

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2014/HP/1050



BETWEEN:

SAM LICHAHA

AND

FURNITURE MART ZAMBIA LIMITED**PLAINTIFF****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 30th DAY OF MAY,
2017**

For the Plaintiff : Mr N. Owkare, Messrs Okware and Associates

For the Defendant : Mr J. Ngisi, Chibesakunda and Company

J U D G M E N T

CASES REFERRED TO:

1. *Wilson Masauso Zulu V Avondale Housing Project Limited 1982 ZR 172*
2. *Zambia National Provident Fund V Yekweniya Mbiniwa Chirwa 1986 ZR 70*
3. *The Attorney General V Richard Jackson Phiri 1988- 1989 ZR 121*
4. *Zambia Airways Corporation Limited V Gershom Mubanga SCZ No 4 of 1992*
5. *Zambia National Broadcasting Corporation Limited V Penias Tembo, Mulenga and Phiri SCZ No 9 OF 1995*
6. *Zambia Electricity Supply Corporation Limited V David Lubasi Muyambango 2006 ZR 22*
7. *Simon Katende and Crosby Bernard V NFC Africa Mining PLC 2009/HK/286.*

LEGISLATION REFERRED TO:

1. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. Mwenda W.S, *Employment Law in Zambia: Cases and Materials*, 2004

The Plaintiff commenced this action by way of writ of summons claiming:

- i. *Damages for unfair dismissal*
- ii. *Cash in lieu of accrued leave days*
- iii. *Interest thereon from the date of dismissal to the date of payment*
- iv. *Costs*

The amended statement of claim shows that the Defendant employed the Plaintiff as a sales assistant on 1st November 1999, and he was promoted to the position of sales man on 1st June 2000. That the Plaintiff later rose to the position of Branch Manager on 1st November 2012, a position he held until he was unfairly dismissed on 18th November, 2013.

The Plaintiff in paragraph 5 of the statement of claim states that he was charged prior to his dismissal, and found guilty of having breached company procedure in that he had released company goods to a buyer who had paid by cheque, and before the cheque had cleared. Further that the Plaintiff breached company policy by not doing sectional stock takes, and failed to maintain up to date filing, as well as failed to supervise and control staff under him, thus breaking the trust relationship with the Defendant.

It is averred in paragraph 6 of the statement of claim that the charges levelled against the Plaintiff were unfounded, as for the first charge, the Plaintiff sought and obtained authority from his superiors before releasing the goods to the buyer who paid by cheque. Further that some of the goods were recovered from the purchaser by the police after efforts made by the Plaintiff, and that the Plaintiff did in fact do the sectional stock take contrary to the Defendant's allegations.

That despite the Defendant finding that the Plaintiff was not updating the daily filing, the Plaintiff was in fact checking on all the filing in the different departments. The Plaintiff also denies having failed to supervise the staff that were under his control, and states that his superiors did not reprimand him for failing to do so.

In paragraph 7 of the statement of claim the Plaintiff states that following his dismissal he appealed to the National Operations Manager, but his appeal was ignored or not attended to by the Defendant, despite the Plaintiff having been promised that his appeal would be heard in January 2014.

That as a result of the failure by the Defendant to communicate with the Plaintiff over the appeal, the Plaintiff had instituted this action. It is also stated that the Plaintiff did not take leave or commute the said days from the date of his engagement on 1st November, 1999 until his dismissal on 18th November 2013.

He states that he has been deprived of the salary and other benefits he would have earned, and he has suffered loss and damage in the form of salary and allowances, and leave pay. He acknowledges partial payment from the Defendant, and claims damages for unfair dismissal, cash in lieu of leave days, interest and costs.

The Defendant in the defence filed on 27th January, 2015 admits having terminated the Plaintiff's contract of employment, but denies that the same was unfair, and in repudiation of the Plaintiff's contract of employment.

It is stated in the defence that the Plaintiff was charged with offences, and he took part in a disciplinary hearing whose outcome was that the Plaintiff was found guilty of the offences. While denying the contents of paragraph 6 of the statement of claim, the Defendant acknowledges that the Plaintiff lodged an appeal against his dismissal, but denies that the same was ignored or not attended to.

It is the Defendant's defence in paragraph 7 of the defence that a date and time for the hearing of the appeal was set, but the Plaintiff was not present at the

scheduled time. That attempts were made to reschedule the hearing to January 2014, but as December and January are the busiest times of the year, it was difficult to settle on the date of hearing of the appeal before the action was commenced.

The Defendant admits that the Plaintiff did not take or commute all his leave days, but states that he has been paid all his accrued leave and other payments. The Defendant further denies having deprived the Plaintiff of his salary and other benefits as alleged.

At the hearing the Plaintiff testified and called no witnesses, while the Defendant called two witnesses. The evidence of the Plaintiff was that he was employed by the Defendant on 1st November, 1999, as a sales assistant. He was dismissed from employment on 18th November, 2013. He stated that at the time of his dismissal he was branch manager at the Cairo road branch, having been appointed to that position on 1st November, 2012.

He gave an account of the events leading to his dismissal stating that on 20th September, 2013, he was suspended from work pending investigations, and he was served a letter of suspension. He identified the letter on page 1 of his bundle of documents as the said letter.

That he was furnished with the charges levelled against him, and the Regional Credit Manager Mr Macintosh called him to attend the disciplinary hearing, which was held on 29th October, 2013. He stated that the charges are on page 3 of his bundle of documents, which are six in total. The Plaintiff also testified that after the disciplinary hearing he was cleared of two of the charges, namely the second and fifth charge, as could be seen on the document on pages 40 to 41 of his bundle of documents.

That the notice of dismissal is on page 42 of his bundle of documents. He told the court that the said notice gives him the right to appeal against the said dismissal within fourteen working days, which he did on 27th November, 2013. The Plaintiff stated that the said appeal which is on page 43 of his bundle of

documents was addressed to the national operations manager, Mr Marius Jacobs.

It was his evidence that Mr Jacobs acknowledged receipt of the appeal, but the appeal was not heard as it was postponed four times. This was due to the fact that on 27th January, 2014 the date scheduled for the appeal, Mr Jacobs was held up, and the matter was rescheduled to 11th February, 2014. On 11th February, 2014 the operations manager was unavailable, and the appeal was postponed to 17th February, 2014. On that date Mr Jacobs was hosting superiors from South Africa, and the Plaintiff was told that he would be informed of the next date. To date he had not been informed of any appeal date.

The Plaintiff denied that he had failed to turn up for hearing of the appeal, testifying that if this had been the position, they would have so informed him. With reference to page 3 of his bundle of documents, the Plaintiff denied having been availed the disciplinary code for the Defendant. He stated that the disciplinary charges that were preferred against him did not quote any provisions of a disciplinary code, and he was not aware of what punishment could be imposed for the charges, as he was not aware of the disciplinary code.

With regard to the sixth charge, it was stated that the amount alleged to have been negligently lost was not stated, but testified that the documents on page 41 of his bundle of documents states that money in excess of K700, 000.00 was lost. He was found guilty of that charge. Further in his testimony the Plaintiff stated that if he had given goods to thieves in January, why was he only charged in September?

He explained that the first charge relates to failing to follow established procedure by accepting fraudulent cheques from ZAF, and delivering stock before the cheques had cleared. That the said clients had gone to the branch on a Saturday, and had explained that the goods needed to be delivered to Mbala by a buffalo plane. He told the court that he had phoned Mr Jacobs and Mr Simasiku, and the two were agreeable to the release of the goods. The

Plaintiff also stated that there was nowhere where it was written that goods could only be released once cheques for their payments were cleared, as they had transacted with cheques on a daily basis.

That in that case, they were only informed on a Monday that the cheque was fraudulent. The Plaintiff's testimony was that immediately after being informed that the cheque was fraudulent, he had told both Mr Jacobs and Mr Simasiku, and he had gone to Kamwala where he was told that the truck that had picked up the goods was said to be. There he had apprehended a person whom the driver of the truck had said had left some phones in the truck, and had gone back for them. He had taken that person to the police, and some of the goods were recovered.

With regard to the third charge, the Plaintiff testified that he used to do the sectional stock take on a daily basis. The incident involving K544, 116.35 was explained as that on 24th July, 2013 Stanslous Muteba who was a stock clerk would log onto the system and request for stock for the various branches. On that date he had requested for stock from Ndola without going through the Plaintiff who needed to authenticate the request.

His evidence was that the branch did not physically receive the stock so requested, but it just reflected on the system. He also testified that the charge does not state the dates on which he did not conduct the sectional stock take, which entails a physical count of the goods in stock. The Plaintiff told the court that he reported Stanslous to the police, and management did not reprimand him for so doing so. The notes for the disciplinary hearing relating to the charge are on page 20 of the Plaintiff's bundle of documents.

That the transaction by Stanslous was picked up by people in South Africa, as they wondered why the branch was requesting for laptops from South Africa when the system was showing that there were laptops in Ndola. That officers from South Africa went to Ndola, and a stock clerk in Ndola had called Stanslous who had transferred the stock electronically on the system from Ndola. That Mr Jacobs and the team in Ndola had asked the Plaintiff if he had

requested for the stock, and when he had denied, he was told to report Stanslous to the police.

As regards the fourth charge pertaining to failing to do the daily filing, the Plaintiff's testimony was that the senior managers used to check the daily filing, and at no date was he told that he had not done the filing properly. He referred the court to pages 4-39 of his bundles of documents testifying that he had called Mooya Chibonta as his witness over the fraudulent ZAF cheque, and her statement was on page 13 of his bundle of documents.

He testified that her statement reveals that Mr Jacobs and Mr Simasiku had authorized release of the goods, and she is the person who had handled the transaction, but was not charged. He also stated that Mr Jacobs got some goods on Mandela's day being a stove and microwave, and procedure was not followed to document the same. It was further his testimony that during the disciplinary hearing he had appeared before Mr Jacobs, who had authorized release of the goods.

The Plaintiff testified that he had 504 leave days at the time of his dismissal, and that his monthly salary was K8, 673.00, and he worked 22 days in a month. That when the 22 working days are divided by the monthly salary, it gives a daily wage of K394.227. The daily wage when multiplied by the 504 days gives K198, 667.00. He told the court that he was paid K141, 958.30 and is still owed K56, 708.70.

When cross examined the Plaintiff told the court that he claims damages for unfair dismissal, but stated that he was not discriminated against. When referred to pages 2 and 3 of the Defendant's bundles of documents, he testified that the two documents were copies of the cheques, whose amounts he could not recall. He agreed that he had released the goods in exchange for the cheques. He also agreed that he was suspended pending the disciplinary hearing.

When referred to the minutes of the disciplinary hearing, the Plaintiff stated that he had no documents to show that Mr Jacobs had authorized release of

the goods before the cheques had cleared. He denied the assertions by Mr Sindowe and other store managers that he did not do the sectional stock takes. The Plaintiff stated that the letter on pages 40 and 41 of the Defendant's bundle of documents was from the Defendant rescheduling the appeal to 11th February, 2014 and to 17th February, 2014 respectively.

The first witness for the Defendant was Bagrey Sindowe, an Administrative Manager at the Defendant. His evidence was that the Plaintiff in 2013 obtained a cheque deal for K380, 000.00, and had the goods delivered before the cheque cleared. He identified the cheques on pages 2 and 3 of the Defendant's bundle of documents as being the said cheques. That after that the Plaintiff was charged and suspended as per the documents on pages 6 and 45 of the Defendant's bundles of documents.

This witness confirmed that a disciplinary hearing was held and minutes for the said hearing were identified as being on pages 8 to 32 of the Defendant's bundles of documents. He stated that the Plaintiff was found not have followed company procedure. DW1 also testified that there was conflicting evidence as to whether the Plaintiff had been authorized to release the goods, and there was therefore need for proof to that effect.

That the document on page 45 of the Defendant's bundle of documents shows that the Plaintiff was found guilty of failing to attend to the sectional stock take, as well as count four which relates to failing to follow the company procedure, in that the daily filing was not up to date. That in count six he was found guilty of gross negligence as he failed to supervise and control the staff. The notice dismissing the Plaintiff is on page 33 of the Defendant's bundle of documents, while the appeal is on page 34.

The document acknowledging the appeal was identified as the one on page 45 of the Plaintiff's bundle of documents. DW1 agreed that the appeal was not heard as scheduled, and he identified the document on page 40 of the Defendant's bundles as the letter rescheduling the appeal to 11th February, 2014. His testimony was that the appeal did not take off on that date as the

operations manager had to rush to head office in South Africa for an emergency meeting. That the Plaintiff was so informed in writing, which letter is at page 41 of the Defendant's bundles of documents.

DW1 further testified that the hearing was rescheduled to 17th February, 2014 at 10:00 hours. On that date the Plaintiff went late and found that the appeal panel had dispersed. In conclusion he stated that the next thing they saw was a demand letter from the Plaintiff for the payment of accrued leave days, and this letter is on page 42 of the Defendant's bundle of documents. That the leave pay was made to the Plaintiff following the demand letter.

In cross examination DW1 testified that human resources issues do not fall under his work jurisdiction. He did however agree that there was a disciplinary code at the place of work. He also agreed that the charges levelled against the Plaintiff did not cite provisions in the disciplinary code that had been breached.

DW1 however told the court that the 1st, 2nd, and 6th offences that the Plaintiff had been charged with warranted dismissal if proved, but that the 4th offence was not dismissible. It was his evidence that the Plaintiff had stated that he obtained authority to release the goods before the cheque cleared, and that Mr Jacobs was not called as a witness to prove the Plaintiff's assertion wrong. He agreed that had Mr Jacobs testified at the hearing that he authorized the Plaintiff to release the goods, the Plaintiff would not have been dismissed.

DW1 further agreed that the minutes of the disciplinary hearing do not reflect that the Plaintiff admitted that he was not doing the sectional stock check. He stated that the 6th charge reflects that the company lost K700, 000.00 as a result of the Plaintiff's negligence. When referred to the 6th charge, DW1 acknowledged that the charge does not mention the loss of K700, 000.00, but talks about failure to supervise and control staff, as well as breach of trust. His evidence was that the K700, 000.00 arose from the K544, 116.35 and K162, 000.00.

DW1 further agreed that the finding with regard to the 6th charge was different from the allegations in the charge. He agreed that the Plaintiff appealed against

his dismissal, and that the appeal had never been heard. It was also agreed that there is no letter on record to show that the Plaintiff was written to, and informed that the appeal was not heard, as he went late for the hearing.

Conrad Mungomba was DW2. He was the Branch Manager at the Ben Bella branch of the Defendant. His testimony was that as branch manager he was in charge of stock, and was the custodian of the shop, and he was also in charge of banking. That the Plaintiff was Branch Manager before him.

He walked the court through the procedure for purchase of goods, testifying that when a client walks into the shop, they can pay either by cash or cheque or through a credit sale. That if they pay by cheque, the cheque is processed on the system, and it is thereafter taken to the bank. Once the cheque clears, the goods are delivered, after authorization is given. DW2 told the court that he had learnt the procedure when he worked in the credit department, and that whilst working there he was taught that cheque payments had to be authorized by the regional office, before deliveries could be made.

DW2 further in his evidence testified that this procedure starts from the salesperson who is the first point of contact with the customer, right through to the branch manager. When cross examined, DW2 stated that he joined the Defendant in June 2011, as a sales person. He agreed that he knew Mr Jacobs as he was the Operations Manager. He could not recall the date when Mr Jacobs left Furnmart, but stated that it was between 2015 and 2016.

He further stated in cross examination that when the Plaintiff was charged and he appeared for the disciplinary hearing, Mr Jacobs was still working for the Defendant. He maintained that stock is only released once a cheque clears. It was his evidence that while this procedure may not be written, it is there, as he was verbally told about it.

He also stated that a person who breaches procedure is suspended pending hearing. In conclusion he stated that if Mr Jacobs authorized release of the goods before the cheque cleared, then there was nothing wrong, as there was authority.

I have considered the evidence. The Plaintiff in this matter claims damages for unfair dismissal, and or cash in lieu of accrued days with interest thereon. The Plaintiff as branch manager was charged with six offences namely failing to follow company policies and procedure by releasing stock before the cheque from ZAF had cleared, resulting in the loss of ZMW162, 000.00. The second charge is refusal to carry out legal and reasonable instructions from the operations manager, the third failure to follow company procedures and policies, resulting in the loss of ZMW544, 116.36, while the fourth charge is breach of company policies and procedures by failing to do the daily filing. The fifth charge is breach of company policies and procedures by failing to update the banking registers, while the last charge is gross negligence by failing to supervise and control the junior staff.

He was found guilty of the 1st, 3rd, 4th and 6th charges. It is argued in the submissions that the Plaintiffs claims should succeed because the purported disciplinary hearing was characterized by procedural irregularities thereby making the dismissal unfair, wrongful and illegal. This is because the four of the six charges refer to breach of company policies and procedures, and the Defendant had not exhibited the said policies and procedures in its bundle of documents, in order to confirm the lawfulness of the Plaintiff's dismissal.

Secondly that the Defendant did not cite any specific provisions that the Plaintiff had breached, thereby denying him an opportunity to raise his defence to the allegations levelled against him.

That thirdly the Plaintiff's contract of employment was not tendered in evidence to demonstrate the Plaintiff's duties that he is alleged to have breached, and also that there was no evidence that was tendered before court distancing ZAF from the cheque which was dishonoured. It is also alleged that Mr Jacobs was not called to testify on the issue of him granting authority to the Plaintiff to release the goods before the cheque had cleared, and that the disciplinary hearing was not completed, as the appeal against the dismissal was never heard.

Counsel refers to the cases of **ZAMBIA AIRWAYS CORPORATION LIMITED V GERSHOM MUBANGA SCZ No 4 OF 1992**, and **ZAMBIA NATIONAL BROADCASTING CORPORATION LIMITED V TEMBO, MULENGA AND PHIRI SCZ No 9 OF 1995**, submitting that the cases held that where there are procedural errors in the conduct of disciplinary hearings, and consequently a Plaintiff does not have opportunity to defend themselves, the action of the Defendant will be deemed to not only be unfair, but also wrongful and unlawful.

The Defendant in the submissions states that unlike unlawful dismissal which emanates from the common law, unfair dismissal is a creature of statute, as provided in the book **Employment Law in Zambia: Cases and Materials 2004 by Mwenda W.S.** That unfair dismissal is provided for in Section 108 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. The section states that;

“(1) No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee.

It is submitted that the Plaintiff when cross examined did not state that he was discriminated against, and that there is in fact no evidence on record to show that his dismissal was on the basis of discrimination. I do note from the evidence on record that none of the factors listed in Section 108 of the Industrial and Labour Relations Act as constituting grounds of discrimination are alleged by the Plaintiff. What he alleges is breach of procedure when dismissing him.

In the case of **ZAMBIA AIRWAYS CORPORATION LIMITED V GERSHOM MUBANGA SCZ No 4 OF 1992** cited by the Plaintiff, the respondent, an employee of the appellant corporation was dismissed by way of letter. He issued proceedings claiming that he had been wrongly dismissed on the grounds, inter alia, that the Disciplinary code and Grievance Procedure governing his employment had not been correctly followed, in that the charges both original

and additional were not in the prescribed form and were not made by his immediate supervisor but by the Managing Director, who was the appellate authority, and the dismissal was back-dated to the date of suspension.

The appellant in that case had filed a defence alleging that the respondent had been properly dismissed without notice, on the grounds of his misconduct, a number of instances of which were set out. The High Court found that the respondent had been wrongfully dismissed and ordered his reinstatement. On appeal it was held that;

“that the appellant failed to comply with the correct procedure in the purported dismissal of the respondent”.

The Respondent in that matter was reinstated, as there were exceptional circumstances warranting the order of reinstatement. The case did not deal with unfair dismissal as envisioned in Section 108 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, but rather wrongful dismissal. What was alleged to have been unfair, and which the court agreed with, was the disregard of procedures in dismissing the respondent.

This is what the Plaintiff alleges in this matter. Therefore a claim for unfair dismissal based on that case cannot stand.

The Defendant in the submissions states that the Plaintiff in arguing wrongful dismissal has misapprehended the burden of proof, as he claims that in the absence of tendering the disciplinary code of conduct in evidence, the Defendant's defence has failed. To this end the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED 1982 ZR 172** is relied on. Counsel submits that in that case the Supreme Court observed that;

“there is one observation I wish to make before leaving this subject. Mr. Phiri's general approach has been to allege that the respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In the process, however, I have also pointed out the deficiencies in the appellant's own evidence. It appears

that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case".

That similar observations were made in the case of **SIMON KATENDE AND CROSBY BERNARD V NFC AFRICA MINING PLC 2009/HK/286**. It is therefore the Defendant's submission that if the Plaintiff did not have access to the documents namely his contract of employment and the disciplinary code, he should have subpoenaed them. It is further argued that for the Plaintiff in this matter to show that his dismissal was wrongful, as the Defendant did not adhere to the disciplinary procedures, as seen from the case of **ZAMBIA NATIONAL PROVIDENT FUND V YEKWENIYA MBINIWA CHIRWA 1986 ZR 70**. It was held in that case that;

- (i) ZNPF procedural rules are part of the conditions of service of the parastatal organization, 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.*

It was also observed in that case that;

"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 this case as already seen, the allegation is that the Defendant did not follow the disciplinary procedures when dismissing the Plaintiff. However the Defendant argues that the Plaintiff was suspended, charges levelled against him and served on him, and that a disciplinary hearing was held. It is only the appeal against the dismissal that was not heard as the Plaintiff went late, after it had been rescheduled. It is therefore argued citing the case of ***THE ATTORNEY GENERAL V RICHARD JACKSON PHIRI 1988- 1989 ZR 121***, that there exists a substratum of facts entitling the Defendant to dismiss the Plaintiff, and he cannot claim that he was unfairly dismissed.

The Defendant also relies on the case of ***ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED V DAVID LUBASI MUYAMBANGO 2006 ZR 22*** which held that;

- 1. 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 exercise properly.***
- 2. Where it is not dispute that the employee has committed an offence for which the appropriate punishment is dismissal and he is so dismissed, no injustice arises from 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 was a nullity.***

Going by the authorities cited above the issue is whether or not the disciplinary procedure was followed, and if it was not, should the dismissal be deemed wrongful? The evidence on record shows that the Plaintiff was charged and suspended and he appeared for a disciplinary hearing. Only the appeal against the dismissal was not heard.

A perusal of the charges shows that the charges levelled against the Plaintiff did not cite the provisions of the disciplinary code that had been breached, and that dates on which he is alleged to have committed those offences or indeed which fraudulent cheques had been accepted by the Plaintiff. In the main the charges alleged failure to follow the laid down policies and procedures. The disciplinary code which DW1 testified exists at the Defendant was not produced in evidence. The burden rests on the Plaintiff to prove that in fact such a disciplinary code exists. In the absence of the disciplinary code it is difficult to decipher whether the Plaintiff was appropriately charged.

As already noted the charges against the Plaintiff do not cite the particular provisions of the disciplinary code that had been breached, and the dates that the said breaches were alleged to have happened or what fraudulent cheques he accepted for payment. This in my view did not give the Plaintiff adequate information for him to prepare a proper defence. He only became aware of the particulars of the allegations at the hearing, and obviously was ill equipped to respond to the same, as he had not prepared adequately, let alone had time to gather any necessary documents for his defence. This can be seen from the minutes of the disciplinary hearing which are on pages 8 to 32 of the Defendant's bundle of documents.

It has been seen that the Plaintiff was found guilty of breaching company policies and procedures. He stated that he had never been availed any document which stipulates the same. The burden rests on him to prove that in fact there were no such policies and procedures. Both DW1 and DW2 told the court that the procedures were not written down, but were explained to the employees. A perusal of the minutes of the disciplinary hearing shows that management of the Defendant acknowledged that the procedure was learnt on the job.

Therefore while the Plaintiff alleged that there was no procedure, this procedure was verbally given to employees on the job. At the time the Plaintiff was charged he was a branch manager and it was expected that he would have

been familiar with the practices and procedures in the branch, as he was in charge of the branch.

The Plaintiff claims that he got verbal authority from Mr Jacobs to release the goods before the cheque from ZAF cleared, and this allegation was not disproved as Mr Jacobs was not called as a witness to counter this allegation. The Defendant states that there is conflicting evidence from Trevor and Mooya who were each present with Mr Jacobs and the Plaintiff respectively, when the Plaintiff phoned Mr Jacobs over release of the goods when the cheque from ZAF was presented.

The minutes on page 14 of the Defendant's bundle of documents show that Trevor who was with Mr Jacobs heard Mr Jacobs tell the Plaintiff to process the deal during the first conversation, and during the second call told the Plaintiff to leave the issue to Monday. Mooya according to the minutes recorded on page 15 of the Defendant's bundle of documents stated that she heard Mr Jacobs tell the Plaintiff whom she was with to go ahead with the transaction, and that it was only when the Plaintiff called Mr Jacobs to ask what they would give the client, following the client's request as he had said he had given them business, that Mr Jacobs said that the issue of the gift would wait until Monday.

With regard to the failure to do the daily sectional stock take, and the daily filing, as well as updating the banking register, the Plaintiff during the disciplinary hearing was called upon to defend himself, and his response was that he did the same. On the issue of failing to supervise and control the staff under him, the issue was narrowed to Stanslous Muteba who moved stock which was subsequently lost. The Plaintiff during the disciplinary hearing stated that Stanslous was authorized to request for stock on the system without the Plaintiff's involvement, and once he discovered the fraudulent request, he had reported him to the police.

From the decision in the case of ***THE ATTORNEY-GENERAL V RICHARD JACKSON PHIRI 1988 - 1989 ZR 121*** the question is whether the Defendant did have the disciplinary authority over the Plaintiff. The Plaintiff was branch

manager of the branch, and therefore was overall responsible for the branch. The Defendant charged the Plaintiff with various offences, due to the losses that had been incurred at the branch. The contention by the Plaintiff was that the charges did not cite the disciplinary provisions breached, the dates when the offences happened and the persons or institutions alleged to have been involved.

My view is that while the Defendant did have the disciplinary power over the Plaintiff, it did not follow the rules of natural justice by specifying in details the breaches against the Plaintiff, so that he could adequately defend himself at the disciplinary hearing.

In the case of **THE ATTORNEY-GENERAL V RICHARD JACKSON PHIRI 1988 - 1989 ZR 121** already referred to it was stated that;

“the major ground of appeal was that the trial commissioner had erred when he found that the discharge was wrongful. It was pointed out that, in accordance with the procedures laid down, the charges were preferred and the plaintiff given every opportunity to be heard in his own defence. We agree that once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of fact to support the same. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures”.

In this matter the charges were not sufficiently drafted to enable the Plaintiff adequately defend himself. Further the evidence of the disciplinary hearing

shows that the issue of the Plaintiff having released the goods before the cheque cleared may have been authorised, as the minutes of the disciplinary hearing show that the Plaintiff phoned Mr Jacobs. However the conflict is between Trevor and Mooya's evidence on the authority given by Mr Jacobs. Mr Jacobs was still in employment when the hearing took place, and he would have resolved the issue.

Further the minutes of the disciplinary hearing show that Stanslous Muteba had authority to log onto the system, and order stock without the Plaintiff's authority, and therefore loss of that stock transferred by Stanslous could not wholly be attributed to the Plaintiff. The minutes also show that no clear admission was made by the Plaintiff over failure to do the daily sectional stock take, as well as the daily filing. Therefore while the Defendant had power to exercise disciplinary powers over the Plaintiff, and the fact there was a substratum of facts which moved it to so exercise those powers, the powers were exercised in an unfair manner to the Plaintiff, when one considers the facts outlined above.

It is therefore my finding that the dismissal of the Plaintiff was wrongful as the charges against him did not enable him to prepare his defence adequately, and also due to the fact that the evidence in the disciplinary proceedings show that he was treated unfairly. Further no appeal in this matter was heard. I accordingly award him twelve months pay as damages for wrongful dismissal. The amount shall attract interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at a rate of six percent per annum until payment.

As regards the claim for unpaid leave days, these are accrued benefits, and are due to him on dismissal. The Plaintiff acknowledged having received the amount of K141, 958.30 as leave pay. He testified that at the time of his dismissal he had accumulated 504 days. He also told the court that his salary was K8, 673.00, and he worked 22 days in a month. That therefore when the salary is divided by the number of working days, it gives K394.227 as the daily


rate. The K394.227 when multiplied by the 504 days comes to K198, 667.00. He claims the balance of K56, 708.70.

The Defendant does not dispute that the Plaintiff is entitled to leave payment. It is their submission that they have since paid him the leave pay due, and if he disagrees what with was paid, he bears the burden of providing computations on what is due to him.

The Plaintiff's payslip for November, 2013 which is on page 51 of his bundle of documents show his gross earnings as K8, 672.40. The leave days reflected on that payslip are 262. The documents on pages 38 and 39 of the Defendant's bundle of documents shows the computation of the leave pay due to the Plaintiff after tax and loans were deducted from that amount. The amount due was calculated on the basic pay of K6, 500.00 and came to K70, 958.33. Tax in the amount of K23, 840.41, an advance in the amount of K1, 004.00, a loan deduction in the amount of K1, 866.09, and an overpayment for 10 days in November, 2013 in the sum of K2, 708.33 bringing the total deductions to K29, 418.83. The amount paid was K41, 539.50.

The Plaintiff did not show that the calculations done above were erroneous and it is therefore my finding that he was paid the leave pay due if full, and he is not entitled to any further payments. That claim fails. The Plaintiff having succeeded on the claim for wrongful dismissal, I award him costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 30th DAY OF MAY, 2017.



S. KAUNDA NEWA
HIGH COURT JUDGE