

Registry

**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT SOLWEZI**

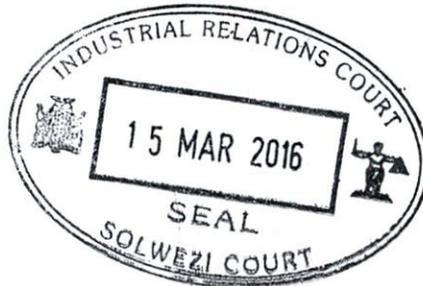
COMP/02/2016

BETWEEN:

SANDRA MUBANGA

AND

HILLTOP HOSPITAL



COMPLAINANT

RESPONDENTS

BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

1. **Hon. W.M. Siame**
2. **Hon. J. Hasson**

For the Complainant : In Person

**For the Respondent : Mr. J.M. Kapasa of Messrs J.M. Kapasa
& Co.**

JUDGMENT

Date : 15th March, 2016

Cases referred to:

1. **Contract Haulage v Mumbuwa Kamayoyo (1982) ZR (SC)**
2. **Chilanga Cement v Kasote Singogo (2002) ZR (SC)**

This Complaint was filed by F/Sandra Mubanga against Hilltop Hospital. We shall, therefore, refer to F/Sandra Mubanga as the Complainant and to Hilltop Hospital as the Respondents which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

1. Court declaration that the dismissal is null and void.
2. Damages for unfair, unlawful and wrongful termination of employment.
3. Damages for mental anguish, pain and suffering caused by the loss of expectation of income.
4. Interest and costs.
5. Any other dues that the court may deem fit.

The duty of this court is to ascertain whether or not the Complainant has proved her claims.

The Complainant's evidence was that she was employed by the Respondents on 1st January, 2015 and worked for six months. She was then made to sign a three (3) year contract.

The Complainant further stated that she attended a meeting together with other fellow employees. In that meeting it was stated by management to the employees, that even the employees who were employed by the proprietor of the hospital were dismissible. It was further stated that even the employees who had developed the habit of phoning the proprietor of the hospital, were equally dismissible.

Another meeting was called in the matron's office. Present during the meeting were:

1. The Complainant
2. Abel Chota (Hospital Administrator)
3. The Matron
4. Dr. Bukasa
5. Dr. Maweji
6. Mr. Misheck Maseka
7. Sister Kangwa.

In that meeting Mr. Chota told the Complainant that they had received a letter from BME at Kansanshi Mines, where husband to the Complainant worked. It is in that meeting where the Complainant was accused of leaking confidential information about patients at Hilltop Hospital to her husband. She was accused of disclosing to her husband the names of people who were on ARV (Aids drugs). She was also accused of revealing what Doctors discuss with patients. She was accused of revealing this confidential information to her husband, who in turn told other employees at BME about it. The Complainant denied all these allegations.

There was again another meeting. This was a third meeting. The third meeting was held in the Accounts Office. Present in that meeting were:

1. The Matron
2. The Administrator

3. Mr. Misheck Maseka

Same issues were discussed. It was then 14.00 hrs of that day. They had held a series of these meetings that day since 08.00 hrs.

On 10th December, 2015 the Complainant was given a letter of termination of employment. That letter was dated 7th December, 2015.

The Complainant called one witness. We shall refer to that witness only as CW1.

CW1 was M/Rasiel Sikasenke, the husband of the Complainant who worked as a Plant Assistant at BME at Kansanshi Mine. CW1 told this court that on 8th November, 2015 whilst at work he received a phone call from the Complainant. The Complainant reported to CW1 that she was accused of leaking confidential information concerning patients at Hilltop Hospital to CW1.

The Respondents called two (2) witnesses. We shall refer to these witnesses as RW1 and RW2 respectively.

RW1 was M/Maxwell Gumbo. The evidence for RW1 was that he last worked for Bulk Mining Explosives (BME) and left employment on 27th November, 2015. RW1 stated that he knew the Complainant on 23rd November, 2015. RW1 said that on that date Chomba Simwinga who was one of his workmates at BME was sick and admitted to Hilltop Hospital, Solwezi. When RW1 went for his

night shift work he announced that Chomba Simwinga was sick. M/Sikasenke who is CW1 in this case and the husband to the within Complainant responded that Chomba Simwinga was not sick but only on water drip. RW1 stated that CW1 said that the Complainant who is wife to CW1 worked at Hilltop Hospital and that Chomba Simwinga only negotiated for sick off days as well as for his admission. RW1 then complained to the Hospital Administrator about leakage of hospital confidential information. The Hospital Administrator advised RW1 to advise Chomba Simwinga to put his complaint in writing. Chomba Simwinga then wrote the complaint on 5th December, 2015. That complaint has been produced as page 11 in the Respondent's Bundle of Documents.

On 5th December, 2015 RW1 also wrote a letter of Complaint to the Hospital Administrator. That letter was produced as page 9 in the Respondents' Bundle of Documents.

RW2 was M/Abel Chota Henry the Hospital Administrator for Hilltop Hospital.

The evidence for RW2 was that the Complainant joined Hilltop Hospital on 1st January, 2015. He stated that the conditions under which the Complainant worked had a confidentiality clause. It also had a termination clause. He stated that Hilltop Hospital terminated the employment of the Complainant and that the Complainant was paid all her dues.

Before the employment of the Complainant was terminated, Hilltop Hospital had received information from BME where the husband for the Complainant worked. The husband to the Complainant is CW1 in this case. The information was that the Complainant was leaking confidential information concerning hospital patients to her husband and her husband disclosed this information to other employees of BME.

The facts of this case are very clear. The facts are that:

1. The Complainant was employed as a Maid/Cleaner.
2. She was accused of leaking confidential information concerning patients who were employees of BME at Kansanshi Mine.
3. Arising from these allegations the Complainant's employment was terminated.

We have also observed that it is not in dispute that the termination of the Complainant's employment was based on an allegation that she was leaking confidential information concerning patients. This has been admitted by RW1 and RW2. The letter of termination of employment shows that the employment was terminated because of the Complainant's "**unacceptable conduct.**" That letter was produced as exhibit "SM1". So, then, the termination was based on grounds of "**unacceptable conduct.**" Termination of employment is an option by either party to the contract of employment to terminate the employment relationship between them. This option must be exercised in accordance with

the Contractual Provisions and must not violate any statutory provisions.

It is wrong as the Respondents did in this case to terminate the Complainant's employment in the manner they did. This is so because if termination of employment is anchored on misconduct (unacceptable conduct) the proper procedure is to charge the employee appropriately. After the employee has been charged what should follow is the hearing. The accused employee must be given a fair hearing by an impartial tribunal/disciplinary committee. When the charge has been proved against the employee the result must be a dismissal. It is wrong to terminate the employment of an employee based on unacceptable conduct without affording the employee a hearing. There is no evidence to prove that the Complainant was charged with any offence. We have seen no charge sheet or charge document. RW2 in his examination in chief said that he gave the Complainant a verbal charge. That is inadmissible. It is inadmissible because we have no proof of it, the conditions of service, the letter of offer of employment and the letter of termination of employment were all evidenced in writing. We have seen no reason why only the charge should be verbal. We have searched for minutes of a disciplinary hearing if any was held. There is none. What we have seen is page 13 to 15 of the Respondents' Bundle of Documents. Those are not minutes of the case hearing. The heading of those minutes shows that it was a management meeting.

There was no charge. The management meeting was chaired by RW2 who stated that he verbally charged the Complainant. It was in that management meeting when management informed the Complainant of the allegations against her for which until that meeting she had no prior notification. We cannot say that, that was a fair hearing because apart from not having been charged, she was not given prior notification to prepare her defence. An accused employee must be given prior notification for the hearing of her case in order to enable the accused employee an opportunity to prepare her defence. A hearing without prior notification is an ambush on the employee and this makes the whole hearing unfair and a conviction from an unfair hearing is a nullity.

That meeting was purely a management meeting. Several management or administration issues were discussed such as payment of rentals, purchase of uniforms for a kitchen lady and security guards. Debtors were also discussed.

We have not seen how the Complainant who was a Maid/Cleaner could access confidential information concerning patients. The Complainant vehemently denied having any access to confidential information. When cross examined by the Complainant RW2 admitted that the Complainant had no access to confidential information concerning patients.

On the above facts we are satisfied that the termination of employment was not founded on firm ground.

We shall now determine the relief sought.

1. Court declaration that the dismissal was null and void

We have already stated that the Complainant's termination of employment was not founded on firm ground. We, therefore, declare that the termination of the Complainant's employment was null and void.

Having declared the termination of employment null and void the next leg is to determine whether or not the remedy of reinstatement would, in the circumstances of this case be appropriate.

We shall not order reinstatement in this case because the facts of this case clearly show that the working environment would not be conducive. The Complainant already passed through a phase of hostile working environment and reinstating her would not be in the interest of both parties. We have noted that infact reinstatement is not one of the remedies sought by the Complainant in her Notice of Complaint.

Needless to state that an award of damages in the circumstances of this case would suffice.

2. Damage for unfair, unlawful and wrongful termination of employment

UNFAIR TERMINATION

Unfair termination of employment is when the employment is terminated without affording an accused employee a hearing or in the circumstances where the hearing was not fair.

To the extent that the Complainant was not charged, and also that she appeared before management committee without prior notification of the allegations, we find that the termination of her employment was unfair.

UNLAWFUL TERMINATION

Unlawful termination of employment means that the employment was terminated in breach of a statutory provision. We have seen no breach of statutory provision in this case. This, however, is not to suggest that the termination of employment was justifiable because there are other aspects of natural justice which were not complied with, such as the Respondents' failure to charge the Complainant with the offence of unacceptable conduct the basis upon which the Complainant's employment was terminated.

WRONGFUL TERMINATION

Wrongful termination means that the procedure was not followed when the employment was terminated. What is in dispute is that the Complainant's employment was terminated because of the allegation that she was leaking confidential information. Because

of this allegation, it was wrongful for the Respondents to terminate the Complainant's employment without charging her with the requisite offence. The procedure is that the Complainant should have been charged, she must have been given notification of the case hearing so as to enable her prepare her defence, then she must have appeared before an impartial committee and the allegation must have been proved. If proved this should have resulted in dismissal. To the extent that this procedure was not followed, the termination of the Complainant's employment was wrongful, and that purported hearing in the management meeting was nothing but mere sham.

We have looked at the case of **Contract Haulage v Mumbuwa Kamayoyo (1)** where the Supreme Court awarded one month salary for breach of contract of employment.

We have also looked at the case of **Chilanga Cement v Kasote Singogo (2)** where the Supreme Court awarded six months' salary for wrongful termination of employment. We have been well guided. In the circumstances of this case we order six (6) months' salary as damages for wrongful and unfair termination of employment.

3. Damages for mental anguish, pain and suffering caused by the loss of expectation of income

We have not been availed with the nature, extent and gravity of the mental anguish, pain and suffering alleged.

This claim, therefore, has not been proved and it fails accordingly.

4. Interest and Costs

We award interest on the within award at the current Bank of Zambia rate from 8th January, 2016 when this Complaint was filed until full payment.

We also award costs of these proceedings in favour of the Complainant (no interest on costs) in default of agreement on any of the within awards same shall be referred to the Deputy Registrar of Industrial Relations Court for taxation or assessment as the case may be.

5. Any other dues the court may deem fit

We have seen no other dues to award.

Leave to appeal to the Supreme Court within 30 days from today is granted.

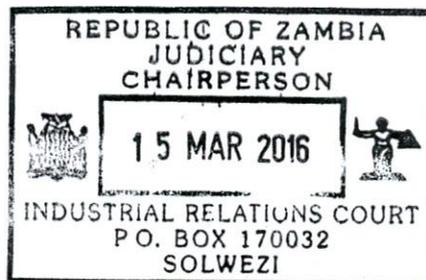
Delivered and signed at Solwezi this the 15th day of March, 2016.



Hon. E.L. Musona
JUDGE



Hon. W.M. Siame
MEMBER



Hon. J. Hasson
MEMBER