POSTS AND TELECOMMUNICATIONS CORPORATION LIMITED v SALIM JACK PHIRI (1995) S.J. (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHIRWA JJ.S.
28TH FEBRUARY, 1995.
(S.C.Z. JUDGMENT NO. 7 OF 1995)

Flynote

Employment Law - Termination of Employment - Discrimination - Social status and sex - Employment (Special Provisions) Act Regulation 4(1) (a)

Headnote

The respondent was dismissed by the appellant during his probation period and was paid a 14 days' salary in lieu of notice. His dismissal was based on certain losses that the appellant had incurred as a result of the respondent's conduct. The respondent sued the appellant contending that he had been discriminated against on the basis of social status and sex. The court found for the respondent and the appellant appealed.

Held:

(i) There was no discrimination justifying the award of damages by the Industrial Relations Court

(ii) The termination by notice was contrary to the provisions of the Employment Regulations, and, consequently, in view of the specific terms of the contract of probation the respondent in this case is entitled to damages for wrongful termination before the end of the contract.

Cases referred to:

(1) Happeza v Zambia Oxygen Limited 1989) S.C.Z. Judgment No. 24
(2) Ngwira v Zambia National Insurance Brokers (1994) S.C.Z. Judgment No. 9
(3) Mubanga v Tazara (3) (1987) S.C.Z. Judgment No. 24
(4) Francis v Municipal Commissioners of Kuala Lumpar (1962) 3 All E.R 633.

For the appellant: C.M. Mukinka of PTC
For the respondent: Dr J M Mulwilwa of Ituna Chambers

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal from a judgment of the Industrial Relations Court finding that the respondent was wrongfully dismissed and awarding him 30 months salary for the termination of his employment through discrimination, and 30 months salary for failure to obtain authority from a proper officer under the Employment (Special Provisions) Act Regulation 4(1) (a)

The facts of the case are that the respondent was employed by the appellant as a Purchasing and Supplies Manager and was employed on terms that he would be on six months probation, and either party was given the option of terminating the employment on 14 days notice during the probation term.

In the event, the respondent was the subject of a complaint by his employers that he had been responsible for losses as a result of failing to adhere to the strict regulations on the procuremtnt of typewriters and the acceptance of delivery of motor vehicle tyres. After enquiries, the appellant wrote a letter to the respondent four months after the commencement of his employment notifying him that his probationary period had had not been successful and his employment had been terminated on payment of 14 days salary in lieu of notice. The respondent complained to the Industrial Relations Court on the grounds that he had been

discriminated against for reasons of social status and sex. The Industrial Relations Court found that the respondent had not been guilty of misconduct, but that, it he were two other employees, one female and one male, had been equally guilty of the same conduct as the respondent. These other two employees were not the subject of dismissal, and the Industrial Relations Court found that there had been discrimination in the circumstances.

The appellant now appeals and on his behalf Mr Mudonka has put forward two grounds of appeal, the first being that there was in fact no discrimination for any reason. In this respect Mr Kukonka pointed out that the evidence indicated that the respondent had breached the reglations as a result of which they had been losses to the employer. He maintained however that the dismissal of the respondent had nothing to do with any of the grounds of discrimination set out in section 129 of the Industrial Relations Act which was the Act that applied at the time of the proceedings in the court below. In that even it was argued that no award of damages or compensation should have been made under this head. Under ground two Mr Mukinka argued that the Employment (Special Provisions) Regulations do not apply to the type of contract in this case namely a contract for fixed probationary period. He also argued that although the employment was terminated within four months and was not allowed to run to the full term of six months the parties had agreed that it could be so terminated so that the resultant four months was in fact a fixed term to which he argued the regulations did not apply. In the result Mr Mukinka argued that there had been no breach of the regulations in that, although no reference had been made to a proper officer under regulation 4(1) before the dismissal of the respondent, the dismissal was as a result of misconduct within the terms of regulation 4(2), and that, consequently, following our decision in the case of Hapeeza v Zambia Oxygen Limited (1), the failure to notify a proper officer after dismissing an employee did not render the dismissal null and void but gave raise only to a penalty.

In those circumstances it was argued that even it there had been a breach of a statutory provision no damages would arise for the breach. Dr Mulwilwa in reply argued that the emergency regulations did apply to this contract and maintained that a contract for instance until retirement age would be for a fixed period and that obviously the regulations were intended to apply to such contracts. He did agree that in this particular case either reinstatement or damages would result from the breach of the regulations and conceded that this was at the discretion of the court, which he said in this case had been exercised properly and that damages had been awarded, although he would not support the quontum of damages as being too high. As to the discrimination Dr Mulwilwa argued that the Industrial Relations Court had in fact found that there had been discrimination and felt that it was for this court to define what was meant by discrimination in accordance with the Act.

In this case we are satisfied that, when arriving at the conclusion that there was no justification for the dismissal of the respondent the court below made a finding of fact and this court has no ground for interfering with that finding. We accept that what this court must consider is whether there had been discrimination contracry to section 129 of the Industrial Relations Act and whether there was a breach of the Employment (Special Provisions) Act Regulations. So far as discrimination is concerned the matter about which there must be no discrimination are set out in section 129, and, so far as they can possibly relate to this case, privide that no person shall be dismissed on grounds of sex or social status, and if anybody is so dismissed there may be application to the Industrial Relations Court which can make an order for compensation or reinstatement depending upon the severity of the circumstances.

We note that in this case the Industrial Relations Court found that there had been discriminated because two other employees had not been disciplined whereas the respondent had. We entirely agree that there was a difference between the treatment of the persons involved, and, as a strict matter of language, the conduct amounted to discrimination. However, the fact that one of the other parties was female and the other male makes it impossible to say that anybody was favoured or discriminated against because of his or her sex. With regard to social status, as we said in the case of Ngwira v Zambia National Insurance Brokers, (2), this expression has nothing to do with a person's standing in the hierarchy of an employer's organisation; it refers solely to his standing in society. In this case there was no evidence that the standing in society of the respondent affeced the situation one way or the other. When discrimination is referred to in the context of persons being wrongly discriminated against within the provisions of section 129 it means discrimination only in respect of those matters which are referred to in the section. Discrimination generally can never be a ground for finding that a person has been improperly dismissed, and could never give rise to an order of compensation or reinstatement under the section. We are satisfied in this case that there was no discrimination justifying the award of damages by the Industrial Relations Court and this ground of appeal succeeds.

In regard to the second ground of appeal, we have dealt before with the result of a failure to notify a proper officer before dismissing a employee in ordinary cases under the provisions of

paragraph (1) of regulation 4 of the Employment (Special Provisions) Regulations. In the case of *Mubanga v Tazara* (3), we said that under that paragraph a dismissal of an employee without the prior approval of a proper officer will affect the validity of the dismissal and the dismissal in those circumstances will be null and void. In the result, in such cases, the court must decide whether or not to make an order of reinstatement or to award damages for wrongful dismissal. In this latter, connection we would refer to the case of *Francis v Municipal Commissioners of Kuala Lumpar* (4), where it was found that an employee whose employment was subject to statutory provisions had been dismissed contrary to those provisions. It was held that, although the dismissal might appear to be a nullity, in fact there was a dismissal because the empoyee was no longer employed, and, in those, circumstances, the general rule of master and servant cases applied, namely that reinstatement would very rarely be ordered, and then only in exceptional circumstances, which were not found to exist in that particular case.

As to the effect of the Employment (Special Provisions) Regulations, in this case the result of the argument put forward by Mr Mukinka would be that the employee would be entitled to be employed during the initial six months and during that time that period could be limited by giving notice within the terms of the contract. We must say at once that we cannot accept this argument by Mr Mukonka and must look at the intention of the legislature which was to protect persons employed from being given notice even in accordance with the terms of their contract. We do agree however, that fixed terms of employment were not intended to be covered by the Act and the regulations. Although we agree with Dr Mulwilwa's argument that persons employed until retirement age, which is in fact for a fixed period, should be covered and are within the intention of the legislature, contracts do not continue after retirement age and we are satisfied that the legislature could not have had the intention to interfere with the ability of members of the public to enter into fixed term contracts, which must inevitably, because of their form, come to an end within a finite time.

We are satisfied that the fixed period of a probationary contract must continue and may not be terminated by notice. However, at the end of that period there is nothing in the regulations to prevent an employer giving notice that the employee will not continue to be employed thereafter. In this particular case the contract was terminated after four months instead of being allowed to run to the end of the six months agreed probationary period. We find therefore that the termination by notice was contrary to the provisions of the Employment Regulations, and, consequently, in view of the specific terms of the contract of probation the respondent in this case is entitled to damages for wrongful termination before the end of the contract. The balance of the contract which was still to run was for a period of two months and we find therefore that the respondent is entitled to the damages of his salary for two months less the fourteen days pay in lieu of notice already given.

For the reasons we have given, the appeal is allowed. The award of damages by the court below is set aside and in its place we make aware of damages to the respondent of six weeks salary. Costs will follow the event.

Appeal allowed.