IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 211/2013**

HOLDEN AT LUSAKA **SCZ/8/276/2013**

(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED	APPELLANT

AND

SALIMU BANDA	1ST RESPONDENT
COLLINS NZOVU	2ND RESPONDENT
CHISANGA MUBANGA	3RD RESPONDENT
NORMAN KAPAMBALALA	4TH RESPONDENT
CHRISPIN MULENGA	5TH RESPONDENT
TIMOTHY LUNGU	6TH RESPONDENT
RONALD CHUNDU	7TH RESPONDENT
GEORGE NGUNI	8TH RESPONDENT
ALBERT M. KAYANIKA	9TH RESPONDENT
PETER CHAMFYA	10TH RESPONDENT
ROBERT NSAMBA	11TH RESPONDENT
CHOLWE KASONKOMONA	12TH RESPONDENT
ILUBALA KOPANO	13TH RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Kajimanga, Musonda, J.J.S.

On the 20th of May, 2016 and 18th January, 2017.

For the Appellant: *Mrs N.C Sikazowe, In-house Counsel, ZESCO Limited*
For the Respondents: *Mr J.M Mulongo, MSK Advocates*

JUDGMENT

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. **Zambia Privatization Agency v. James Matale (1995/97) ZR 157**

2. **Angholor v. Cheesbrough Ponds (Z) Limited (1976) ZR 1**
3. **Sagar V. Ridehalgh and Sons (1931) 1 CH 310**

Legislation referred to:

The Local Authorities Superannuation Fund Act, Cap 284, section 28

This is an appeal against the Judgment of the Industrial Relations Court.

The brief facts of this matter are that the Respondents were employees of the Appellant, holding various positions in management. The contracts of employment for some of the Respondents were terminated on 10th October, 2011, while the contracts of employment for the other Respondents were terminated on 7th November, 2011.

According to the letters of termination, the Respondents had been "retired", others in accordance with clause 11.3 of the conditions of service for non-represented staff while others were "retired" in accordance with section 28 of the LASF Act. Despite the letters stating that the Respondents had been "retired", they were paid benefits under a redundancy clause in the Appellant's conditions of service. Further, the evidence on record shows that

the Respondents came to know about their redundancies and the immediate replacement of their positions by new appointees, at a general meeting addressed by the then new Managing Director.

However, notwithstanding the provision under which the Respondents were retired, the terminal benefits were to be paid the same. This was as follows:

1. **three months' pay in lieu of notice;**
2. **redundancy package of 24 months' pay, plus 2 months for each completed year of service; and**
3. **repatriation allowance.**

The Respondents were paid their terminal benefits. However, according to them, their redundancy packages were not calculated in accordance with the Appellant's conditions of service under which they were serving. They stated that the gross pay that was supposed to be used for calculating the package was the one that appeared on their payslips. Further, that the acting allowance which the 7th and 8th Respondents were entitled to at the time of retirement, should have been incorporated in the calculation of the redundancy package for the 7th and 8th Respondents. Earlier on, Management had granted a request to consider computing the benefits of one Victor Mwanza,

an employee who had died on duty, on the acting grade as a way of appreciating his contribution to the Appellant company. The Respondents also claimed that the 13th cheque, which employees of the Appellant were entitled to in December of each year, should be paid to them because the 3 months' pay in lieu of notice meant that they were entitled to all the entitlements up to January or February when their notice period should have ended respectively.

After hearing the matter, the Industrial Relations Court found that the Appellant had incorporated all the allowances applicable to the Respondents in computing their redundancy packages pursuant to clause 11.3 of their conditions of service. Hence, the claim by the Respondents that their packages should have been calculated using the gross pay could not be sustained.

On the argument that the declaring of the Respondents redundant was unlawful, the lower court was of the view that the "retiring" of the Respondents and the act of filling their positions with different personnel, almost immediately, did not conform with the provisions of clause 11.3 of the Appellant's conditions of service, on when a redundancy exercise should be undertaken.

The court added that redundancies are planned activities and that an employee needs to be prepared with the loss of a job. That in the case at hand, the redundancies were done in an arbitrary manner and that the Respondents were clearly ambushed in the whole exercise. Therefore, it awarded the Respondents 3 months' gross pay, as compensation for the abrupt loss of employment.

The court also found in favour of the 7th and 8th Respondents as regards their acting allowance forming part of their gross pay.

As regards the 13th cheque, it was the lower court's view that having been terminated on 10th October, 2011 and 7th November, 2011, the Respondents 3 months' notice period encompassed the month of December when the 13th cheque was due to be paid to all the employees.

The Appellant has appealed against the above decision of the lower court on three grounds. These are:-

Ground one

That the Court below erred in both law and fact when it held that the Complainants be entitled to payment of a thirteenth cheque against existing law and precedent. (sic)

Ground two

That the court below erred in both law and fact the 7th and 8th Complainants be entitled to inclusion of acting allowances in computation of their benefits. (sic)

Ground three

That the Court below erred in law and fact when it held that the Complainants be entitled to 3 months' pay as compensation for the abrupt termination of their employment.

The Respondents also cross appealed on the following ground:

That the Court below erred when it refused to grant an order for calculation of the Cross Appellant's redundancy package according to ZESCO's conditions of service but relied instead on some formula not reflected in the exhibited conditions of service for non-represented employees.

We shall start with the main appeal.

Both parties filed heads of argument.

On behalf of the Appellant, Mrs Sikazwe submitted, in ground one, that the 13th cheque is not provided for in the conditions of service. That it is a gratuitous payment that is made in December because Christmas day falls in December. She added that the Respondents are disqualified from receiving this bonus as they were not employees of the Appellant as at December, 2011.

Mrs Sikazwe argued that since the Respondents had ceased to be employees of the Appellant, they were not entitled to this

payment. That the Respondent's employment terminated on or about 11th October, 2011 and 7th November, 2011 and not the date when the three months would have expired. She stated that paying the Respondents the 13th cheque would amount to unjust enrichment as there is no consideration flowing from the Respondents.

It was Mrs Sikazwe's argument that the position proposed by the lower Court suggests that the payment in lieu of notice does not terminate the employment but that the employment is terminated on the date when the notice should have expired. She submitted that the payment in lieu of notice actually terminates the employment. She cited the case of **Zambia Privatization Agency v. James Matale** (1) and **Angholor v. Cheesbrough Ponds (Z) Limited** (2) to support her argument.

On behalf of the Respondents, Mr Mulongo argued that the Court below correctly held that the Respondents were entitled to the 13th Cheque. That the three months' notice period from 10th October, 2011 and 7th November 2011, respectively, encompassed the month of December when the 13th cheque was due to be paid to the Respondents.

Mr Mulongo agreed with the holding by the lower Court that an employee is entitled to whatever he would have earned had he actually worked in the notice period. That the notice period merely gives the employer the right to dispense with the employee's attendance during the notice period. To support his argument, counsel cited **Zambia Privitisation Agency v. Michael Malisawa and 17 others.** (He did not provide the citation).

We have looked at the evidence on record. We have also considered the submissions and authorities cited by the parties on this ground.

It is our view that a payment in lieu of notice, is a payment made to an employee when the employment is terminated without notice. That is, the employee stays away from work for the period he has been paid. The employee does not work through the notice period but receives pay in the normal way. The purpose of the pay in lieu of notice is to compensate the employee for not having been given the requisite notice period, as may be required in the contract of employment. According to the Appellant's conditions of service, the provision for notice of redundancy stated that:-

"the company shall give:

1. three months' notice or payment of three (3) months basic salary in lieu of notice to an employee to be declared redundant."

The above provision in the conditions of service shows that there are two ways of giving notice. Firstly, it is through the giving of the 3 months' notice. Secondly, it is through the payment of three (3) months basic salary in lieu of notice to an employee to be declared redundant. In the first scenario, the employee continues to work during the notice period and the employment terminates at the end of the notice period. In the second scenario, the employment terminates immediately the notice is given and the employee is not required to work for the period of the notice.

In the case before us, the second scenario is what happened. The employment terminated immediately the notice was given. We say this on the authority of **ZPA v Matale** [1] wherein it was held that:-

> "The payment in lieu of notice was a proper and a lawful way of terminating the respondent's employment on the basis that in the absence of express stipulation every contract of employment is determinable by reasonable notice...In the case of Mumpa v Maamba Collieries, we said, it is the giving of notice or pay in lieu that terminates the employment."

Further, the Appellant's conditions of service under clause 11.2 show what an employee is entitled to after being declared

redundant. The 13th cheque is not one of the entitlements. Therefore, we agree with the submission on behalf of the Appellant that the 13th cheque is a gratuitous payment. It is not a condition of service. An employee cannot claim it as a matter of right.

Therefore, we find merit in ground one of the appeal and we allow it.

We now come to ground two. In ground two, Mrs Sikazwe submitted that the 7th and the 8th Respondents were not entitled to have their acting allowances incorporated when computing their benefits. She argued that the two Respondents were not entitled because there is no provision in the conditions of service. Further, that the practice had been not to incorporate acting allowance when computing benefits.

She stated that the conditions of service are silent on how the computations should be done when an employee is acting in a higher grade. She went on to state that the memorandum relied upon by the Respondents, was a request to management to pay the benefits of an employee who had passed away prior to the completion of his acting period. That this request was made

outside the conditions of service because the employee died on duty.

Mrs Sikazwe went on to state that the Court has a duty to enforce conditions of service as they exist and not create conditions which do not exist. She stated that this condition of service which the court pronounced does not exist. She cited the case of **Sagar v. Ridehalgh and Sons** [3] in which the court stated that existence of a long standing custom would be sufficient to support a proposition. She submitted that there was evidence before the Court which showed that it was not the norm to pay acting allowances as part of the benefits.

On behalf of the Respondents, Mr Mulongo submitted that in its arguments, the Appellant stated that the memorandum was a request to pay Mr Mwanza's terminal benefits based on a grade higher than his substantive grade. That unlike Mr Mwanza whose benefits were paid as if he had been confirmed in the higher grade, the 7th and 8th Respondents' claim in the court below was that they be paid only acting allowance as part of their benefits. That at no time did the 7th and 8th Respondents' claim payment as if they had been confirmed nor did the Court below award payment on higher grades. He argued that the lower court

was on firm ground when it held that the 7th and 8th Respondents were entitled to inclusion of acting allowance in the computation of their redundancy packages.

We have looked at the evidence on record. We have also considered the submissions and authorities cited by the parties on this ground. The Appellant's conditions of service, in Appendix V, appearing at Page 328 of the record of appeal, show how a redundancy package is supposed to be calculated. Under 2.0, this document says that **gross pay includes the basic pay plus all other allowances being paid to the employee on a monthly basis**.

However, clause 11.2.1 (iv) of the conditions of service lists the allowances that are supposed to be included when calculating the redundancy package. It states as follows:

> "For purposes of calculating the redundancy package, a months' gross pay shall mean the basic salary **and the following** allowances being paid to the employee on a monthly basis if they appear on the last payslip: services allowance, housing allowance, transport allowance, hardship allowance, standby allowance and shift allowance."

The use of the words **"and the following"** means that the allowances are specified. An allowance may appear on an

employee's last payslip but if it is not one of the ones listed above, then it cannot be included when calculating the redundancy package.

In the case before us, the 7th and 8th Respondents argued that the acting allowance should have been included in the calculation of their benefits. However, the acting allowance is not one of the allowances listed under clause 11.2.1(iv) above. Therefore, it cannot be included in the calculation of the benefits. In any case, the 7th and 8th Respondents had not been confirmed in the positions they were acting. Therefore, they could only be paid in accordance with the conditions of service applicable in their substantive positions.

Accordingly, we find merit in the second ground of appeal and we allow it.

We come to ground three of the appeal. The Appellant argued that the Court below erred in law and fact when it held that the Complainants be entitled to 3 months' pay as compensation for the abrupt termination of their employment.

In support of this ground, Mrs Sikazwe submitted that the claim for damages is a form of unjust enrichment because an

employee can only leave employment in one form. He or she cannot be entitled to damages and a redundancy package at the same time. Hence the compensation following the redundancy is adequate since it is compensating the employee for losing the job.

On behalf of the Respondents, Mr Mulongo submitted that the lower court had jurisdiction to award damages or compensation for termination of employment. To support his argument, he relied on section 85A (a) of the Industrial Relations Act, Cap 269 of the Laws of Zambia. He stated that the award of an equivalent of three months gross pay as compensation for abrupt loss of their employment was in keeping with section 85A(a) of the Act.

We have looked at the evidence on record. We have also considered the submissions and authorities cited by the parties on this ground.

The Appellant's conditions of service, under clause 11.2.1 show what an employee's entitlement is upon being declared redundant. It provides that:-

"where absolutely necessary, the company shall reduce the number of its employees by declaring some employees redundant upon the following terms:

1. Compensation

   (i) In addition to the provisions of section 28 of the LASF Act, employees shall be paid 24 months gross pay and retirement benefits as stipulated under clause 11.2?

   (ii) An employee shall be paid on pro rata ...

2. Notice of Redundancy

   The Company shall give:

   (i) Three (3) months' notice or payment of three (3) months' basic salary in lieu of notice to an employee to be declared redundant."

In the case before us, the Respondents were paid the following:-

(i) Three months' salary in lieu of notice

(ii) Redundancy package of 24 months

(iii) Two months' salary for each completed year of service

(iv) Repatriation allowance; and

(v) Leave days if any.

The above payment was paid as a redundancy package. However, it is clear from the evidence that the Respondents were not declared redundant. This is because they were replaced almost immediately. This was against the provisions of **section 28 of the Local Authorities Superannuation Fund Act, Cap 284** and clause 11 of the Appellant's conditions of service which

required that certain conditions are met before a person is declared redundant. As the lower court correctly stated, redundancies are planned activities. An employee is supposed to be prepared for such an eventuality. The Respondents were not given that opportunity. Therefore, we agree with the lower Court that they were entitled to damages for breach of the employment contract because redundancy was used only as a way of getting rid of them.

Accordingly, we dismiss this ground of appeal for lack of merit.

We now come to the Respondents' cross appeal. The Respondents filed one ground of appeal. It states as follows:

> **"That the Court below erred when it refused to grant an order for calculation of the Cross Appellant's redundancy package according to ZESCO's conditions of service but relied instead on some formula not reflected in the exhibited conditions of service for non-represented employees."**

In support of the cross appeal, it was submitted that the court below, in its own judgment, found as a fact as follows:

> "We are also satisfied beyond doubt that the formula used by the Respondent to calculate the Complainants' redundancy package was not reflected in the conditions of service for non-represented employees, but that the said formula had been applied in the computation of terminal benefits for the members of staff since 2004..."

That in justifying its reliance on the formula, the court below called in aid the case of **Sagar v. Ridehalgh and sons Limited** [3] wherein a test for a custom was laid down that:-

> **"But for a custom to be upheld, it must be long established, reasonable, certain, not contrary to law and must be strictly proved. Clear and compelling evidence is required to establish that a custom and practice exists."**

It was argued that without applying the above test, the lower court held that the practice of computing terminal benefits in the way the Appellant did existed.

Mr Mulongo stated firstly, that the court did not establish that the alleged custom was long standing in terms of a period of time as against many instances of its application, with clear and compelling evidence. Secondly, that the court below laid the proper foundation as to when a custom may be called in aid when it stated that:-

> **"it is sometimes argued that where terms of employment are not specifically incorporated into the individual contract of employment or general conditions of service, they can be found in those practices which are customary in a particular industry. Support for our view can be gleaned from the case of Sagar v. Ridehalgh and sons Limited..."**

It was argued that from the above, it was clear that recourse to a practice or custom can only arise when an individual

contract of employment or general conditions of service do not specifically incorporate some particular terms of employment on which a decision must be made.

Counsel stated that given that the ZESCO conditions of service for non-represented staff of 2003 governed the Respondents' employment, the reliance by the court below on a formula not reflected in the conditions of service, but based on an alleged custom, is a misdirection and flies in the face of the expressed view of the court below that recourse to a custom can only be had when general conditions of service do not provide particular terms of employment.

That gross pay, as it appears on the payslip, ought to have been used to calculate their redundancy package (terms of employment) in accordance with clause 11.3 of the conditions of service.

In response to the cross appeal, the Appellant argued that the court below made findings of fact and that this court cannot overturn the lower court's findings unless the findings are perverse or made in the absence of relevant evidence. It was stated that the formula that was used to calculate the redundancy package was correct. That what is in dispute is the

tax treatment of the salary. Counsel for the Appellant submitted that the finding of the court regarding the tax treatment was supported by both the law and the facts of the case.

Counsel argued that the rate of grossing up should be at 10% which is the rate applicable to benefits. That taxable rates are 35% for PAYE and 10% for benefits and that even grossing up should be done in the same way. That salaries should be grossed up at 35% when one is working and 10% when one is declared redundant.

On the gross pay that was used, it was argued that the correct gross pay was the one that appeared on the Respondents' letters of appointment and not the one that appeared on the payslips. Counsel urged this court to dismiss the Respondents' cross appeal because the Appellant applied the formulae on the correct gross pay, taking into account the Respondents' correct entitlement and the correct tax treatment.

We have looked at the evidence on record and considered the submissions and authorities cited by both parties on the cross appeal. We agree with the submission by the Appellant that the cross appeal is challenging the findings of fact of the trial Court. The law is well settled that a party to proceedings in the

Industrial Relations Court can only appeal on points of law or on points of mixed law and fact. **See: Section 97 of the Industrial Relations Act, Cap 269 of the Laws of Zambia.** As we have already stated, this cross appeal is challenging the lower Court's findings of fact. Therefore, it cannot be upheld.

On the reasons we have given above, we find no merit in the Respondents' cross appeal and we dismiss it.

In summary, this appeal succeeds in part.

We order that each party bears its own costs.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

C. KAJIMANGA
SUPREME COURT JUDGE

M.C MUSONDA
SUPREME COURT JUDGE