

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

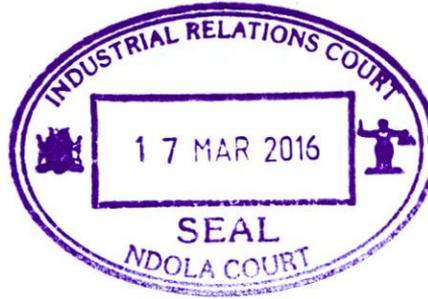
COMP/89/2014

BETWEEN:

BALDWIN SIKAONGA

AND

ATTORNEY GENERAL



COMPLAINANT

RESPONDENT

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

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

For the Respondent : Ms. M.K. Lupiya, Legal Counsel, Attorney-
General's Chambers

JUDGMENT

Cases referred to:

1. Zesco v David Lubasi Muyambango (2006) Z.R. 22 (SC).
2. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172
3. Contract Haulage Limited v Mumbuwa Kamayoyo (1982) Z.R. 13 (SC).
4. Zinka v Attorney General (1990 - 1993) Z.R. 73

Legislation referred to:

- 1. The Local Government Service Regulations, 1996, S.I. No. 115 of 1996.**
- 2. The Local Government (Amendment) Act No. 6 of 2010.**
- 3. The State Proceedings Act, Chapter 71 of the Laws of Zambia.**

Baldwin Sikaonga (hereinafter referred to as “the Complainant”) filed a Notice of Complaint against the Attorney General (hereinafter referred to as “the Respondent”) wherein he alleged that his dismissal from employment with Kapiri Mposhi District Council on 4 April, 2009 was wrongful and unlawful. It should be noted that while the Complainant was working for Kapiri Mposhi District Council at the material time and at the time of his dismissal held the rank of Sub-Inspector, the Local Government Service Commission, a public body, was his employer by virtue of sections 90 and 93 (a) and (b) of the Local Government (Amendment) Act No. 6 of 2010. The Attorney General is the Respondent in this case by virtue of section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

The Complainant now seeks the following relief:

- (a) An order for reinstatement;
- (b) In the alternative, damages for wrongful and unlawful dismissal;
- (c) Unpaid salaries from May 2009 to date;
- (d) Any relief which the Court deems fit;
- (e) Interest;
- (f) Costs.

The Respondent has denied that the Complainant is entitled to the relief sought as the claim for reinstatement cannot be sustained since the

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Complainant was lawfully dismissed from employment. The Respondent claims that the Complainant was suspended from employment following allegations of gross misconduct and gross negligence, offences for which he was charged.

Further, the Respondent alleges that the Complainant failed to follow the proper channel of appeal that was available at the time. That he brought the letter of appeal 30 days after the requisite time permitted for filing in an appeal. That in any event, the Local Government Service Commission considered the appeal and upheld the decision of the Council.

The Complainant deposed to an Affidavit in Support of Complaint wherein he avers that he was employed by Kapiri Mposhi District Council on 10 February, 1992 as a Watchman. In 1995 he was promoted to the rank of Corporal as shown at exhibit "BS1" annexed to his affidavit. In 2001 he was again promoted to the rank of Sub-Inspector and started to serve under Division III Conditions of Service as shown at exhibit "BS2".

His duties as Sub-Inspector included, inter alia, enforcing Council regulations and other directives as issued and instructed by his immediate supervisor, the Chief Inspector, who at the time was Leonard Noah. The Complainant deposes further that a number of persons used to trespass on Council premises using unauthorised routes behind the Council commonly known as 'Civic Centre'.

This situation led the Council's Works Department to erect a barrier around Council offices between October and November, 2008 with a 'no through road' sign. Council Police were instructed to enforce the

regulations by charging trespassers a sum of K10,000 (unrebased currency) or order those who could not pay the fine to clear vegetation around Council premises as deterrent measures.

Between 2 and 9 January, 2009 the Complainant apprehended a trespasser and ordered him to go and pay K10,000 at Accounts Department. The trespasser did not have money to pay the fine and the Complainant ordered him to weed the Council premises which he did and left. According to the Complainant, what he did on that day was in the course of duty. He deposed that other Council police officers also enforced the said regulation.

On 9 January, 2009 the Complainant received a letter charging him for gross misconduct and negligence of duty and requesting him to exculpate himself as shown by exhibit "BS4". On 14 January 2009, he exculpated himself accordingly as evidenced by exhibit "BS5". On 19 January, 2009 he was suspended from duty as per exhibit "BS6". On 14 April, 2009, he received a dismissal letter which he has exhibited as "BS7".

On 10 May, 2009 he appealed to the Chairman of the Council against the dismissal but did not receive any response from the Council until 11 December, 2013 when the Local Government Service Commission wrote to him upholding his dismissal following his letter to the Commission as evidenced by exhibits "BS9" and "BS10", respectively.

The Complainant deposed that as an employee serving under Division III Conditions of Service he was supposed to be heard by the Council which should have resolved his issue through a resolution. He deposed further

- that this was not done but instead his employment was terminated by an Acting Deputy Council Secretary, the same individual who had suspended him while acting as Chief Administrative Officer.

The Complainant averred that he was charged under the wrong conditions of service which were for officers serving in Division IV while he was serving in Division III. According to the Complainant, under the conditions of service for Division III, the Council Secretary or Deputy Council Secretary had no power to dismiss him from employment as only the Council by resolution could do so as evidenced by exhibit "BS11" which is a copy of the relevant portion of the conditions of service under which he served. The Complainant averred that he was not given a hearing at which he could explain himself, ask questions to witnesses and call his own witnesses.

The Complainant deposed further that the correct procedure was not followed in dismissing him and that the offence of gross misconduct does not exist in the conditions of service even for Division IV officers. He averred that the offence of negligence does exist in his conditions of service but requires a first offender to be given a severe reprimand in writing, followed by demotion for the second breach and discharge for the third breach but that was not followed in his case. That in any event, he was never negligent in the discharge of his duties but discharged them with due care and without discrimination. He averred that the reasons for his dismissal were not proven and they never supported the charge of negligence. For these reasons, his dismissal was wrongful/or unlawful.

In his viva voce testimony as his own sole witness, the Complainant, whom we shall hereinafter refer to as "CW", basically repeated his affidavit

evidence. He averred that he was charged with the offence of punishing a person unlawfully, which the Council termed as gross misconduct and gross negligence as shown at exhibit "BS6". This offence consisted of giving false information, gross negligence, use of abusive and provocative language, insubordination and own preferences, thereby subjecting the Council to absolute ridicule, disrepute and unacceptable shame, culminating in gross misconduct and gross negligence contrary to paragraphs 40.4 (d),(e); 40.5 (a), (b); 41.1. (b); 42.1; 42.2 (vii) of the Conditions of Service.

CW testified that he denied the charge because he did not act out of his own will but because it was a duty given to him by the Council. He said the Council gave them authority to fine or punish trespassers and it even received money from a trespasser who was apprehended by another officer. As proof of that payment, CW referred to receipt number 7136047 in the sum of K10,000 which was issued by Accounts Office to acknowledge receipt of money from the trespasser. CW wondered why he was punished while the person who charged the trespasser K10,000 was not punished.

CW lamented that he was not called for any hearing. He was very concerned that both the charge letter and dismissal letter stated that Division IV conditions of service applied to him when he was not serving under those conditions. He said that he raised his concern which was not addressed prompting him to appeal to the Council Chairman. He testified that in fact the Council had told him to appeal to the Council Secretary but he did not do so and instead appealed to the Council Chairman. He said he did so because the conditions of service, especially Statutory Instrument

- No. 115 of 1996, regulation 35 (1) thereof, allowed him to appeal to the Council Chairman. According to CW, there was no reply from the Council up to the time he filed his complaint in this Court.

It was CW's testimony that he did not appeal to the Provincial Local Government Appeals Board against his dismissal as at that time the Council had not responded to his letter of appeal to the Council Chairman. While awaiting a response from the Council, the Local Government Service Commission was established and he appealed to the Commission on 25 June, 2011. The Commission dismissed his appeal and notified the Complainant accordingly on 11 December, 2013.

CW testified that the Council singled him out because of an incident in 2007 when he questioned why the Council was employing more people when it was failing to pay the people already in employment. CW also averred that the genesis of his problems with the Council could be traced to the dissolution of the Council and his being appointed as an aide to the Local Government Administrator appointed to manage the affairs of the Council. He testified that after this appointment all his senior officers expected him to be reporting back to them on the actions and decisions of the Local Government Administrator. When he did not act or report back as expected, the Council officers decided to terminate his employment.

CW testified further that in the charge letter he was charged with personally deciding to arrest, detain and punish Chief Nkole's retainer and embarrassed the Council in the process. He testified that according to the Acting Council Secretary, Venture Kafula, who was in the company of Cosmas Chalusa, the Chief Administrative Officer, the District

Commissioner and Chief Nkole were not happy about the punishment meted out to the Chief's retainer. CW was taken to see Chief Nkole accompanied by Venture Kafula and the Director of Works, the late Nsonde. After explaining everything to the chief, the chief forgave him but after returning from meeting the chief, he was charged with the subject offences.

CW testified in addition that he charged the Chief's retainer and his wife in conformity with the verbal instructions he received from the Chief Inspector. He stated that not all Council Police directives are reduced to writing. He testified that despite the Council refusing to accede to the fact that the officers had issued this directive, he was not the only officer who implemented this instruction.

In cross-examination CW said that he was given verbal instructions to arrest, punish or fine trespassers by his immediate supervisor, the Chief Inspector. He said there were witnesses when the instructions were given but he did not call them to corroborate his story. He also admitted that he had nothing but his word to prove that trespassers paid fines and were given receipts.

In re-examination CW stated that they used to get instructions from his supervisor but they could not ask him where he got his instructions from. He reiterated that the instructions were verbal. He testified that the 1996 Conditions for Division I, II and III officers under which he served did not have the chapters which were quoted in his dismissal letter. The chapters were found in Division IV conditions of service.

- This marked the close of the case for the Complainant.

In response to the complaint, the Respondent filed into Court an Answer as well as an Affidavit in Opposition to Notice of Complaint sworn by Evelyn Nyirenda Chilala, a Senior Human Resource Management Officer at the Local Government Service Commission in which she deposed that Kapiri Mposhi District Council charged the Complainant with the offence of gross misconduct and gross negligence in accordance with the terms and conditions of the Local Government Service Regulations 1996.

According to Chilala, the Council proceeded to suspend the Complainant following his alleged gross misconduct and gross negligence, offences which he was charged with. She averred that the officer did not invoke the proper administrative channel of appeal that was available at the material time with respect to the dissatisfaction that he had as regards the decision to dismiss him. That the Complainant, being an officer in Division III, ought to have appealed to the Provincial Local Government Appeals Board and not to the Council Chairman as he did in his letter of appeal dated 10 May 2009 exhibited as "ENC1" in the Respondent's Affidavit in Opposition to Notice of Complaint. The appeal was lodged before the Local Government Service Commission on 25 June, 2012 which was well beyond the 30-day period within which he was expected to lodge an appeal with the Commission as shown by "ENC2".

The Local Government Service Commission considered the appeal and on 17 October, 2013 decided to uphold the Council's decision to discharge the Complainant from the Local Government Service as evidenced by exhibit "ENC3".

In her viva voce testimony as the Respondent's sole witness, Evelyn Chilala, Senior Human Resource Management Officer at the Local Government Service Commission (hereinafter referred to as "RW"), recounted the evidence she deposed in her affidavit. She averred in addition that after the dissolution of the Provincial Local Government Appeals Board and the creation of the Local Government Service Commission, a number of appeal cases that were pending at the provincial level were transferred to the Local Government Service Commission and the case in casu was one of the appeals that were transferred following the Complainant's appeal as shown in his letter of 25 June 2012. RW testified that the operations of the Local Government Service Commission are guided by Statutory Instrument No. 115 of 1996.

RW testified that after reviewing the Complainant's file she discovered that there was no appeal lodged by the Complainant to the Provincial Local Government Appeals Board. She averred that Statutory Instrument No. 115 of 1996 which provides the terms and conditions for Division 1, II and III officers states under regulation 41 that appeals should be lodged within 30 days from the date the decision being appealed against is made but this was not the case in the Complainant's case as he was dismissed on 14 April, 2009 and his appeal was dated and received on 25 June, 2012.

RW averred that in 2009 when the Complainant was dismissed, respective councils including Kapiri Mposhi District Council had powers to employ and dismiss employees. If an employee was aggrieved by the Council's decision, he could appeal to the Provincial Local Government Appeals Board. The procedure provided then was that an employee was charged

and asked to exculpate himself. The Head of Department then prepared a report for an appropriate Committee of Council which would hear the officer and depending on the nature of the case, if the matter was likely to lead to summary dismissal, the senior officer in the department would suspend the officer. If the supervisor had gathered enough evidence about the particular case, he could charge and suspend the officer in the same letter.

In the case in casu, the officer was charged, exculpated himself and later received a letter of dismissal. The dismissal was based on the fact that the officer had misconducted himself and there was some negligence of duty by apprehending the Chief's retainer and his wife. He meted out punishment on them without authority from the Council.

It was RW's further evidence that in Councils authority has to be stipulated either in the conditions of service or by-laws which the Councillors have agreed upon. However, when the documents of appeal submitted to the Local Government Service Commission were reviewed, it was observed that the actions by the Complainant were not backed by any law. RW said there was no evidence to show that even other people who trespassed were punished in a similar manner.

The documents before the Commission showed that there was an appeal to the Council Chairman on file. The appeal was dated 2009 and addressed to the Council Chairman of Kapiri Mposhi District Council. RW testified that this was not a proper channel of appeal because being a Division III employee, the Complainant should have appealed to the Provincial Local

- Government Appeals Board despite being dismissed by the Council Secretary because at that time in the Council anyone could dismiss anyone.

In cross-examination, RW admitted that the Complainant was serving in Division III and that was the reason why the Local Government Service Commission entertained his case. She testified that if he was serving in Division IV, his case would not have been entertained by the Commission. She also admitted that there is no record to show that an appropriate committee of Council sat to hear the Complainant.

RW admitted in further cross-examination that only the Council has power to dismiss and there has to be minutes of the resolution to dismiss the employee. RW confirmed that the main problem with the Complainant was that he had punished the Chief's retainer and his wife.

She admitted that the charge letter and letter of suspension including the dismissal letters were all authored by one individual officer, Cosmas Chalusa although he did so while wearing different hats.

RW averred that in considering the appeal the Local Government Service Commission based its decision on the fact that the letter of appeal was out of time. She admitted that the Complainant was not heard on the merits.

RW testified that the case in casu was not well handled by the Council as the offence committed of punishing the Chief's retainer could have been resolved differently and did not warrant a dismissal. She further stated that had the Provincial Local Government Appeals Board been in place to hear and determine the case, the Complainant would have been reinstated

since that was the recommendation. She admitted that the Complainant was charged on the terms and conditions of service that were not applicable to him. She also testified that the officer who dismissed the Complainant did not have the authority to dismiss the Complainant as officers in Division III could only be dismissed by a full council after passing a resolution, which resolution was not there in the case of the Complainant.

There was no re-examination of RW and this marked the close of the Respondent's case.

At the close of the case, the parties had expressed their desire to file written submissions. At the time of writing this judgment, however, we had only received written submissions from Counsel for the Complainant. This fact notwithstanding, neither party will be disadvantaged as the case will be decided on the merits. We are however, grateful for the submissions we have received.

From the affidavit, documentary and oral evidence before us, the following facts are not in dispute:

- (a) The Complainant was employed by Kapiri Mposhi District Council on 10 February, 1992 and was dismissed on 14 April, 2009.
- (b) As a Sub-inspector, he was a Division III officer serving under Division III terms and conditions of service.
- (c) The Complainant was responsible for enforcing Council directives and received instructions from his immediate supervisor, the Chief Inspector.

- (d) The Complainant was charged for gross indiscipline and gross negligence of duty for punishing the Chief's retainer and his wife for trespassing on Council premises.
- (e) Following the charge and his exculpation letter, but without a Council meeting to resolve the issue, the Complainant was dismissed on 14 April, 2009.
- (f) The Complainant was advised in his dismissal letter to appeal to the office of the Council Secretary within 30 days from 9 April 2009 but he appealed to the Council Chairman on 10 May, 2009.
- (g) The Complainant did not receive any response from the Council and following the constitution of the Local Government Service Commission, he appealed to the Commission 25 June, 2012.
- (h) The Local Government Service Commission received the appeal but dismissed it as being out of time.

After critically analysing the evidence before us, both oral and documentary, we have narrowed down the issues to be determined to two, namely:

- (1) Whether or not the Complainant's summary dismissal was wrongful or unlawful; and
- (2) Whether the Complainant is entitled to the relief he is seeking.

It is trite law that a contract of employment can be terminated by either party in accordance with the terms provided in the contract. In other words, an employer can terminate an employee's employment if the employee is deemed to have breached a term of his contract. In this instance, however, the employer must follow the procedure as provided in the conditions of service as well as observe the principles of natural justice

in dismissing such an employee. When the procedures given for terminating as well as the principles of natural justice have not been adhered to, the dismissal will be deemed unlawful or wrongful.

In addressing the question whether the Complainant breached a term of contract for which he could be dismissed, we rely on the Supreme Court's guidance in **Zesco v David Lubasi Muyambango (1)** that:

As we have said in the Attorney-General v Phiri, 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.

On the basis of the authority cited above, our role as a Court is to establish whether or not the Complainant's employer had the necessary disciplinary power and whether it was exercised in due form.

In order to address the issues we have identified above, the following questions must also be addressed, namely, whether or not the Complainant breached a term of his contract to justify its termination; whether or not the employer had the necessary power to terminate the Complainant's contract of employment and whether in terminating the Complainant's contract of employment the employer followed the laid down procedure.

From the outset, we remind ourselves that the burden of proof is on a balance of probabilities and that it is trite that he who alleges must prove his case. In this case the Complainant must prove his case against the Respondent on a balance of probabilities. This is in accordance with the

principle enunciated by the Supreme Court in **Wilson Masauso Zulu v Avondale Housing Project (2)** that he who alleges must prove his case.

The Complainant's advocate has submitted that the dismissal was unlawful for two reasons, namely, it was procedurally wrong and the facts of the case did not support the dismissal. She has stated that the Complainant was dismissed without a hearing being held, a fact that was confirmed by the Respondent's witness. According to Counsel, that fact alone must render the purported dismissal null and void ab initio and must entitle the complainant to damages for wrongful dismissal.

In deciding whether the Complainant's dismissal was wrongful or not we have recourse to the writings of the eminent author of Selwyn's Law of Employment, 17th edition, Astra Emir, who at page 429 states:

One way in which wrongful dismissal may occur is when the employer terminates the employment without carrying out the disciplinary procedure which has been incorporated in the employee's contract."

The facts before this Court are that the Complainant was charged, suspended and dismissed for obstructing and punishing the retainer to Chief Nkole who was in the company of his wife for trespassing on Council property. There is evidence before this Court and both parties are agreed on this, that there was no disciplinary case hearing conducted by the Council or its officials. In our view this is contrary to the rules of natural justice, specifically the *audi alteram partem* rule, which is a principle that stipulates that no person should be judged without affording that person a fair hearing.

In the case of **Contract Haulage Ltd v Mumbuwa Kamayoyo (3)**, Acting Deputy Chief Justice Gardner said the following in relation to the need for observance of the rules of natural justice in certain cases:

where there a statute which specifically provides that an employee may only be dismissed if certain procedures are carried out, it can properly be argued, as in the Kang'ombe case, that an improper dismissal is ultra vires. In the same way, where there is some statutory authority for a certain procedure relating to dismissal, a failure to give an employee an opportunity to answer charges against him, or indeed any other unfairness, may be said to be contrary to natural justice to the extent that a dismissal under these circumstances would be null and void.

It is our understanding that unlawful or wrongful termination of employment occurs when the circumstances of dismissal and any conditions are not in accordance with the governing law, the individual contract of employment or a collective agreement supplemented by the personnel policies of the individual organisation.

In the case in casu the Complainant did not appear before the Council or any of its officers and neither did he appear before the Local Government Service Commission for the determination of his case as required by his conditions of service. It is our finding based on the authorities cited above that the Complainant's dismissal was wrongful as it was procedurally wrong and he was not afforded an opportunity to be heard as provided for in his conditions of service.

The evidence before us shows that the Complainant was a Division III officer governed by the provisions of the Conditions of Service for Local Government Officers (1996) - Divisions I, II and III. A careful perusal of the

disciplinary process provided therein shows that officers at this level could only be dismissed by resolution of Council. RW admitted that neither the Council nor its Committee at Kapiri Mposhi heard the Complainant or passed any resolution to dismiss him. The Complainant was dismissed by a single officer sitting in an office as shown by exhibit "BS7", a state of affairs alluded to by the Respondent's witness RW who testified that "at that time a lot of funny things used to happen as anyone could hire and fire in the Council."

The evidence before this Court which was admitted by RW is that the Complainant was a Division III officer but was charged under rules pertaining to Division IV officers. It is again our finding and holding that the terms and conditions used to effect discipline on the Complainant were not applicable to him and hence any findings based on them were null and void.

The Complainant testified that as Sub-Inspector he was competent to effect Council directives. It is however, in dispute as to whether the Complainant had instructions to stop persons from trespassing on Council premises and impose sanctions on those who defied this Council directive. The Respondent has argued that there is no documentary evidence of the instruction. The Complainant on the other hand testified that the instructions were issued by the Chief Security Officer on parade and therefore, could not have been in writing.

To prove that he was not the only officer who effected the Council directive, the Complainant gave examples of Constable Howard Malupande who arrested a Mr. Mwila Musonda who paid a fine of K10,000 on Council

Receipt No. 7136047 and Council Police Inspector Stephen Kangwa who arrested a woman and punished her by ordering her to clear some vegetation. Although the Complainant did not produce the receipt or call the officers he mentioned to testify in corroboration of his claim, the Complainant's evidence in this regard was not rebutted by the Respondent. We therefore, find the Complainant's evidence that the instruction to prevent people from trespassing on Council premises was given viva voce to Council policemen credible and we are inclined to believe it.

Moving on to the charges of gross misconduct and gross negligence, which were given to the Complainant, as Counsel for the Complainant rightly submitted, there is no offence of that description in the conditions of service applicable to the Complainant, a fact which was confirmed by RW. This in effect means that the Complainant was charged with a non-existent offence.

As regards the charge of gross negligence, the term 'gross negligence' is defined in clause 62 (b) as a "failure to execute proper care and regard to the manner of discharging duty resulting into financial or pecuniary loss, loss of council property, injury or loss of life". We concur with Counsel for the Complainant in her submission that the action of the Complainant to order the Chief's retainer and his wife to clear some vegetation at the Council premises did not result in any financial loss, injury or loss of life to the Council to constitute gross negligence. Therefore, as RW rightly conceded, the charges handed down to the Complainant were not supported by facts on the ground.

In her oral testimony RW averred that the Complainant's appeal against the dismissal could not be upheld because it was out of time. There is evidence before the Court that the Complainant was advised at the time of dismissal through a letter exhibited as "BS7" dated 4 April, 2009 that:

I, however, wish you success in all your endeavours and should you be aggrieved by this decision, you are free to appeal to the office of the Council Secretary within 30 days from the date of this letter.

The evidence is that on 10 May 2009, within the 30-day period given for appealing, the Complainant lodged his appeal, not to the Council Secretary as advised, but to the Council Chairman. In paragraph 2 of the appeal letter exhibited as "BS5", the Complainant gave his reasons for appealing to the Council Chairman as follows:

I have decided to appeal to the Council than the Council Secretary because he mooted my dismissal. I therefore seek a hearing of my case to anybody higher in hierarchy as provided under regulation 35 (i) (b) of Statutory Instrument No. 115 of 1996. ...

This Court's view is that the Complainant was right in refusing to appeal to the Council Secretary, being the officer who had dismissed him in the first place as evidenced by exhibit "BS7". The Complainant cannot, therefore, be faulted for following the provisions of regulation 35 (1) of the Local Government Service Regulations, 1996 and appealing to the Council.

Regulation 35 provides that if an officer is dissatisfied with the findings of a principal officer, he should appeal to the Council. In the present case we have established that the Complainant was dismissed by an officer and not the Council and therefore, his appeal lay with the Council.

Our understanding of regulation 35 (1) is that an officer who is dissatisfied with a Council decision may appeal to the Local Government Service Commission. However, this avenue is not open to an officer who is dissatisfied with the decision of a principal officer. An appeal from such an officer lies to the Council.

Regarding the legality of the Complainant's dismissal by the Council Secretary, dismissal is a punishment which only the Council can impose on officers to which the regulations apply. The Council Secretary has no such power. Therefore the purported dismissal of the Complainant by the Council Secretary was irregular and unlawful. Regulation 34 (1) provides:

34 (1) The Council may impose any one or more of the following punishments:

- (a) dismissal with no benefits;*
- (b) discharge, by due notice or payment of salary in lieu of notice, with benefits;*
- (c) reduction in rank; or*
- (d) reduction in salary.*

We take cognisance of the testimony by RW that had the Complainant lodged his appeal in time, the Local Government Service Commission would have reinstated him. We concur with RW's averment under cross-examination that the offences the Complainant was charged with were trivial and not supported by facts. We are also in agreement with the submission by Counsel for the Complainant that the charging and dismissal of the Complainant was an abuse of, and a misunderstanding of the law by the Council.

It is our finding that the Complainant was not directed by the Council to appeal to the Provincial Local Government Appeals Board but to the Council Secretary and that after noticing that time had elapsed without any response from the Council, the Complainant appealed to the Local Government Service Commission which had since replaced the Board. It is our observation that the delay in the appeal is partly attributable to the fact that the dismissal occurred during the period of transition from Provincial Appeals Board to Local Government Service Commission.

From the evidence before us, we find that the Commission did not give the Complainant an opportunity to be heard. It did not decide the appeal on the merits but dismissed it purely on the basis that it was lodged late. We are of the view and concur with RW, in this respect that had the Commission sat and determined the appeal on the merits, it would most probably have discovered the anomaly in the dismissal of the Complainant by the Council Secretary and reinstated him.

It is our view that in a case such as the case in casu where the employer's decision has the potential of depriving the employee of his livelihood, it is imperative for the employer to afford the employee an opportunity to be heard as per the holding in the case of **Zinka v Attorney General (4)**.

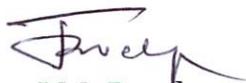
Having analysed the matter in the manner we have done, it is our finding that while the employer had the necessary disciplinary power to terminate the services of the Complainant, the power was not exercised in due form as the laid down procedure was not followed and the Complainant was not afforded the opportunity to be heard. Further, the offences which the Complainant allegedly committed did not warrant summary dismissal.

We therefore find and hold that the Complainant was unlawfully and wrongly dismissed. The Complainant has prayed for the remedy of reinstatement. However, we are cognisant of the fact that the Complainant has since reached retirement age, hence an order of reinstatement would not be appropriate in the circumstances. Consequently we order as follows:

- (a) We award the Complainant damages for wrongful dismissal which shall consist of unpaid salaries from May, 2009 to the date of retirement;
- (b) The unpaid salaries shall take into consideration all subsequent increases in basic salary;
- (c) He shall be paid his pension benefits due on retirement;
- (d) We award costs to the Complainant to be taxed in default of agreement;
- (e) Interest shall be payable on the amount due at ruling Bank of Zambia lending rates from the date of filing the complaint to the date of judgment and thereafter, at 6% per annum until payment.

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

Delivered at Ndola the 17th day of **March, 2016.**


J.M. Bwalya
MEMBER


Judge W.S. Mwenda (Dr)
DEPUTY CHAIRPERSON




G.M. Samusungwa
MEMBER