

ZAMBIA NATIONAL PROVIDENT FUND v YEKWENIYA MBINIWA CHIRWA
(1986) Z.R. 70 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
10TH JULY,
(S.C.Z. JUDGMENT NO. 18 OF 1986)

1986

Flynote

Administrative Law - Judicial Interpretation - Disciplinary rules of parastatal organisation - Whether statutory.

Administrative Law - Natural Justice - Right to be heard - Failure to comply with disciplinary rules - Effect of.

Employment - Dismissal - Non-Compliance with disciplinary rules - Effect of.

Headnote

The respondent, as the personal representative of one Godwin J Kamanga (deceased), who was dismissed by ZNPF, his employers, upon his admitted dishonest conduct brought a successful action in a lower court to nullify the dismissal due to non-compliance with ZNPF disciplinary rules. The employers appealed.

Held:

- (i) ZNPF procedural rules are part of the conditions of service of the parastatal organisation and are not statutory.
- (ii) Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is nullity.

Cases referred to:

- (1) Glynn v Keele University and Another [1971] 2 All E.R. 89
- (2) Contract Haulage Ltd. v Kamayoyo (1982) Z.R. 13

For the appellant: M.Matakala, Zambia National Provident Fund.
For the respondent: C.C. Mwansa, Legal Aid Counsel.

Judgment

GARDNER, J.S.: delivered the judgment of the court: This is an appeal from the judgment of the High Court declaring that the dismissal of one Godwin J Kamanga by the appellants was contrary to the procedure laid down in the regulations of the appellant's organisation and holding that the dismissal was null and void.

The facts of this case are that Mr Godwin J Kamanga, who prior to the commencement of this action died and to whom we will refer in this judgment as the deceased, was employed in the accounts department of the appellant's organisation. In early 1980, a sum of money was found to be missing from the funds for which the deceased was responsible and on

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the 8th of May, 1980 a letter was written by the respondent to the deceased referring to his failure to account for the sum of K4,734.85n and stating that he would be suspended pending the outcome of investigations. At the same time the matter was put in the hands of the police. On the 14th of May, 1980, the deceased wrote to the appellant urging the withdrawal of the matter from the hands of the police on the grounds that a number of other instances of loss of money had occurred in the appellant's organisation and it would be bad for the appellant's image for these losses to come to light. That letter finished with the words "I know I am guilty but you can do something." The deceased also paid K1,000 in respect of the discrepancy in his accounts and gave the appellant a cheque for the sum of K3,800 which cheque was dishonoured on presentation.

On the 14th July, 1980, the appellant again wrote to the deceased to the effect that investigations had disclosed that the total discrepancy, in his accounts amounted to K24,637.96. The letter contained the following words:

"... This amount is too large to be lost by an individual in a public institution and no Management can tolerate such a situation. You are therefore guilty of misconduct, under Regulation 10 (m) of the Board's conditions of service regulations. It has because of the seriousness of the offence been decided to terminate your employment with the Board in accordance with Regulation 17 (c)(i) with effect from the date of your suspension, 8th May, 1980.... "

The respondent as personal representative of the deceased caused an originating summons to be issued calling for a judicial interpretation of Regulation 16(a)(b)(c) and (e) of the Zambia National Provident Fund Board's conditions of service regulations. Regulation 16 reads as follows:-

"16. Suspension and prohibition from carrying out duties (a) An employee suspected of misconduct, or against whom criminal proceedings have been instituted may be prohibited by the Director from carrying out the duties of his post, and the prohibited shall remain in force until cancelled by the Director or otherwise under these Regulations. (e) If the employee against whom the order of prohibition or suspension has been made under this Regulation on the ground that criminal proceedings are were instituted against him is acquitted of the crime or is not brought to trial, the order of prohibition or suspension shall remain in force pending the conclusions of any proceedings taken against him on the charge of misconduct, and if no such proceedings taken, the director shall cancel the order of prohibition or suspension and the employee shall thereupon be entitled to be paid the full amount of his salary for the period of subsistence of the order of suspension, less any allowance paid to him under

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paragraph (c) above . . ."

In the affidavit in support of the originating summons the deponent thereto claimed principally that the interpretation sought was that of sub-regulation (e).

In the affidavit in opposition filed on behalf of the appellant it was averred that the deceased had been dismissed on the grounds of misconduct and not on the grounds that criminal proceedings had been taken against him, and reference was made to regulation 17 of the regulations. Regulation 17 reads as follows:

"17. Inquiries into Charges of Misconduct of an Established Employee -

(a) An allegation of misconduct against an established employee shall be investigated without delay by the Director and subject to the provisions of paragraph (d) of Regulation 16 a charge of misconduct shall thereafter be preferred against the employee, and when such charge is preferred the employee shall be called upon to answer the charge in writing within a stated period;

(c) If the employee charged with misconduct is found guilty by the Director, the Director may cancel any prohibition or order of suspension in force under regulation 16 in relation to the employee, and may further

(i) Discharge the employee; or . . ."

The rest of the regulation is not relevant to this judgment.

In due course the deceased was found not guilty of the charge of theft brought against him by the police in respect of the sum of K4,739.85 which was the amount of the discrepancy in his accounts referred to in the appellant's letter of the 8th May, 1980.

In his judgment the learned judge found that investigations revealed that the deceased had misappropriated K24,637.26n but no charge of misconduct was preferred against the deceased and the deceased was dismissed without calling upon him to answer the charge in writing within a stated period; the director did not consider the charge as there was none and the director did not decide whether or not the deceased was guilty of misconduct. The learned trial judge therefore found that the director did not make a finding that the deceased was guilty of misconduct and that the deceased dismissal without giving him an opportunity to be heard was contrary to regulation 17. It is against that finding and the finding that the dismissal was null and void that this appeal is now brought.

It is apparent that the learned trial judge did not in fact consider the interpretation of Regulation 16(e) as called for in the originating summons, but we are satisfied that during the course of the proceedings before him and in the affidavits prior to the proceedings the question of the proper procedure under Regulation 17 was raised. We are further satis-

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fied that so far as the discrepancy relating to a total of K24,637.26 is concerned no charge relating to that total sum was preferred against the deceased. He was not called upon to represent himself

thereon and accordingly we agree with the learned trial judge that in this respect the provisions of Regulation 17 were not complied with. So far as the earlier discrepancy of K4,738.85 is concerned it is not clear whether an actual charge was preferred against the deceased but it is clear that after he was suspended by the letter dated the 8th of May, 1980, he wrote a letter in mitigation dated 14th of May, 1980, in which he confessed to his guilt in respect of that sum and the learned trial judge in his judgment found that the letter referred to was a confession of misappropriation of the money.

Miss Mwansa on behalf of the respondent has argued that the letter dated the 14th of July, 1980, indicated that the deceased was dismissed in respect of the total sum K24,637.26n, and that he never had an opportunity to make representations in respect of this sum. Mr Matakala on behalf of the appellant argued that the deceased was dismissed for misconduct, and as he had in fact been guilty of misconduct the appellant was entitled to dismiss him.

In the case of *Glynn v Keele University and Another* (1), a student was disciplined by the Vice Chancellor of the University without compliance with the procedure laid down by the University statute before imposing such discipline. It was held in that case that the rules of natural justice had not been complied with in that the student had not been given a chance of being heard before the decision was reached to inflict the penalty upon him. However the plaintiff in that case had suffered no injustice in that it was not disputed that the offence had been committed by him. The offence was one which merited a severe penalty and the penalty was intrinsically the proper one; consequently it was held that the plaintiff had no right of redress.

We respectfully agree with the finding in that case and consider that it applies to the situation in this appeal. Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, but the employer dismisses him without following the procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow the procedure and he has no claim on that ground either for wrongful dismissal or for a declaration that the dismissal was a nullity.

The deceased by his own admission was guilty of the offence of theft for which the punishment of dismissal was a proper one. The fact that the internal provisions of the appellant's organisation were not complied with in no way resulted in an injustice to the deceased.

It is pertinent to refer here to the case of *Contract Haulage Limited v Kamayoyo* (2), in which this court held that where there is a statute the specifically provides that an employee may only be dismissed if certain proceedings are carried out, or where there is some statutory authority for a certain procedure relating to dismissal,

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a failure to give an employee an opportunity to answer charges against him is contrary to natural justice and a dismissal in those circumstances is null and void. In that case we did not take into consideration the situation which would arise where, despite a failure to comply with a certain procedure before taking disciplinary action, no injustice resulted, but, apart from this, we confirm that that judgment states the law as it relates to a dismissal being *ultra vires* and in consequence null and void. Where the procedural requirements before disciplinary action are not statutory but merely

form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could possibly give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void.

In the case at present before us although the appellant is a parastatal organisation its conditions of service are not statutory and in the circumstances no declaration could be made that the dismissal was null and void for failure to comply with the appropriate procedure.

The appeal is allowed and the declaration to the effect that the deceased's dismissal is null and void is set aside.

Costs in this court and in the court below will be the appellant's.

Appeal allowed.