

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

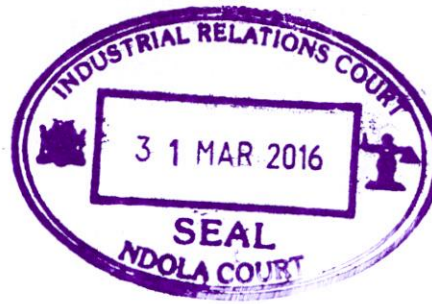
COMP/12/2014

BETWEEN:

NJAWA JAMES LUNGU

AND

ZESCO LIMITED



COMPLAINANT

RESPONDENT

BEFORE: HON. JUDGE Dr. W. S. MWENDA - DEPUTY CHAIRPERSON
HON. J.M. BWALYA - MEMBER
HON. G.M. SAMUSUNGWA - MEMBER

For the Complainants : Ms. E. I. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent : Mr. A. Sike, Acting Chief Legal Officer, North And CBD, appearing with Mr. M. Zaza, Principal Legal Officer, ZESCO

JUDGMENT

Cases referred to:

1. Khalid Mohammed v Attorney General (1982) Z.R. 49 (SC)
2. Chimanga Changa v Stephen Chipango Ng'ombe (2010) Z.R. Vol. 1, p. 208
3. The Attorney General v Richard Jackson Phiri (1988-1989) Z.R. 121 (SC)
4. Ward v Bradford Corporation (1971) 70 LG R 27

On 27 January, 2014, Njawa James Lungu, the Complainant herein, lodged a Notice of Complaint against the Respondent, Zambia Electricity Supply Corporation Limited (ZESCO). The ground upon which the complaint was presented was that the dismissal of the Complainant by the Respondent was wrongful and unfair. According to the Complainant, the Respondent was in breach of the Conditions of Service in failing to constitute a proper disciplinary committee when hearing the case at first instance by excluding staff from Stores and Accounts Department to sit on the committee.

As relief the Complainant prays that the Court grants him the following:

- (a) A declaration that the dismissal was wrongful and unfair.
- (b) An order for reinstatement and payment of full salaries effective from the date of the said wrongful dismissal.
- (c) Alternatively, payment of damages for wrongful and unfair dismissal and accrued benefits.
- (d) Interest on all monies claimed in (c).
- (e) Costs of and incidental to this action.
- (f) Any other relief the Court may deem fit in the circumstances of the case.

In rebuttal, the Respondent deposed that the Complainant was rightly and fairly dismissed in line with the disciplinary procedure in the Conditions of Service for Non- Represented Staff under which he served. Further, that it did not breach the Conditions of Service as there was no specific requirement in the same to include staff from Stores and Accounts Department in the composition of Disciplinary Committee.

The Complainant (CW) testified on oath on his own behalf.

In a nutshell, his evidence was a repetition of facts he deposed to in his Affidavit in Support of Complaint. It was his testimony that he was employed as Assistant Stores Officer by the Respondent in March, 2009 and was in 2010 promoted to Stores Officer for Luapula Region and sent to Mansa. In October, 2011 he was appointed as Area Stores Officer for the region.

CW testified that as Area Stores Officer his duties included raising purchase requisitions; receiving materials bought for the region and ensuring that the materials were in the right quantity; issuing materials to end users, namely ZESCO employees. His duties also included reconciliation of all the materials issued both in the system physically and on Bin Cards.

The facts of the case as narrated by CW were that in November, 2012 he was assigned to travel from Mansa to Ndola to collect materials for Luapula region. He was assigned a driver and a truck, a Nissan UD.

It was CW's evidence that the driver was told to refuel the truck for the trip. Mr. Kapampa, the Stores Assistant, gave the driver fuel but before they could start off, the driver was assigned to deliver wooden poles to sites that were under construction.

According to CW they started off from Mansa around 11.00 hours and after travelling for some time the driver stopped to refuel. He had carried extra fuel in a drum behind the vehicle. CW testified that he was informed that the driver had requested for extra fuel. It was CW's testimony that this was something that was done regularly by drivers in the company.

It was CW's further evidence that as the driver was refueling, he decided to go and buy some drinks since they had stopped by a market place.

CW testified that as he was coming out of a shop, he noticed a ZESCO Land Cruiser pulling out from where their truck had parked and heading in the direction the driver and himself were coming from. The driver of the Land Cruiser whom he identified as Fredrick Mbesuma waved at him and he waved back. CW says he did not recognise the other occupant of the Land Cruiser. By the time he got back to the truck the driver had already finished refueling and they proceeded to Ndola where they parked the truck at the Workshop.

The following day CW went to the Stores to arrange for materials. In the meantime, the driver proceeded to prepare the truck for their trip back to Mansa. The driver had to have the truck washed and refueled whilst CW was preparing the materials at Stores. CW averred that they started loading materials after 14.00 hours. When they finished it was too late to start off for Mansa so they decided to spend a night in Ndola. They started off the following day in the morning using the Ndola-Serenje-Mansa route.

Narrating the facts of the second charge, it was CW's evidence that in January, 2013 the same driver and the same truck were assigned to go to Kitwe to service the truck which by then was the only truck in the region.

Prior to the trip the truck was assigned to work with the Operations people. CW averred that this was a Sunday and there was to be a shutdown of power in the whole of Luapula from 06.00 hours to 17.00 hours. According to CW, the driver called him on Sunday morning around 05.00 hours asking for fuel since he was travelling to Ndola that day. The name of the driver was Rodgers Chishimba.

CW testified further that since he was not feeling well he asked Chishimba to pick up his Sales Clerk called Brian Katebe. Chishimba did not indicate the quantity of the fuel he requested because that was not the practice. The reason being that they would not know how much fuel would already be in the tank.

According to CW, Brian Katebe called him while at the filling station saying the driver had requested for extra fuel. CW said he was not given the quantity of fuel the driver requested for but that they usually gave 150 litres to be stored in a PVC drum. CW testified that he told Brian Katebe to issue the extra fuel. CW said that he authorised the issuance of 100 litres because the practice was that on long distances drivers were given extra fuel because they would not refuel anywhere else on the way.

The driver was issued with fuel and he started off for Ndola. CW explained that when a driver asked for fuel it was automatic that there was a requisition authorising him to be issued with the fuel. The requisition

would be signed by the Regional Manager or the Chief Engineer or one of his two Assistants.

It was CW's evidence that when he reported for work on Monday around 07.30 hours he found security personnel in his office who said fuel had been stolen from the filling station and asked for a fuel voucher which was used to issue fuel for the truck in question. CW averred that he gave the security personnel the original voucher and they instituted investigations.

After a few days CW was verbally told not to report for work as they were still investigating the fuel that was issued in January. After a few days he received a suspension letter. Later he was handed a charge sheet relating to a charge of dishonest conduct. It was alleged that in November, 2012 he was found siphoning fuel at a point where they stopped to refuel and that on the same trip they (CW and the driver) collected fuel from Ndola which was not accounted for.

CW was given a second charge of authorising fuel to be issued to the driver. The driver was also charged with siphoning fuel.

According to CW a Disciplinary Committee was constituted for the first case hearing which comprised of the Human Resources Officer from Mansa, the Workshop Manager from Ndola, the Branch Manager from Samfya and the Regional Manager from Luapula Province who was the charging officer.

CW testified that when he was going for the case hearing he asked the Human Resources Officer if he could carry any documents to prove his case. He said he was told not to carry anything or go with any representative since he was in management.

CW testified that he noticed that there was no one from Accounts, Finance or Stores on the panel. He said these are people who knew the specific procedures at Stores. According to CW, the rules provided that someone appearing before a disciplinary committee should be represented or at least call a witness.

In addition, CW said he asked the panel to call Mbesuma who allegedly found them siphoning fuel but they said they would not call him as they would rely on the report that he made. It was CW's contention that calling a witness would have helped him verify the transactions that went on.

It was CW's testimony that he was summarily dismissed a few weeks after the case hearing. He said he was afforded an opportunity to appeal against the verdict at director's level and he still insisted that the appeal committee should call Mbesuma and his colleague who had allegedly found them siphoning fuel but the committee refused.

CW testified that he again received a letter that he was dismissed and that he should appeal to the Managing Director. He appealed to the Managing Director but was still unsuccessful. The Managing Director dismissed the appeal and upheld the dismissal.

On the second charge, CW said he asked the panel to bring people from Stores or Accounts who knew the procedure but they were not brought. He explained to the panel the Stores procedure, where you delegate someone to issue fuel. It was CW's testimony that he delegated the issuing of fuel to Brian Katebe and when the driver collected the fuel he was not there and did not know how much fuel was issued to him. He also did not know who authorised the fuel that was issued in Ndola.

CW testified that he authorised Brian Katebe to issue fuel at 05.30 hours on the material day because at 06.00 hours there was going to be a power shutdown and the pump uses power. Further, Peter Kapampa, the Stores Assistant's health was failing him and CW thought that it was better to let him rest and so he assigned someone else to issue the fuel. CW said he did not authorise the issuance of 210 litres of fuel. He said when he was told by Brian Katebe that the driver was requesting for extra fuel he gave him a go ahead knowing that there was a form which authorised him to collect extra fuel.

It was CW's testimony that when he reported for work on Monday he enquired from Brian Katebe how much fuel he had issued to the driver and he was told that a total of 226 litres had been issued and that 100 litres was unauthorised.

CW said he informed his supervisor the Regional Accountant, about the 100 litres of unauthorised fuel that was issued to the driver. The Supervisor said they should inform the Regional Manager and have the issue normalised. According to CW, there were times when they would

issue fuel without authority when the signatories were not around but they would ensure that security recorded the transaction in their Occurrence Book (OB).

When referred to page 17 of the Complainant's Notice to Produce, which exhibited Brian Katebe's statement to ZESCO Police, CW denied authorising Brian Katebe to issue 210 litres of fuel. According to CW, Brian did not tell him the quantity of fuel he wanted and that normally 150 litres were issued.

During cross-examination CW testified that management of fuel was part of his duties. He said a driver would fill in a requisition, have it authorised and bring it to Stores.

CW wondered why Fredrick Mbesuma said they were siphoning when the fuel was going from the drum carrying the extra fuel into the tank of the truck. He stated that he could not question the Chief Engineer for authorising the issuance of fuel.

CW further testified that he asked for stock taking to be done and it was discovered that there were no shortages and the 100 litres of fuel which was unauthorised was returned by Rodgers Chishimba because he did not use it.

CW conceded during cross-examination that they had 350 litres of fuel on the trip from Mansa to Ndola and back. He testified that before refueling they had covered 270 kilometers. CW insisted in cross-examination that the fuel was being put from a 20 litre container into the tank. He conceded that he authorised Katebe to authorise fuel without knowing the quantity of fuel. He agreed with the comments at page 9, paragraph 12 of the Minutes of the Disciplinary Case Hearing exhibited in the Respondent's Notice to Produce, that it was a weakness on his part not to have questioned why the driver was refueling after covering a distance of only 200km. He admitted under further cross-examination that he was negligent to have authorised the issuance of the extra 210 litres of fuel.

On the issue of composition of the panel to hear his case, CW stated that he was not aware that ZESCO has the discretion to constitute any panel to hear a disciplinary matter. He however agreed that he was properly charged and that he exhausted the administrative channels.

During re-examination, CW reiterated that he did not authorise issuance of 210 litres of fuel. He stated that when he was called by Brian Katebe he was told that the driver had requested for extra fuel and according to ZESCO regulations, extra fuel meant 150 litres. That is what was normally given considering the distance.

He stated in further re-examination that he did not ask the driver why he was refueling just after 200km because it was the duty of the driver to make sure that the vehicle did not run out of fuel and secondly, the distance they had covered consumed fuel. That is why the driver refueled.

This marked the close of the Complainant's case.

In support of their case the Respondents called three witnesses, hereinafter referred to as "RW1", "RW2" and "RW3", respectively.

RW1 was Fredrick Mbesuma, an Environmental Information Specialist at the Respondent Company. The summary of the facts as narrated by RW1 were that on 20 November, 2012 on their way to Mansa just before Luapula Bridge, they noticed a ZESCO truck parked between some shops when under normal circumstances it was supposed to be parked by the road side. RW1 was in the company of an independent valuer from R M Fumbeshi and Company and a colleague by the name of Antony Mando from ZESCO. They approached the truck and found the driver decanting fuel from a drum on top of the truck into 20 litre container. When asked, the driver said he was refueling the truck. According to RW1, Anthony Mando knew one of the people on the truck, CW. They thereafter started off for Mansa.

RW1 testified that whilst in Mansa they reported the issue of the truck being parked in an awkward manner and decanting of fuel from a drum into a 20 litre container to the Regional Inspector, a Mr. Siame.

During cross examination, RW1 said he did not look at the dash board of the truck to see whether it had run out of fuel. Further, he said he saw the driver removing fuel from the drum but did not stay long enough to know what he did with the diesel he had put in a container. In further cross-examination, RW1 conceded that there are no rules on parking by the

roadside but under normal circumstances the truck should have been parked by the road side.

He also testified that he attended a Magistrate's Court in relation to the same case.

RW2 was Loveness Kasalu, the Senior Human Resources Officer. Her evidence which is basically a repeat of the evidence already before Court was that she received a report to the effect that CW in the company of Rodgers Chishimba (the driver) were found siphoning fuel from a truck. It was her evidence that CW was charged for dishonest conduct and suspended in accordance with their disciplinary procedures.

RW2 testified that CW was asked to exculpate himself within 48 hours, which he did. A panel was constituted by management which comprised of the Workshop Manager who is a Mechanical Engineer by the name of Mr. Sinkala, Mr. Banda the Principal Electrical Engineer, Joseph Kafungu, then Branch Manager - Samfya, and herself sitting in as Secretary for the committee.

It is worth noting that RW2 testified that the Chairperson of the panel asked CW before they proceeded with the case hearing whether he was comfortable with the panel to which he said he was. Further, RW2 testified that throughout the disciplinary process, the Respondent used the Conditions of Service for Non-Represented Employees (Effective 1 April, 2013).

RW2 also testified that management has the discretion to appoint members of the disciplinary committee depending on the nature of the case.

During cross-examination RW2 testified that relevant documents were availed to CW during the case hearing. She stated that the statements of Brian Katebe, Fredrick Mbesuma and Anthony Mando were availed to the Complainant at the hearing. She also averred that witnesses who are ZESCO employees are allowed during case hearing. She, however, said she could not remember having heard CW request for witnesses in the case hearing.

RW2 testified in further cross-examination that it was not allowed and it still is not allowed to give out fuel and regularise the transaction later. She reiterated her evidence given in examination-in-chief that management appoints people to sit on the panel depending on the nature of the case.

RW3 was Mike Weluzani Banda, Principal Engineer for Kitwe Region. Most of what he testified is already on record before this Court. However, RW3 was part of the disciplinary committee panel that sat to hear the Complainant's disciplinary case.

RW3 testified that management at ZESCO has the discretion and is at liberty to constitute a committee. It was RW3's testimony that when they started the case CW was asked to comment on the composition of the panel and state if he was comfortable with the committee to which he responded that he was very comfortable.

According to RW3, CW indicated to the panel that he had acted inappropriately by not asking the driver of the vehicle why he had stopped to refuel after covering 200 km when in Mansa they had put enough fuel to reach Ndola.

RW3 stated that CW had indicated that he acted negligently by failing to notice that the driver had misappropriated fuel. It was RW3's further testimony that in CW's admission and the other things they had looked at such as the documents contained on pages 3 to 11 of the Complainants Notice to Produce filed on 9 July, 2014 and the statement of Katebe, they came up with a decision to uphold the summary dismissal.

During cross-examination RW3 testified that no witnesses were brought at the hearing; that they deliberated based on statements as per the practice in ZESCO. It was his evidence that statements were shown to CW and that he was told and given a copy of the statements.

RW3 explained how they get information in ZESCO. He said there is a system in place at ZESCO to enable one to know how much fuel was used. It was his further evidence that the document shown to the committee indicated where they drew fuel, the total amount of fuel put in the truck in Mansa and when CW and the driver started off through Serenje into Ndola and back. It indicated the total amount of fuel used, including the remaining fuel.

RW3 testified that he did not remember CW asking for witnesses so that he could question them. Commenting on the alleged improper composition of the panel, RW3 said that the discretion of management to constitute a panel depended on the nature of the case so that it would not be helpful if the issue is to do with engineering to bring an accountant or a driver on the panel. Further, that all the panel needed to do in CW's case was to look at the figures, a simple arithmetic which a person at senior engineer level was able to determine. According to RW3, these were figures which CW did not dispute.

RW3 testified under further cross-examination that the procedure at ZESCO is that when a signed statement is produced, it is taken as valid. According to him, all this is covered under the Grievance and Procedure Code. From his experience at ZESCO, it is a tradition to just consider statements only. He agreed that this could just be a convention that was started by ZESCO.

In re-examination, RW3 stated that when they asked James Njawa Lungu (CW), in his own words he said he acted negligently and should have noticed the siphoning of the fuel.

This marked the close of the case for the Respondent.

In considering the evidence adduced in this case we are mindful that the onus of proving the case on a balance of probabilities lies on the Complainant as per the case of **Khalid Mohamed v Attorney General (1)**.

From the evidence before this Court, we have found as facts the following:

1. The Complainant was employed by the Respondent as a Stores Officer based at Mansa Regional Office.
2. On 12 April, 2013 he was charged with the offence of dishonest conduct pursuant to clause 9.1.25 of the Disciplinary Code of Conduct for Management Staff Employees under the Conditions of Service for Non-Represented Staff effective 1st April, 2013.
3. Investigations were conducted by the Respondent and the Complainant was placed on suspension.
4. The Complainant was found guilty of the alleged offence and summarily dismissed.
5. The Complainant appealed against the dismissal up to the last level but the dismissal was upheld.

Having given the above findings of fact, we now consider the grounds of complaint as laid out in the Notice of Complaint, but before we do so, we would like to state that at the time of writing this judgment we had only received submissions from Counsel for the Respondent for which we are grateful. We shall refer to them as and when necessary.

The Complainant alleges that his dismissal by the Respondent was wrongful and unfair and that the Respondent was in breach of the Conditions of Service in failing to constitute a proper disciplinary committee when hearing the case at the first instance by excluding staff from Stores and Accounts Department to sit on the committee.

Having considered the evidence on record, both oral and documentary, we find that the issues to be resolved by this Court are:

- (1) Whether or not the Respondent had reasonable grounds for believing that the Complainant had committed the offences levelled against him; and
- (2) Whether or not the Respondent breached the Conditions of Service by excluding staff from Stores and Accounts Department to sit on the disciplinary committee.
- (3) Whether or not the Complainant's dismissal was wrongful and unfair.

With regards to the first issue, we are guided by the Supreme Court's holding in the case of **Chimanga Changa Limited v Stephen Chipango Ng'ombe (2)**

wherein the Court stated that an employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. The Court further stated that the function of the employer was to act reasonably in coming to a decision.

In addition we draw our minds to the holding of the Supreme Court in the case of **Attorney General vs Richard Jackson Phiri (3)** in which the Court stated thus:-

It is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The duty of the Court is to examine if there was the necessary disciplinary power and if it was exercised in due form.

We are of the view that in the case at hand there is no doubt as to whether the necessary disciplinary power existed and whether it was exercised in due form. There is evidence on record that the Respondent had the power to discipline the Complainant by virtue of the Disciplinary and Grievance Procedure Code for Management Staff Employees (which was applicable to the Complainant) which the Respondent duly exercised pursuant to clause 9.1.25 for the offence of Dishonest Conduct whose penalty is summary dismissal on first breach.

As a Court therefore, there is no cause for us to intervene in the matter in this regard. Our decision is further supported by the judgment of Lord Denning in **Ward v Bradford Corporation (4)** which, although not binding on us, has persuasive value, where he stated thus:

We must not force these disciplinary bodies to become entrammelled in nets of legal procedure. So long as they act fairly and justly, their decision should be supported.

On the second issue, we agree with the submission by Counsel for the Respondent that the composition of the Disciplinary Committee is at the discretion of the Respondent's management and that the said management correctly exercised its discretion in constituting the Disciplinary Committee that heard the Complainants case.

We have observed from the evidence before the Court that the Complainant was asked before the hearing whether he was comfortable with the composition of the panel to which he answered in the affirmative.

Having decided that the composition of the Disciplinary Committee is at the discretion of the Respondent's management and having observed that the said discretion was exercised correctly, we agree with Counsel for the Respondent that for this Court to rule on the composition of the disciplinary tribunal would be tantamount to interposing itself as an appellate tribunal within the domestic disciplinary procedures to review what was done by that committee. This is contrary to the guidance given by the Supreme Court in the case of **Attorney General v Richard Jackson Phiri (3)**. In this case the Supreme Court further guided that:-

Once the correct procedures have been followed, the only question for consideration of the Court - - - would be whether there were facts established to support the disciplinary measures since it is obvious that any exercise of power will be regarded as bad if there is no substratum of fact to support the same - -

In the case in casu, the Respondent has shown that the Complainant was charged in accordance with the Disciplinary Code. He was given the opportunity to exculpate himself and be heard in his defence. We are satisfied that the Respondent followed the procedure under clause 4.0. of the Disciplinary and Grievance Procedure Code.

In addition, there is evidence to show that facts were available to support the charge and dismissal of the Complainant. On his claim of unfair dismissal, as Counsel for the Respondent rightly submitted, the Complainant has not led any evidence to prove his allegation that his dismissal was unfair.

On the facts and evidence before us and going by the Supreme Court decisions in the cases cited herein, we find and hold that the Complainant's dismissal was neither wrongful nor unfair and he is therefore, not entitled to any of the relief sought.

We find no merit in the complaint and we dismiss it accordingly.

We make no order for costs.

Informed of Right of Appeal to the Supreme Court within thirty (30) days hereof.


Delivered at Ndola **31st** day of **March, 2016.**



Judge W.S. Mwenda (Dr)
DEPUTY CHAIRPERSON



J.M. Bwalya
MEMBER



G.M. Samusungwa
MEMBER