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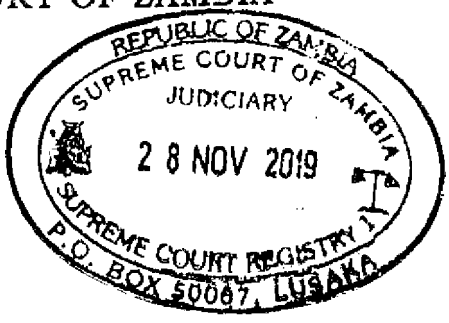
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No.213/2016



BETWEEN:

OLIVER BWALYA — APPELLANT

AND

ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED — RESPONDENT

CORAM: Malila, Kajimanga and Kabuka JJS

On 5th November 2019 and 28th November 2019

For the Appellant: Mr. H. M. Mulunda of Messrs LM Chambers

For the Respondent: Mr. M. Mwaba, In-house Counsel

JUDGMENT

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. Redrilza Limited v Abuid Nkazi and Another (2011) Z.R. 394
2. Chilanga Cement Plc v Kasote Singogo (2009) Z.R. 122
3. Contract Haulage Limited v Mumbuwa Kamayoyo (1982) Z.R. 13
4. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
5. Chikuta v Chipata Rural Council (1974) Z.R. 241
6. National Milling Company Limited v Grace Simataa (2000) Z.R. 91
7. Attorney General v Marcus Achiume (1983) Z.R. 1
8. National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie (2000) Z.R. 154
9. Premesh Bhai Patel v Rephidim Institute Limited (2011) 1 Z.R. 134

10. **Edward Mweshi Chileshe v Zambia Consolidated Copper Mines Limited (1995/1977) Z.R. 148.**
11. **Antonio Ventriglia and Manuela Ventriglia v Eastern and Southern African Trade and Development Bank (2010) Z.R. 486**

Legislation referred to:

1. **Employment Act Chapter 268 of the Laws of Zambia; sections 30, 32 and 34 (repealed)**
2. **Supreme Court Act Chapter 25 of the Laws of Zambia; rule 58(3)**

Introduction

1. This appeal is from a judgment of the Industrial Relations Court (IRC) handed down on 7th December 2015, dismissing the appellant's claim against the respondent for damages for unlawful, wrongful and/or unfair dismissal and payment of various allowances.

Background to the appeal

2. The background facts are that on 7th December 2010, the appellant was employed by the respondent as a research and planning manager on a two-year fixed term contract. Prior to the expiry of his contract, the appellant applied for its renewal and by a letter dated 11th December 2012, he was offered a three-year

contract as channel business development manager effective 13th December 2012 which he duly accepted. However, on 24th December 2012, he received a letter appointing him to the position of regional business manager for Luapula region and transferring him from Lusaka to Mansa with immediate effect. Following this appointment, the appellant lodged a grievance against the chief sales and distribution officer (CSDO), in which he complained of victimization, tribalism, nepotism, intimidation, unprofessional conduct and the unjustified scrapping off of his position. The said grievance was settled through the respondent's grievance handling procedure. The appellant was subsequently charged with the offence of failure and refusal to obey contractual instructions on the grounds that he refused to take up the position of regional business manager in Luapula. The appellant was later found guilty of the charges preferred against him and eventually dismissed from employment after going through the respondent's disciplinary process. He then appealed against his dismissal but the same was unsuccessful. Aggrieved by this decision, the appellant commenced proceedings against the respondent before the IRC challenging his dismissal.

Pleadings before the IRC

3. In his notice of complaint dated 17th April 2013, the appellant claimed:

   3.1 Damages for unlawful, wrongful and/or unfair dismissal;
   3.2 Damages for emotional distress and mental anguish arising from the dismissal;
   3.3 Payment of all monies, allowances, bonuses and gratuity owed to the appellant as though he had served the full contractual term;
   3.4 Payment of the outstanding car allowances for the period of eleven (11) months;
   3.5 Alternatively, that he be deemed to have been declared redundant;
   3.6 Costs;
   3.7 Interest; and
   3.8 Any other relief of the Court may deem fit.

4. The basis of the claim was that the decision to transfer him to Luapula was made in bad faith and contrary to the law as his contract as channel development manager was still running for a period of three years and had not been terminated. Further, that he did not consent to his appointment as regional business manager nor did he receive a contract of service when the said appointment was made.

5. The appellant asserted that the CSDO informed him that his position as channel development manager had been scrapped

and/or done away with; that by virtue of the scrapping of his position whilst his contract was still running, the respondent rendered him redundant and it should have paid him his redundancy package before purporting to re-employ him as regional manager.

6. He also contended that his transfer to Luapula was unreasonable given the fact that it was made with immediate effect considering that he was a family man based in Lusaka and had medical limitations or concerns which the respondent was aware of. According to him, the real reasons for his dismissal were the allegations he made against the CSDO.

7. In addition, the appellant contended that on 5th May 2011 and 11th November 2011 whilst driving a company vehicle, namely Toyota Corolla ABJ 132, he was involved in an accident which left him without transport for a period of 11 months during which he was deprived of his car allowances to which he was entitled under his conditions of service.

8. The respondent denied the claim and contended that according to

the appellant's conditions of service, management could appoint and transfer the appellant wherever his services were required. That the respondent did in fact appoint and transfer the appellant to Luapula Region as regional business manager within the same department but the appellant refused to accept the appointment and instead raised a grievance against the CSDO, who was the overall head of the department under which the appellant fell. That despite resolution of the grievance, the appellant refused to take up the appointment in Mansa where his services were needed. As a consequence, he was charged in accordance with the applicable disciplinary code and subsequently dismissed after being found guilty of failure or refusal to obey lawful instructions and refusal to obey contractual instructions.

Evidence of the parties in the IRC

9. The appellant's evidence was that he had a difficult working relationship with the CSDO, one Lozindaba Sakala, to such an extent that on 26th December 2012, he was forced to raise an official grievance against her. Prior to him raising this grievance,

he was appointed as regional business manager - Luapula Province. This appointment was not accompanied by a contract of employment stating the terms and conditions attached to his position. When the appointment was made, his contract for the position of channel development manager was still subsisting and hence, it had not been terminated. Upon receiving the letter of appointment and transfer, he invoked the grievance procedure. A grievance hearing subsequently took place and he presented his submissions to the grievance committee. During the hearing, the CSDO apologized for all the ill treatment she subjected him to and thereafter, the issues were concluded amicably. He then received a letter from the chief human resources and administration officer signifying the settlement of the grievance.

10. Immediately after the resolution of his grievance the position he had been appointed to in Luapula was advertised in the press. Subsequently, he was charged with the offence of failure to obey contractual instructions, that is, for failing to report to his new station in Luapula Province. He duly exculpated himself for the charges and later attended a disciplinary hearing that had been

arranged for him. However, he was not allowed to cross-examine the CSDO during the disciplinary hearing and the chief human resources manager was never called to the said hearing.

11. He testified that his contract as channel development manager was not terminated as such because the respondent did not notify him in writing and that at the time he was appointed to the position of regional business manager, he still held the position of channel development manager. Therefore, he had never been officially appointed to the position of regional business manager because the respondent did not avail him with a letter and a contract in this regard. That a letter was only given to him later after he was charged on 13th February 2013. He also said that he had not signed the contract because he was busy reflecting upon the disciplinary charge.

12. It was his further evidence that his appointment as regional business manager was not preceded by an offer letter and consultation as required. He stated that he had a medical condition which made it difficult for him to work outside Lusaka and that the respondent had been settling the medical bills arising

therefrom but that he was not allowed to present his medical certificate from Teba Hospital before the disciplinary panel.

13. The appellant conceded, however, that the respondent's management had the right to transfer any member of staff to wherever they were needed and that this was in line with his terms and conditions of service. He admitted that according to the respondent's disciplinary code, the charge of refusal to obey contractual instructions, which was preferred against him in this regard, carried the sanction of dismissal and that according to the letter written to him after the disciplinary hearing he was found guilty as charged and that the appropriate penalty had been applied. The appellant also agreed that the respondent had followed the due disciplinary process in that he was charged, given an opportunity to exculpate himself and appeared before a disciplinary hearing. Thereafter, he was allowed to appeal to the respondent's managing director, which he did.

14. The appellant's evidence also disclosed that during the currency of his employment he had been involved in two motor car accidents involving the respondent's vehicles and that on each occasion he

was entitled to a replacement car, but as regards the last accident he neither received a replacement car nor a car allowance. He conceded that although he was claiming car allowance as part of his relief pursuant to the provisions of the contract of 13th December 2012 the provisions upon which he could rely with regard to this claim were not in existence at the time of the accident. In addition, that the contract which contained the said provision did not apply retrospectively because it was based on the initial contract.

15. Kamaula Wachata (RW), the respondent's talent management and development manager, testified on its behalf. His evidence was that when the appellant became channel development manager, he did not sign a contract but towards the end of the first contract he applied for its renewal. It was accordingly renewed. Later, a vacancy of regional business manager occurred in Luapula Province. The appellant was subsequently appointed to that position mainly due to the fact that he had the requisite skills and competencies and hence, a decision was made that he should be transferred to Mansa to head the region as regional business

manager for Luapula province. At the time of his appointment as regional business manager, his earlier position as channel development manager was put on hold. It later became surplus to the respondent's requirements and it was, therefore, eventually earmarked for abolition.

16. He stated that the appellant's transfer to Luapula Province was contained in a letter dated 24th December 2012 which was issued to him at the material time and the said letter spelt out the terms and conditions he was to enjoy i.e. at grade ZT3. He explained that the position of regional business manager was in fact ranked higher in status because of the greater responsibility attached thereto in the sense that, at the region, one was in charge of a bigger division and had more subordinates to superintend. As such the decision to transfer him was made in good faith.

17. Further, that the decision to transfer the appellant was in line with the provisions of the terms and conditions of service set out in the Zamtel conditions of service document, which applied to the appellant. Clause 25.1 thereof empowered the respondent to transfer the appellant but he did not accept the transfer even after

several reminders on account that he had a medical condition and that the move was part of an alleged victimisation campaign that had been launched against him.

18. He testified with regard to the issue of victimisation that the appellant had written to the chief human resources and administration officer about it and subsequently, a hearing of the grievance was held officially. The findings of the grievance handling committee were that the said grievance was a mere misunderstanding between the CSDO and the appellant. The conclusion arrived at was that they should work together in harmony.

19. After the resolution of the grievance, the appellant was expected to report to Luapula Province as regional business manager but instead of doing so, he declined to travel to Mansa. This prompted his immediate supervisor, a Mr. Namangolwa Chigumbe to raise a disciplinary charge against him for failure or refusal to obey lawful instructions and refusal to obey contractual instructions in accordance with the respondent's disciplinary and grievance procedure. That the appellant was requested to exculpate himself

which he did and thereafter, a disciplinary hearing was held. He said that the appellant did not present any medical document to the respondent at the hearing that rendered him unfit to work outside Lusaka. The findings of the hearing were that the appellant was guilty of the charges and hence he was issued with a letter of dismissal.

20. In terms of the appellant's claim for car allowance for a period of 11 months during the year 2011 when the appellant did not have a company car, RW testified that the appellant's initial position of channel development manager involved field work and that he was allocated an operational vehicle for this purpose as opposed to car allowance. That according to clause 2.1(d) of the respondent's motor vehicle policy, only employees with desk jobs were entitled to a car allowance and that the appellant only became entitled to a car allowance on 18th September 2012 when the operational vehicle was withdrawn.

21. He explained that on 29th November 2011, the appellant did not have a vehicle because the one he was given was involved in an accident. He was later given a vehicle registration no. ABJ 132

which was earlier involved in an accident. The appellant was later involved in an accident with the second vehicle he was allocated. In between, the appellant had to pay for his own way to work whilst investigations into the accidents were underway and this is the reason why there was a delay in giving him another vehicle. He concluded by stating that the appellant was not entitled to claim for a refund of expenses because his vehicle had been involved in an accident.

Consideration of the matter by the IRC

22. After considering the evidence and arguments by the parties, the IRC found that there were two issues for its determination, namely: Whether the dismissal of the appellant was unfair, unlawful and/or wrongful; and whether the appellant is entitled to the relief sought.

23. As to the first issue, the court found that by failing or refusing to comply with the directive to take up the appointment in Luapula Province, the appellant was acting contrary to what he had agreed to when he joined the employ of the respondent. In its view, the respondent had the prerogative to transfer the appellant and that

there was nothing harsh in the manner the respondent dealt with the appellant when the disciplinary process was initiated. Further, that on the evidence before it, the respondent complied with the rules of natural justice and there was nothing untoward in the manner the disciplinary process was conducted. As such, the claim for unfair dismissal failed.

24. With respect to unlawful dismissal, the trial court found that for a dismissal to be unlawful one must show that some statute or law has been breached or violated. However, no evidence had been led as to which statutory provision was breached by the respondent. Neither was any allegation asserted against the respondent as to which law was broken.

25. Regarding wrongful dismissal, the trial court observed that the legal basis for an action for wrongful dismissal is breach of contract. It found that no evidence had been led before it to show that the respondent breached the contract that was in place with the appellant and therefore, he was not entitled to any damages.

26. On the question of whether the appellant was entitled to the relief

sought, the IRC found that since the case for unfair dismissal had not been made and the fact that the dismissal was neither unlawful nor wrongful, it did not see the basis for granting the relief of damages for emotional distress and mental anguish arising from the dismissal. It also found that the claim for payment of all monies, allowances, bonuses and gratuity owed to the appellant as though he had served the full contractual term could not be sustained. It found that under clause 7 of the respondent's conditions of service, gratuity was only payable at the end of the employment period. It reasoned that since the appellant's contract was terminated before it had run its full term, no gratuity could be paid to the appellant. The trial court also found that the claim for bonuses and allowances could not be sustained as the appellant had not provided the basis upon which it could order the same to be paid.

27. Concerning the car allowances, the trial court agreed with the position taken by the respondent that the appellant was not entitled to car allowances for the period he claimed. Having so

found, the court concluded that there was no basis upon which the appellant could be granted the claims for costs and interest. All the claims having failed, the trial court dismissed the appellant's action but made no order for costs.

The grounds of appeal to this Court

28. Aggrieved with this decision, the appellant has launched an appeal to this court on the following grounds:

28.1 The court below erred in law and fact when it held that the appellant was not unfairly, wrongfully, and unlawfully dismissed despite there being evidence of victimisation and non-compliance with the conditions of service by the respondent.

28.2 The court below erred in both law and fact when it failed to apply section 34(1) of the Employment Act Chapter 268 of the Laws of Zambia[repealed].

28.3 The court below erred in law and fact when it accepted the hearsay evidence of [RW] as regards the deliberations of the grievance proceedings which RW1 did not attend.

28.4 The court below erred in law and fact when it failed to apply the principle of substantive justice and thus dismissing the claim of redundancy despite the evidence that the appellant's position was scrapped off or earmarked for scrapping off.

28.5 The court below erred in law and fact when it refused to award

the appellant's salaries and other entitlements as though he had served the entire contractual term.

The arguments presented by the parties

29. Both parties filed written heads of argument which their respective counsel briefly augmented at the hearing. The oral submissions were in the main, a repetition of their written heads of argument and we consider it unnecessary to reproduce them. In support of ground one, the learned counsel for the appellant submitted that when the appellant took up the position of channel development manager, he was advised that he would enjoy the same conditions as contained in the contract of 7th December 2010 which provided in clause 10 as follows:

> **"10.1 Both parties may terminate this agreement by giving 2 months' written notice thereof or payment in lieu of notice.**
>
> **Notwithstanding the above:**
>
> **a) where an employee terminates the contract before the expiration of the contract period, the employee shall pay to the employer a sum equal to the employee's total gross salary for the remainder of the contract period.**
>
> **b) where the employer terminates the contract for reasons other than misconduct or performance, the employer shall pay the employee a sum equivalent to the employee's total gross salary for the remainder of the contract period.**

10.2 If the employee is desirous of renewing this contract, he/she shall apply in writing to the managing director 3 months before the end of the employment period. Such application will be treated as an offer or application for re-employment, which may or may not be accepted by the company."

30. He contended that the appellant's employment was wrongfully terminated as the respondent did not give the appellant the requisite notice of two months as stipulated in the contract of service in clause 10.1 nor was he paid for the remainder of the contract period as per clause 10.1(b) since the termination of his employment as channel development manager via appointment as regional business manager had nothing to do with his performance or conduct. Thus, the court below erred on this score.

31. Further, that the respondent did not comply with its own conditions of service when appointing the appellant as regional business manager as the appellant was not advised of the conditions he was to enjoy in his new post contrary to clause 1.3 of the respondent's conditions of service which provides that:

"In all cases, the appointment shall contain details of terms of appointment such as grade, salary and applicable allowances, if any gratuity, effective date and conditions of service."

32. It was also argued that sections 30 and 32 of the Employment Act requires that the employee should know and fully understand the duration of the contract as well as the wages to be paid. According to counsel, the letter only mentions ZT3 which as was established via the evidence of RW is a categorization which comprises varying salary scales, gratuity and other perquisites and the appellant challenged the respondent on this score. It was his contention that the court below should have found that the appellant was unlawfully dismissed as he was merely asserting his statutory rights as to the conditions of service which the respondent did not follow pursuant to the conditions of service which encapsulate the requisites of the law under sections 30 and 32 of the Employment Act. That the appellant reminded the respondent on its responsibility according to a letter in the supplementary record of appeal dated 26th December 2012, to abide by its conditions and the Employment Act but which fact the respondent ignored, refused or neglected to clarify or comply with and opted to be in breach of the law.

33. Additionally, that there is evidence on record showing that the appellant complained of victimisation at the hands of his supervisor. Counsel submitted that the purported appointment and transfer was done in bad faith as it was merely intended to get him out of Lusaka as evidenced by a letter from the chief human resources and administration manager acknowledging the fact that the CSDO apologized and undertook not to victimize the appellant. This, he contended, was evidence upon which the court below should have found for the appellant on account of unfair dismissal. Instead, the court sought to fetter its discretion when it was mandated to do substantial justice. That there is also on record the letter of Joshua Mukwaila who similarly levelled accusations of victimisation by the CSDO which accusations were related to the appellant's complaints against the latter.

34. We were then referred to the case of **Redrilza Limited v Abuid Nkazi and Another**[1] where it was held that:

> **"(i) There is a difference between dismissal and termination. Dismissal involves loss of employment arising from disciplinary action. While termination allows the employer to terminate the contract of employment without invoking disciplinary action.**

(ii) The Industrial Relations Court is empowered to delve into the reasons for terminating a contract of employment. But that should not be done in every instance, or case.

(iii) While the Industrial Relations Court is empowered to pierce the veil, the power must be exercised judiciously and in specific cases where it is apparent that the employer is invoking the termination clause out of malice."

35. Counsel submitted that the appellant's employment as channel development manager was unilaterally terminated by the respondent and thus, he should be paid for the remainder of his contract as channel development manager. The said termination is not in any way linked to the subsequent dismissal following the refusal to take up the appointment as regional business manager.

36. It was his contention that there was nothing irregular with the appellant claiming the payment. He referred us to the case of **Chilanga Cement v Kasote Singogo**[2]. Further, relying on the case of **Contract Haulage Limited v Mumbuwa Kamayoyo**[3], he argued that the respondent breached clause 13.9 of its disciplinary and grievance code which reads thus:

"13.9 PROCEEDINGS

- **Decisions shall be made collectively**

consider the information adduced even through its own human resource department, the hospital records, or through Professional Life Insurance before making a decision, which it did not. That the respondent was responsible for paying insurance medical bills after verifying the bills authentically against medical record/copies submitted to the company by the employee as per requirement. Alternatively, the respondent should have allowed the process of the new appointment to follow the law in view of sections 28 and section 34 of the Employment Act and/or clause 1.5 of its own conditions of service. Thus, the learned judge should have observed the labour laws and the respondent's own conditions of service that the respondent was not at liberty to deny the appellant his rights of being medically examined and certified fit or not for the new appointment as per law requirement.

39. In arguing ground three, counsel stated that the appellant raised a grievance against his supervisor and the minutes of the grievance proceedings were taken but never availed to the court and the appellant. That by his own admission, RW did not attend the meeting and, therefore, could not give an account of what

transpired in the meeting as that is tantamount to hearsay. However, RW did acknowledge, premised on the letter authored by the respondent's chief human resources and administration, that there was a misunderstanding between the appellant and his supervisor. It was argued that the court below should have accepted the evidence of RW only to the extent that he saw a letter by the chief human resources and administration manager acknowledging victimisation.

40. In support of ground four, counsel submitted that there is no dispute from the record that the respondent admitted that the appellant's position was earmarked for scrapping off and by RW's admission the appellant's position was frozen whilst the respondent was still a going concern. He contended that the appellant was declared redundant and the court below should have deemed him as such. Further, that the purported appointment as regional business manager is a mere smoke screen intended to shield the respondent's unfair treatment of the appellant in that there was no genuine engagement/consultation between the appellant and the respondent as the appointment was

with immediate effect and the letter of appointment did not stipulate the conditions of service. He argued that it was an error on the part of the court below when it failed to exercise its discretion to deem the appellant redundant as prayed for in the amended affidavit and notice of complaint. Relying on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[4], he contended that the court below ought to have dealt with all matters brought before it.

41. In arguing ground five, counsel submitted that clause 10.1 of the contract of service between the appellant and respondent provided that the respondent would pay the appellant the total gross salary for the remainder of the contract period. This was the operative contract and pursuant to which the appellant should have been paid for the remainder of the renewed three-year contract which was terminated unilaterally by the respondent through no fault of the appellant. He argued that the sum equivalent to the employee's total gross salary for the remainder of the contract period is inclusive of all the bonuses, allowances and perquisites as well as gratuity. Therefore, counsel contended, the court below was wrong

when it declined to award the relief and tied the same to the disciplinary proceedings. The cases of **Chikuta v Chipata Rural Council**[5] and **National Milling Company Limited v Grace Simataa**[6] were cited in support. We were accordingly urged to uphold the appeal.

42. In response to ground one, the learned counsel for the respondent submitted that the findings by the lower court that the appellant was not unfairly, wrongfully or unlawfully dismissed was based on the evidence adduced before it. He stated that the lower court found as a fact that the respondent had the prerogative to transfer the appellant anywhere his services were required. Thus, in effect, it was the appellant that breached the terms of his contract by refusing to take up the new appointment. That the lower court also found as a fact that there was nothing harsh in the manner the respondent handled the appellant's disciplinary process and as such wrongful or unlawful dismissal did not arise.

43. Relying on the case of **Attorney General v Marcus Achiume**[7], he argued that this court will not interfere with findings of fact made by the lower court except in special circumstances, and which

circumstances do not arise in this case. According to counsel, the appellant has raised a lot of issues that lack clear thought and direction. That, the only issue for determination is whether the respondent had breached the terms of employment for the appellant by transferring him to Luapula as regional business manager and whether such transfer was punctuated with malice. He argued that the lower court found as a fact that the respondent had the authority from the agreed terms of employment to transfer the appellant and that there was no malice involved in the exercise of such authority. That notably, the appellant has not disputed the fact that the respondent could transfer him anywhere his services were required.

44. On the argument by the appellant that the respondent terminated his contract of employment, counsel referred us to the **Redrilza Limited**[1] case (supra) for the distinction between termination and dismissal. He submitted that the appellant was dismissed from employment following disciplinary action and that clause 10.1(b) of the conditions of service cited by the appellant does not help his cause as it provides that where the employer terminates the

contract for reasons other than misconduct, then the employee shall be deemed as if he had served the full contractual period. In the case of the appellant, he was dismissed for misconduct on account of refusing to obey contractual instructions. That even if it were to be argued that the appellant's contract was terminated for no reason and he should be paid as if he had served the full length of the contract, the clause being relied upon would still not be enforceable by court action as the same is unconscionable. Reliance was placed on the case of **National Airports Corporation Limited v Reggie Emphraim Zimba and Saviour Konie**[8].

45. On the issue of victimisation, it was argued that the lower court considered the claim and satisfied itself that the issue had been adequately dealt with through the respondent's internal administrative process. Therefore, it was surprising that the appellant still insists on the issue of victimisation despite the court electing to believe the evidence of the respondent's witness that the issue was a mere misunderstanding and was resolved. Counsel pointed out that in its judgment, the lower court had restated the evidence from the appellant that the issue of victimisation was only

raised by him after his transfer to Luapula Province as regional business manager and that even in his own exculpatory statement, the appellant admitted that his grievance had been resolved. However, there was no evidence adduced by the appellant to show that resolution of the grievance meant he was no longer required to take up his new appointment in Luapula Province as regional business manager.

46. On the issue of the respondent breaching clause 13.9 of its disciplinary and grievance code, counsel relied on the case of **Premesh Bhai Patel v Rephidim Institute Limited**[9] and contended that this argument was not raised before the lower court and was thus not considered.

47. As to the argument that the appellant's transfer was in bad faith, it was submitted that in the contract of employment which the appellant signed, he agreed to be appointed as research and planning manager ZT3, or any other appointment as may be agreed or directed. Therefore, it was shocking for the appellant to allege that his transfer to Luapula Province and appointment as regional business manager was done in bad faith. That the lower

court cannot be faulted for finding that his appointment and transfer to Luapula Province was in accordance with the conditions of service applicable to him.

48. Counsel argued that the issue of victimisation as alleged was not connected to the transfer in that the appellant's services were required in Luapula Province as the evidence of the respondent's witness showed. Further, that it was worth noting that the appellant was first employed as research and planning manager and was then later moved to the position of channel development manager without signing a new contract. Thus, there was nothing irregular or unusual with the respondent moving him again to the position of regional business manager - Luapula, which appointment he refused to take up.

49. In response to ground two, counsel submitted that based on the evidence from the appellant in cross-examination, the lower court cannot be faulted for not attaching any weight or consideration to the position taken by the appellant that he was medically unfit to work outside Lusaka. According to counsel, the said evidence revealed that there was no evidence adduced at the disciplinary

hearing or trial in the form of a medical report showing that the appellant was unfit to work outside Lusaka. He contended that the argument by the appellant that the respondent should have investigated the appellant's claim of being medically unfit since it provided him with a medical scheme is nothing short of an unrealistic expectation. That it is a fact that the appellant did not have a medical report rendering him unfit to work outside Lusaka. All that was produced was a referral form from a hospital and that the appellant admitted in cross-examination that the referral form was not a medical report, neither did it state anywhere that he could not work outside Lusaka.

50. It was also his contention that section 34 (1) of the Employment Act only applied to the appellant's first appointment and not a transfer in accordance with the terms of his contract. In any case, counsel contended, it would be unreasonable and an unrealistic expectation that each time an employee is transferred, he is subjected to a medical examination to ascertain his medical fitness. That it was notable that the appellant did not raise the issue of being unfit as the reason for refusing to obey contractual

instructions of him being transferred.

51. The respondent's arguments in response to ground three were that the appellant had not indicated which evidence in particular from RW, regarding the grievance proceedings which he did not attend, was hearsay and admitted by the court. Further, that the appellant never objected to RW's evidence on this issue. In any event, all that RW did was to merely confirm the contents of the letter from the respondent to the appellant on the issue of the appellant's grievance.

52. In response to ground four, counsel submitted that the claim for redundancy by the appellant has no basis as that was not the reason behind his dismissal. He argued that the record shows that a suitable option of regional business manager – Luapula was offered to the appellant after his position was earmarked for scrapping off and that he refused to take it up. That it was also incorrect for the appellant to allege that in transferring him to Luapula Province as business development manager, the conditions were not stated as this flies in the teeth of the evidence before court.

53. He pointed out that the three positions the appellant was appointed to (i.e. research and planning manager, channel development manager and regional development manager) were all in the ZT3 grade. As such, it was not clear what the real issue was in so far as details of the position was concerned.

54. On the issue of substantial justice, counsel contended that the appellant had misunderstood what the same entails. He referred us to the case of **Edward Mweshi Chileshe v Zambia Consolidated Copper Mines Limited**[10] where this court stated as follows on substantial justice:

> **"The substantial justice which the statute calls upon the Industrial Relations Court to dispense should endure for the benefit of both sides."**

55. He argued that the lower court evaluated the evidence on the redundancy claim and cannot be faulted for not attaching any value to the claim as it was not the reason for the appellant's dismissal from employment.

56. In response to ground five, counsel repeated his arguments under ground one on the issue of unenforceability of clause 10.1(b) on

the ground that the same is unconscionable as well as the arguments that the appellant was not terminated but dismissed for misconduct.

Consideration of the appeal and decision by this court

57. We have considered the record of appeal, the judgment appealed against and the arguments of both parties.

58. The first ground attacks the trial court for holding that the appellant was not unfairly, wrongfully and unlawfully dismissed despite there being evidence of victimisation and non-compliance with the conditions of service by the respondent.

59. The contention of the appellant is that his appointment and transfer to Mansa was merely intended to get him out of Lusaka and that the evidence that he complained of victimisation at the hands of the CSDO should have led the trial court to find that his dismissal was unfair. In turn, the respondent's position is that the lower court's finding that the appellant was not unfairly, wrongly or unlawfully dismissed was based on the evidence deployed before it. That the lower court found as a fact that from the agreed terms

of employment, the respondent had the authority to transfer the appellant and that there was no malice involved in the exercise of such authority. Further, that the appellant has not disputed the fact that the respondent could transfer him anywhere his services were required.

60. In arriving at the finding that the appellant was not unfairly dismissed, the trial court stated at page J16 of its judgment as follows:

> **"Our understanding of unfair dismissal is that this will normally arise where an employer has no fair or substantive reason for dismissal, or has followed an unfair procedure in implementing the dismissal, or where the reason relied upon does not permit dismissal on the facts of the case.**
>
> **In other words, for a dismissal to be deemed unfair, it must be shown that it was harsh, unjust and unreasonable or that the rules of natural justice were not complied with in arriving at the decision to dismiss the complainant. It is imperative that a party is afforded an opportunity to be heard on the charges levelled against him, to enable him fashion out a defence."**

61. We agree entirely with these remarks. The circumstances which led to the appellant's dismissal from employment in this matter are common cause. The dismissal was triggered by the appellant's

refusal of the appointment and transfer to Mansa as regional business manager. We note, as the lower court found, that it was a term under clause 25.1 of the Zamtel conditions of service that the respondent could transfer the appellant wherever his services were needed. This provision was consistent with clause 2.0 of the conditions which provided for employee obligations. Clause 2.4 reads as follows:

> **"The employee shall work in such places as ZAMTEL may deem fit and direct or advise from time to time**

62. And clause 2.10 stated that:

> **"Employees shall obey and comply with all lawful orders given by the Company or by an official of the Company in authority."**

63. Further, clause 2.2 provided that:

> **"All employees shall comply with contractual obligations and operational rules obtaining in ZAMTEL as amended from time to time."**

64. Clause 2.15 went on to state that:

> **"Breach of any of these obligations shall lead to disciplinary action."**

65. From the foregoing, there can be no doubt that the appellant breached his obligations under the Zamtel conditions of service by

refusing to take up his appointment in Mansa. The schedule of offences appearing in the Zamtel disciplinary code indicated that the penalty for the offence of refusal to obey contractual instructions was dismissal. In this appeal, the appellant has not shown that there was no fair or substantive reason for his dismissal. Neither has he shown that, on the facts of the case, the reason relied upon by the respondent does not permit dismissal.

66. In the view we take, the acrimonious history between the appellant and the CSDO has nothing to do with the issue of whether the rules of natural justice were complied with when the respondent arrived at the decision to dismiss him, nor does it relate to whether the dismissal was harsh, unjust or unreasonable. In any event, the evidence on record indicates that the appellant's grievance regarding the victimisation he allegedly faced at the hands of the CSDO was adequately addressed and concluded at the grievance hearing held on 28th January 2013 which fact has not been disputed by the appellant. In the circumstances, there is nothing before us to show that the dismissal was unfair.

67. The appellant also contends that the respondent did not comply with the requirement of two months' notice under clause 10 of his contract of employment when appointing him as regional business manager and that it failed to inform the appellant of the conditions he was to enjoy in his new post contrary to clause 1.3 of the respondent's conditions of service and as such, his employment was wrongfully terminated. It was further contended that the court below should have found that the appellant was unlawfully dismissed as he was merely asserting his statutory rights under sections 30 and 32 of the Employment Act which required that the employee should know and fully understand their conditions of service.

68. These arguments, in our view, are misconceived for obvious reasons. The appellant's appointment as regional business manager did not bring his employment with the respondent to an end. The effect of that appointment was merely to transfer the appellant from one post to another within the respondent company and scale ZT3. The wording of clause 10 however, envisages a situation where the employment relationship between the parties

would cease by way of termination. Accordingly, the requirement of giving two months' notice did not arise in the case at the time of the appellant's appointment as regional business manger.

69. On the failure to inform the appellant of the conditions of service applicable to the position of regional business manager, our view is that the same was not fatal because the letter appointing him to that post indicated that before taking up the appointment, he should meet with the CSDO for briefing and induction. Had he done so he could have been availed with information regarding his conditions of service. In any case, when he received his appointment letter, he indicated that he would not take it up. Therefore, he cannot now be heard to say that the respondent failed to comply with clause 1.3 by not advising him of the conditions he was to enjoy as regional business manager.

70. The appellant's arguments are further weakened by the fact that his contract of employment did not come to an end by way of termination but rather, he was dismissed from employment. It is trite law that in order for the claim of wrongful dismissal to stand, a complainant must have shown that the provisions of the contract

of employment or code of conduct were not adhered to by the respondent when it terminated the contract. The breach in question relates to failure to follow the laid down procedure of dismissal. We note that the issues of breach of contract raised by the appellant in this appeal relate to his appointment as regional business manager. What he should have done, in our view, was to show that there was a breach in the procedure of his dismissal.

71. In so far as the procedure of the appellant's dismissal is concerned, the finding of the trial court was that when he was charged for his refusal to take up the position in Mansa, he was given an opportunity to exculpate himself and appeared before a disciplinary committee and was subsequently dismissed following which he was given an opportunity to appeal. The appellant has not in any way shown that due process was not followed. Having failed to do so, the trial court cannot be faulted for finding that the dismissal was not wrongful or unlawful. Ground one, therefore, has no merit.

72. The grievance in ground two is that the court below erred when it failed to apply section 34(1) of the Employment Act.

73. The kernel of the appellant's argument in this ground is that the trial court should have found that the respondent was not at liberty to deny the appellant his rights of being examined and certified fit for his new appointment as per the requirements of section 34(1) of the Employment Act and clause 1.5 of the Zamtel conditions of service. Section 34(1) provided that:

> **"(1) Subject to the provisions of subsection (2), every employee who enters into a contract of service under the provisions of section twenty-eight shall be medically examined by a medical officer before such contract is attested; such examination shall have relation to the fitness of the employee to undertake the work which he has contracted to do, and a report of the result of such examination shall be sent by the medical officer to the employer."**

74. And clause 1.5 of the Zamtel conditions of service stated as follows:

> **"Every offer of employment is subject to the prospective employee undergoing a medical examination by a registered medical practitioner..."**

75. The respondent contends, however, that the requirement of the appellant being subjected to a medical examination only applied to his first appointment and not a transfer in accordance with the terms of his contract. We wholly agree with this submission as that was the true import of section 34(1) of the Employment Act and

clause 1.5 of the Zamtel conditions of service. From our reading, neither the Employment Act nor the Zamtel conditions of service made provision for employees to undergo medical examination when they were transferred by their employer. The argument that the appellant was denied his rights of being medically examined is, therefore, flawed.

76. It was also argued by the appellant that the disciplinary committee which heard his case did not give him a fair opportunity to adduce evidence by way of a medical report showing that he suffered from chronic tonsillitis. We have, however, perused the minutes of the disciplinary hearing and have noted that no request was made by the appellant at the hearing for him to be allowed to adduce a medical report or any other document. He, therefore, cannot now be heard to say that he was denied the opportunity to do so when he took no steps to make such a request. This ground equally lacks merit and it fails.

77. Ground three alleges error on the part of the trial court in accepting the hearsay evidence of RW as regards the deliberations of the grievance proceedings which the witness did not attend.

78. The appellant contends that since RW did not attend the grievance proceedings, he could not give an account of what transpired in the meeting and that the court below should have only accepted his evidence to the extent that he saw a letter by the chief human resources and administration manager acknowledging victimisation. The respondent, on the other hand, argues that the appellant never objected to RW's evidence on this issue in the court below.

79. We have perused the proceedings in the court below and agree with the respondent that the appellant did not raise any objection with respect to RW's evidence regarding the grievance deliberations amounting to hearsay during the trial or in his submissions in the court below. In the case of **Antonio Ventriglia and Manuela Ventriglia v Eastern and Southern African Trade and Development Bank**[11], we held that an issue that has not been raised in the court below cannot be raised on appeal. The appellant is accordingly precluded from raising this issue at this stage of the proceedings. Moreover, RW's evidence as aptly submitted by the respondent, was merely to confirm the contents of the

respondent's letter to the appellant in relation to the appellant's grievance. We accordingly determine that this ground of appeal must also fail.

80. In ground four, the appellant asserts that the trial court erred when it failed to apply the principle of substantive justice and thus dismissing the claim of redundancy despite the evidence that the appellant's position was scrapped off or earmarked for scrapping off.

81. The thrust of the appellant's argument under this ground is that since the respondent admitted that the appellant's position was earmarked for scrapping off whilst it remained a going concern, the court below should have declared the appellant redundant as prayed for in his amended notice of complaint.

82. In countering this argument, the respondent contended that the claim for redundancy has no basis as that was not the reason behind his dismissal. Moreover, a suitable option of regional business manager was offered to the appellant after his position was earmarked for scrapping off but the appellant refused to take

it up.

83. In resolving this ground of appeal, we shall start by considering the conditions of service governing the appellant's employment, specifically clause 37.0 which dealt with the issue of redundancy. This clause stated that:

> **"37.0 Redundancy**
>
> **37.1 Where in the event of its operations, due to unforeseen circumstances, it becomes necessary to declare positions redundant; the company shall undertake a redundancy exercise three (3) months before the actual day of retrenchment.**
>
> **37.2 Redundancy shall be dealt with in accordance with the labour laws of Zambia.**
>
> **37.3 Management will always endeavour to find alternative employment with ZAMTEL before declaring a position redundant.**
>
> **37.4 Should the alternative solution fail to remove the need for a certain number of redundancies, the selection of those to be declared redundant should take cognizance of the following guidelines which should be determined after consultation:**
>
> **37.5 Once a position has been declared redundant, the Company shall pay the employee salaries, allowances, leave pay and all benefits including gratuities accruing to the employee on prorate basis.**

37.6 Employees declared redundant will be entitled to their normal period of notice or pay in lieu of notice as outlined in this document. All redundancy payments are subject to the Zambian taxation laws.

37.8 Redundancy calculations shall be on the basis of the last drawn salary."

84. The import of clause 37.0 is that where it became necessary for the respondent to declare a position redundant, it would endeavour to find alternative employment within the company before declaring a position redundant. In the present case, RW's testimony revealed that following the appellant's appointment as channel development manager, a vacancy arose in Luapula Province for the position of regional business manager and a decision was made for the transfer of the appellant to Luapula Province to fill that vacancy. It was further revealed that at the time of the appellant's appointment as regional business manager, the position of channel development manager was put on hold. However, it later became surplus to requirements and was, therefore, eventually earmarked for abolition.

85. These facts, in our view, do not fit into the straight jacket of redundancy. We say so because the term 'redundancy' generally

involves a state of being no longer in employment on account that there is no more work available. In the case before us, the appellant was transferred from the position of channel development manager to regional business manager which position fell within the same department of the respondent company and the same scale, ZT3. We posit that a transfer does not connote a discontinuity in employment. On the contrary, it is indicative of the fact that the employment is continuous.

86. We note from the record that although it would appear that it had become necessary to do away with the position of channel development manager, the respondent took steps to find the appellant alternative employment within the company before declaring the position redundant in line with clause 37.0 of the Zamtel conditions of service. It is, therefore, clear that the respondent did not want to rid itself of the appellant in this case. The appellant, however, refused to accept his appointment and transfer to Luapula Province, causing the respondent to charge him with the offence of failure and refusal to obey contractual instructions. Given these facts, we do not see how the claim for

redundancy could arise. The claim, as aptly argued by the respondent, is unfounded. This ground of appeal, therefore, lacks merit.

87. In ground five, the appellant assails the lower court for refusing to award the appellant salaries and other entitlements as though he had served the entire contractual term.

88. The appellant contended that by virtue of clause 10.1 of his contract of employment with the respondent, he should have been paid for the remaining period of his renewed three-year contract. The respondent submitted that clause 10.1 was unenforceable as it provided that the employee shall be deemed as if he had served the full contractual period where the employer terminated the contract for reasons other than misconduct and, in this case, the appellant was dismissed for misconduct for refusing to obey contractual instructions.

89. We have examined clause 10.1 relied on by the appellant and we agree with the respondent that a proper reading of it will show that it only applied to cases where the employer terminates the contract

for reasons other than misconduct. The appellant, having been dismissed from employment following a charge relating to misconduct, is not entitled to be paid salaries or any other entitlements for the remainder of the contract period. Ground five is, therefore, without merit.

90. Before we conclude, we are compelled to comment on the written heads of argument filed by the appellant. We note that after concluding the submissions in support of ground five, the appellant surreptiously sneaked in arguments under the heading, 'car allowance' which appears to be the sixth ground of appeal. We deprecate this conduct which is in violation of Rule 58(3) of the Supreme Court Rules Chapter 25 of the Laws of Zambia. The respondent has argued that the appellant's arguments under this 'head' should not be allowed as the appellant never obtained leave of this court to add this additional ground of appeal. We are in total agreement with the respondent and need not add anything more.

Conclusion

91. For the reasons stated above, we conclude that this appeal is devoid of merit and it is accordingly dismissed. We, however, make no order for costs.

DR. M. MALIA, SC
SUPREME COURT

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE