

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

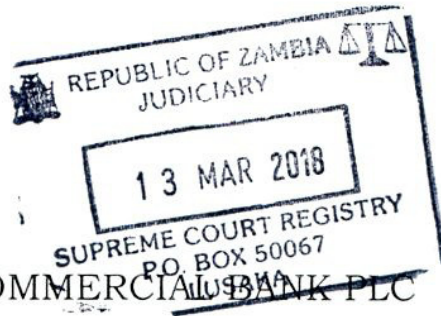
APPEAL NO. 161/2009
SCZ/8/88/2009

BETWEEN:

FRED MULOMBA

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC



APPELLANT

RESPONDENT

CORAM: HAMAUNDU, KAOMA AND KABUKA, JJS

On 6th March, 2018 and 13th March, 2018

For the Appellant: Mr. E.B. Mwansa, SC – EBM Chambers

For the Respondent: Mr. B. Gondwe – Buta Gondwe and Associates

JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. Boston Deep Sea Fishing Company Ltd v Ansell (1888) 39 Ch. D. 339
2. Agholor v Cheesebrough Ponds (Zambia) Ltd (1976) Z.R. 1
3. Zambia Airways Corporation Ltd v Gershom Mubanga (1990-1992) Z.R. 149
4. Zambia National Provident Fund v Chirwa (1986) Z.R. 70
5. Zulu v Avondale Housing Project Ltd (1986) Z.R. 172
6. Chimanga Changa Ltd v Stephen Chipango Ngombe (2010) 1 Z.R. 208
7. Attorney General v Phiri (1988-1989) Z.R. 121

Works referred to:

1. Halsbury's Laws Volume 16, 4th Edition reissue, paras 627 and 628
2. Chitty on Specific Contracts, 27th Edition, Volume 2, 2004, paras 39- 215 to 216, and para 39-218
3. Black's Law Dictionary, 9th Edition, 2004

The appellant was employed by the respondent bank in 1976. Over the years, he worked at various branches and in different positions. His last position was branch manager at Ndola West Branch. On 22nd March, 2002 he was suspended to facilitate investigations into some irregularities unearthed at his branch by the bank's internal audit, compliance and controls. On 6th February, 2003 he was charged with misconduct, particularly abuse of authority, under clause 2, sub-clause 2.1 of the Conditions of Service/Grievances and Disciplinary Procedure Code DRH/12/96 for Non-Represented Staff. The penalty for this offence is summary dismissal.

The details of the charges as set out in the charge sheet at page 21 to 22 of the record of appeal were as follows:

- 1. On 28th August, 2002, he deposited a cheque of K5 million into his account at Ndola West Branch which was issued by him but drawn on his account held at Monze Branch. Although the cheque was given same day value by Mrs. Charity Mulwanda, he had insufficient funds in the account at Monze Branch as the account reflected a credit balance of K3,428.23, hence it could not accommodate the cheque of K5 million. However, the cheque was debited to the account which overdrawed the account by K4,996,533.92 as at 2nd September, 2002. The account was regularised the following day after a transfer of K5 million from his Ndola West Branch Account No. 054027-693 after obtaining a salary advance of K5 million over and above his monthly entitlement of K1,988,658.18.**
- 2. On 24th September, 2002, he issued and deposited another cheque into his account at Ndola West Branch for K4 million drawn on his**

Monze Branch account which had insufficient credit balance of K3,466.08 and therefore, could not accommodate the cheque. The cheque was issued specifically to cover a salary advance obtained in September. In order to cover the cheque of K4 million, on 1st October, 2002, he availed himself two salary advances of K4 million each; totaling K8 million which was far in excess of his entitlement of K2 million and contrary to regulations governing salary advance. Then on 2nd October, 2002 he withdrew a sum of K4,360,000 from his Ndola West Branch account and later made an online deposit on his Monze Branch account. The transaction was effected after obtaining salary advance of K4,360,000. The act of drawing and issuing of cheques with the full knowledge that there was no money in the other account amounted to abuse of authority/office.

3. Between March and October, 2002, he obtained salary advances well in excess of his entitlement with the highest figure being K8 million obtained in September and October, 2002. He obtained all the salary advances without seeking Head Office authority. In most cases, he allowed his subordinate, Mrs. Mulwanda to consider his requests for salary advances. (The charge sheet went on to summarise the salary advances he obtained between March and October, 2002 and stated that his obtaining a salary advance without seeking Head Office authority and contrary to regulations governing salary advance amounted to abuse of authority/office).
4. Between March and October, 2002 while operating as Manager at Ndola West Branch, he approved salary advances for staff well in excess of their monthly entitlement of 30% and 50% for represented and non-represented staff respectively. (A schedule of the salary advances was attached and it was stated that the failure to grant salary advance to both represented and non-represented staff members as per Clause 7.1.1 page 10 of the Conditions of Service/Grievances and Disciplinary Procedure Code for non-represented staff amounted to indiscipline on his part).
5. On 1st August, 2002, Mrs. Mulwanda was availed a car loan of K20 million on condition that the payment was made direct to the supplier and the blue book surrendered to the Bank. However, contrary to the above conditions, he authorised Mrs. Mulwanda to purchase a sum US\$3,000 (K13,470,000) against the car loan leaving a balance of K6,530,000 which Mrs. Mulwanda had not accounted for as the blue book had not been submitted to the bank. He failed to ensure that the payment was made directly to the suppliers and blue book secured.

6. On 24th September, 2009 he raised and encashed a Form 1 for the sum of K1,900,000.00 on the account of Mr. Kennedy Nsangu at Monze Branch when the latter's account had insufficient credit balance of K149,212.98 and could not, therefore, accommodate the Form 1 amount. After he had cashed, the entry was later cleared to Monze Branch under normal clearing contrary to Head Office Circular No. 103/2000 pro dated 18th April, 2000 issued by the Director Branch Operations which requires all staff transactions to be online in computerized branches. His encashment of K1,900,000 with the full knowledge that Mr. Nsangu had insufficient funds in his account amounted to abuse of authority.

On 14th February, 2003 the appellant exculpated himself in writing.

1. On his salary advances, he explained that it was common practice for branch managers obtaining salary advances at branch level. However, he regretted that in so doing he had offended management. He admitted that he obtained salary advances of K8 million each which went towards meeting pressing personal commitments, but said full recovery of the advances was made within the same months.
2. As regards salary advances to staff in excess of their monthly entitlement, he said it was also common practice in all branches.
3. In respect of the car loan to Mrs. Mulwanda, he said the US\$3000 was reserved to pay the supplier while the balance was earmarked towards the cost of clearing the vehicle and the blue book must have been surrendered to the relevant department.
4. Concerning the encashment of K1,900,000, again he did not see anything wrong in the use of Form 1, considering that he used to receive similar requests from senior management staff to perform transactions of like nature on their accounts. He further said Mr. Nsangu was a fellow manager and had on the same date confirmed receipt of cash from hire of a truck which should have been deposited into his account and records showed the same was honoured.

On 24th February, 2003 the appellant was informed of a disciplinary case hearing to be held on 28th February. The hearing

was held as scheduled. The minutes of that meeting appear at pages 151 to 154 of the record and show that the charge was read out to the appellant who confirmed having understood the charge and readily admitted the charge.

On 4th March, 2003 the appellant was dismissed from employment with immediate effect. On 10th March he appealed against the dismissal to the Appeals Committee but the appeal was unsuccessful prompting him to file a complaint in the Industrial Relations Court alleging wrongful, unfair and unlawful dismissal and seeking, inter alia, that he be retired early; and that he be paid all of his benefits, and damages for mental distress.

The appellant's main argument at the trial was that the irregularities levelled against him did not cause any financial loss to the respondent and were the usual activities done by managers, seniors, and juniors in the Bank in their course of work. He further claimed that his seniors on the Copperbelt, particularly the former General Manager for Ndola Business Centre did not like him because he was honest. He called two other witnesses including Mrs. Mulwanda, who like him, had been dismissed from the Bank.

The respondent's defence was that the appellant's dismissal was in accordance with the law and the conditions of service under which he served; and that he was availed every opportunity to be heard on the allegations against him. In all, three witnesses were called to substantiate this defence.

In determining the matter, the court noted the following irregularities:

- 1. The appellant was in the habit of approving his salary advances well above his entitlement of 50% of his salary which had to be settled at once.**
- 2. At times, the appellant obtained salary advances twice in a day which went well above his entitlement, hence in breach of the bank regulations.**
- 3. The appellant was in the habit of approving salary advances for his members of staff which were above their entitlements.**
- 4. The appellant had allowed his junior officer to approve his advances.**

According to the court below, the gist of the matter which amounted to abuse of authority was that the appellant never obtained Head Office approval to obtain salary advances which amounted to failure to follow established procedures or outstanding instructions as per clause 1.8 of the Disciplinary Code.

The court then took the view that being in authority; the appellant was abusing his authority as he used irregular methods of obtaining salary advances from the salary advance account which was above 50% without Head Office approval. The court also noted that the appellant was charged with the offence of abuse of authority; that he exculpated himself; that he was heard and dismissed; and that he appealed and his appeals were dismissed.

Further, the court considered the appellant's argument that other bank officials were doing the same by using underhand methods to obtain salary advances in other branches but found that the appellant was not honest in his dealings regarding his employer's business; and opined that it was not for the court to find out what happened to other bank officials who did not follow the regulations. On the basis of all the foregoing, the court found that the appellant dealt with the matters of the Bank in a very unscrupulous manner, and therefore, dismissed the complaint.

The appellant has appealed to this Court on ten grounds framed in the Memorandum of Appeal as follows:

- 1. The lower court misdirected itself in law and in fact to have held that the complainant dealt with matters of the bank in a very unscrupulous manner, to that extent it found no merit in the complaint.**

2. The lower court misdirected itself in law and fact to have held that the complainant was not honest in his dealings regarding his employers' business and as such it was not for the court to find out what happened to other Bank officials who did not follow the regulations of the bank.
3. The lower court misdirected itself in law and fact when it held that the gist of the matter which amounted to abuse of authority was that the complainant never obtained Head Office approval to obtain salary advances which amounted to failure to follow established procedures as per Clause 1.8.
4. The lower court misdirected itself in law and fact when it held that the complainant/appellant was in the habit of approving his salary advances well above his entitlement of 50% of his salary which had to be settled at once and at times obtained salary advance twice in a day which meant well above his entitlement, hence in breach of the Bank's regulations.
5. The court below misdirected itself in law and in fact to have held that the complainant/appellant was also in a habit of approving salary advances for his members of staff which were above their entitlements.
6. The lower court misdirected itself in law and fact to have failed to hold that the principles of natural justice were not observed by the respondent and its disciplinary committee when dealing with the appellants' case.
7. The lower court misdirected itself in law and in fact to have failed to take into account that the acts of overdrawing ones' account was regarded as a minor offence in accordance with the respondent's Disciplinary Code and did not warrant a dismissal but a series of warning letters, which were not written to the appellant.
8. The lower court misdirected itself in law and in fact to have failed to take into account that the charge levelled at the appellant was vague/ambiguous as it was not defined by the Disciplinary Code, thus required judicial interpretation, which was not sought by the respondent.
9. The lower court misdirected itself in law and fact to have failed to take into account that the actions of the appellant of overdrawing one's account and approving salary advances for his members of staff which were above their entitlements were regarded as normal

practice, this is supported by the fact that other members of staff who did the said actions were either not charged or were re-instated and allowed to continue with their normal duties, save for the appellant, as the bank did not suffer any financial loss.

10. The lower court misdirected itself in law and fact to have failed to take into account that the dismissal of the appellant had no legal basis, as no evidence was adduced by the respondent to support its action, thus rendering the dismissal as unfair and wrongful.

To support the appeal, counsel for the appellant filed heads of argument on which he relied. He also informed us at the hearing of the appeal that the ten grounds of appeal are actually summarised in ground 10. Therefore, we shall endeavour to set out the appellant's arguments as briefly as possible.

In ground 1, it was argued that all the transactions by the appellant at Ndola West Branch that formed the basis of the charges against him, were recorded or documented and that they were not falsified. Further, that inspectors used to inspect the branch once or twice per year without pointing out the said irregularities to the appellant; and the team that audited the branch, headed by Garth Chiwela, never made any recommendation to be taken against the appellant because he did not deal with the matters of the Bank in an unscrupulous manner.

In ground 2, it was submitted that it was a misdirection by the court to hold that the appellant was not honest because the appellant was only doing what was a common practice in the bank, though it might have been against the Bank's regulations. It was also argued that the evidence of other bank officials who did not follow the regulations was before the court, to see whether the appellant was treated unfairly or not by his employer.

It was further contended that the use of Form 1 was a common practice by most senior employees like the Managing Director, Human Resource Director, General Manager and Managers but they were not disciplined.

In respect of ground 3, State Counsel conceded that the appellant did not obtain Head Office approval when taking his salary advances but made Mrs. Mulwanda to authorise the advances for him. However, he argued that this failure, as correctly noted by the court below, amounted to failure to follow established procedures or standing instructions as per clause 1.8 of the Grievances and Disciplinary Code which attract warning letters for the first and second breaches, and a discharge for the third breach. The gist of this argument is that the appellant was charged with a

wrong offence of abuse of authority which attracts summary dismissal under clause 2.1 of the Grievances and Disciplinary Code.

To support ground 4, State Counsel cited the case of **Boston Deep Sea Fishing Company Ltd v Ansell**¹ where it was held that:

“Of course if he (the employer) knows of the act (wrongful act) and he still continues to employ him (the employee), it might have been held by Judges of fact or by a jury that he had condoned it and prevented himself from insisting on legal rights.”

He further cited the case of **Agholor v Cheesebrough Ponds (Zambia) Ltd**² where the High Court said **“when incompetence has been condoned by the employer, it cannot be relied upon as a ground for dismissal.”** The kernel of this argument is that the respondent cannot rely on the breaches of its regulations which it had condoned as grounds for dismissing the appellant.

The appellant's contention in ground 5 is that he admitted approving salary advances for his members of staff which were above their entitlement because this was a practice in the Bank and in any case, the members of staff cleared the advances before the month end.

In ground 6, it was submitted that the panel which heard the appellants' case was composed of five members and one of them

was Mr. Ngulube whom the appellant said had a grudge against him; and that the appellant was not asked by the panel whether he had anything to say about the panel. To sustain this argument, counsel cited the case of **Zambia Airways Corporation Limited v Gershom Mubanga**³, where this Court held that **“The inclusion of two interested parties in the disciplinary committee showed that the principles of natural justice were not followed.”**

Regarding ground 7, it was argued that the issue of drawing and issuing cheques where there was no money in the account which is an instance of overdrawing of one's personal account falls under clause 2.13 of the schedule to the Disciplinary Code and attracts penalties of first warning for first breach, second warning letter for second breach and discharge for third breach.

We were also referred to clause 5.7 of the Disciplinary Code where **‘discharge’** is defined as termination of employment by the Bank by giving due notice of 30 days or pay in lieu of notice. The contention here was that since overdrawing one's account is a minor offence, the dismissal without warning was wrong and unfair.

The gist of ground 8 is that the Disciplinary Code does not define '**abuse of authority**'. While it was acknowledged that clause 2.0 provides for misconduct while clause 2.1 provides for abuse of authority as an instance of misconduct with the first breach attracting summary dismissal, it was contended that the failure to clearly define the parameters of abuse of authority left the charging officers at large to actually abuse the charging of their subordinates; and that since 'abuse of authority' was not defined in the Code, the court misdirected itself to have held that the appellant was properly charged for the said offence.

In ground 9, it was the appellant's argument that he maintained an account at Monze Branch, which branch was being managed by Mr. Nsangu; that the said manager, using his discretion, overdrew the appellant's account deciding not to bounce the cheques issued by the appellant; and that overdrawing one's account was a common practice which the Bank condoned. He insisted that some of the people who committed similar irregularities as him were still working, while some had even been promoted like Mr. Kakokota, the General Manager.

In respect of ground 10, it was argued that the dismissal of the appellant had no legal basis and was wrong and unfair because (1) the evidence that was adduced was supporting the charge of failure to comply with established procedures or standing instructions which offended clause 1.8 of the Disciplinary Code; (2) the evidence showed that it was common practice to get salary advances twice a month and sometimes over one's entitlement, to overdraw an account and to use Form 1 in all the branches of the Bank; (3) the respondent lost no money in all the alleged irregularities; (4) the offence of abuse of authority was not defined in the Code; and (5) the circular on granting of salary advances from the Human Resource of the bank to all branches dated 20th October, 1999 was ignored by the Head Office and all the branches and as such it was wrong and unfair to use same against the appellant alone.

In conclusion, the appellant also relied on the submissions he filed in the lower court, especially from pages 283 lines 7 to page 292 of the record of appeal. He prayed that the appeal should succeed with costs. In his oral submissions before us, State Counsel simply repeated, in the main, the arguments set out above.

Counsel for the respondent also filed heads of argument on which he relied and augmented orally. He submitted that the appellant is raising issue only on the claim of unfair dismissal. Counsel referred to **Halsbury's Laws of England, Volume 16, 4th Edition reissue at paragraph 627**, which explains situations where dismissal will be regarded as unfair, such as incidences concerning trade unions and redundancy. He also made reference to **Chitty on Specific Contracts, 27th Edition, Volume 2, 2004, at paragraphs 39-215 to 216**, which states, inter alia, that:

"Normally, the fairness of a dismissal is, under the statutory provisions decided as a two-staged process. At first, it is for the employer to show that he dismissed the employee for a substantial justificatory reason and at the second stage, it is for the tribunal to decide whether he acted reasonably in treating the reason as a sufficient reason for dismissing the employee..."

In this respect, it was argued that a dismissal will not be said to be unfair if the same is reasonable and the substantive or principal reason for the dismissal is justifiable at law.

Coming to the current case, it was submitted that the appellant was dismissed for consistent breach of clear provisions on approvals of salary advances whereby he literally created a situation where there was a constant and pervasive culture of irregular salary advances completely beyond the entitlement of his subordinates

and himself at the branch he was running. That this was substantiated by oral and documentary evidence led by the respondent and the appellant not only admitted his breaches but confirmed that he completely disregarded regulations in the approval of salary advances.

On the use of his personal account at Monze and Ndola West Branch accounts, it was contended that this too is well documented and conceded by the appellant, amply showing his personal involvement and culpability; and that this shows an irregular use of authority to circumvent regulations for personal benefit and also shows an element of trying to hide one's tracks in so far as the appellant was trying to use other people's accounts which was a classic case of abuse of authority and financial indiscipline by him.

Counsel also cited **Black's Law Dictionary, 9th Edition, 2004** which defines '**abuse**' as a departure from legal or reasonable use and can also include '**misuse**'. It was argued that the appellant misused his authority and when charged his only defence was that others, such as Mr. Banda and Mr. Kakokota were doing it and are still in the employ of the respondent. According to the respondent, this argument is misplaced as the alleged breaches by the two

officers could not be compared to the appellant's breaches and infractions including the scale at which he did them.

Counsel further cited a passage from **Halsbury's Laws of England (supra)**, at **paragraph 628**, which states as follows:

"The burden on the employer. In all cases, the burden lies upon the employer to show that dismissal was fair. He must show what was the reason (or, if there is more than one, the principal reason) for the dismissal; and he must also show that it was a reason which law regards as acceptable; and that in the circumstances, having regard to equity and the substantial merits of the case, he acted reasonably in treating it as a sufficient reason for dismissing the employee."

Furthermore, counsel quoted from paragraph 39-218 of **Chitty on Specific Contracts**, which reads as follows:

".....However, provision has now been made that failure by an employer to follow a dismissal procedure shall not be regarded by itself as making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."

To further buttress the argument, counsel cited the case of **Zambia National Provident Fund v Chirwa⁴**, where we held that:

"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim in that ground for wrongful dismissal or declaration that the dismissal is a nullity."

On the ground of natural justice, it was argued that the issue of Mr. Ngulube sitting on the disciplinary committee was not raised by the appellant during the hearing and thus was not considered. It

was also argued that it has not been shown that Mr. Ngulube had a personal interest in the matter nor can it reasonably be said that old alleged personal differences for which the appellant was not even charged could have any legal weight or considered as such.

In conclusion, it was contended that the appellant was properly and fairly dismissed as per his conditions of service and given the office he occupied, and therefore, this appeal lacks merit and must be dismissed with costs.

We have perused the record of appeal and considered the arguments by learned counsel on both sides. Our first reaction is that grounds 3, 4 and 5 attack findings of fact made by the trial judge which findings were supported by the evidence and were in fact common cause. In our view, these grounds are misconceived.

Regarding ground 6 and the subject of natural justice, clearly the appellant was given an opportunity to be heard. He was charged, he exculpated himself in writing, and he was afforded an opportunity to be heard before a disciplinary committee where the charges were read to him, which he readily admitted. Consequently, the Disciplinary Committee dismissed him. He appealed to the Appeals Committee, but his appeal failed.

Further, as submitted by counsel for the respondent, the question of Mr. Ngulube sitting on the disciplinary committee was never raised by the appellant during the disciplinary proceedings and the committee had no opportunity to decide on the matter. Therefore, we cannot fault the court below for not holding that the principles of natural justice were not observed by the respondent and its disciplinary committee when dealing with the appellant's case as this was a non-issue. In our view, this ground lacks merit.

As we see it, the main question raised by this appeal, which as rightly put by State Counsel Mwansa is in ground 10, is whether the dismissal of the appellant was wrongful and or unfair. State Counsel agreed with the Court that the other grounds of appeal are merely arguments meant to support ground 10.

In the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**⁵, this Court held that:

“Where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations and that a plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case.”

Quite clearly, since the appellant had alleged that he was wrongfully, unfairly and unlawfully dismissed after working for the

company for 26 years, the legal and evidential burden rested on him to prove that allegation on the balance of probabilities.

As the minutes of the disciplinary committee hearing at page 154 of the record show, the appellant had admitted the charge(s) as framed in the charge sheet. We set out the details of the charge of abuse of authority earlier in our judgment regarding obtaining salary advances above his entitlement, overdrawing his account, approving salary advances for staff members above their entitlement, use of Form 1 which was forbidden and unsatisfactory supervision of a car loan given to Mrs. Mulwanda.

The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question. In the case of **Chimanga Changa Limited v Stephen Chipango Ngombe**⁶, this Court held that:

“An employer does not have to prove that an offence took place, or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably when coming to the conclusion.”

This is also what the learned editors of **Halsbury’s Laws of England** (supra), at paragraph 628 state. In the present case, the company’s Disciplinary Code which formed part of the appellant’s

conditions of service provided for misconduct and specifically, **'abuse of authority/office'** which attracted summary dismissal. As submitted by Mr. Gondwe, there was also overwhelming evidence, before the disciplinary committee that the appellant committed the offences for which he was dismissed and he readily admitted the misconduct. We are not persuaded by the brave argument by State Counsel Mwansa that the appellant admitted something he did not understand and that he was misled by a wrong charge.

We note that while the appellant admitted wrong doing on his part, he argued that failure to comply with established procedures or standing instructions attracted warning letters for first and second breach and discharge for third breach in accordance with clause 1.8 of the Disciplinary Code and that the phrase **'abuse of authority'** is not defined under the Code rendering it prone to abuse by the charging officers.

Spirited though this argument is, again we are not persuaded. As Branch Manager, the appellant must have been very familiar with the offences under the Disciplinary Code and could not have been misled by anyone into admitting to a wrong charge. In any case, we held in the case of **Attorney General v Phiri**⁷ that:

“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; and that the duty of the Court is to examine if there was the necessary disciplinary power, and if it was exercised in due form.”

In this case, State Counsel Mwansa conceded that the respondent had the necessary disciplinary power and that it was exercised properly. As we said earlier, the charges were read to the appellant. He understood the charges and admitted the same. He never told the disciplinary committee that he was wrongly charged because abuse of authority was not defined in the Code or that he ought to have been charged under clauses 1.8 and 2.13.

We are satisfied that the facts of this case clearly established abuse of authority/office by the appellant and that the respondent acted reasonably and did not need to satisfy itself beyond reasonable doubt that the appellant committed the acts in question.

The appellant further argued that he was unfairly treated because the Bank's regulations were breached by most senior officers, who were not disciplined or dismissed. The respondent's position is that the alleged breaches by Mr. Banda and Mr. Kakokota could not be compared to the appellant's breaches and infractions including the scale at which he did them.

Our perusal of the record does not show that the appellant had established by evidence that the infractions of the other senior officers were as serious as those he committed. Besides, page 151 of the record shows that Mrs. Mulwanda and Mr. Nsangu, the people involved with the appellant in the irregularities equally appeared before the disciplinary committee. Mrs. Mulwanda was also dismissed from employment although it seems from the appellant's evidence that Mr. Nsangu was reinstated.

The appellant's responses during the disciplinary hearing are well documented in the minutes, at page 154 of the record and make very interesting reading. When he was asked why he had engaged in such irregular activities in his capacity as branch manager, he said he had a building project in Monze which he started while he was manager at Monze Branch as part of his preparations for retirement and that he spent all the salary advances he got on the project. He said he resorted to getting the salary advances after all efforts to get a house loan failed and that he did endeavour to repay all the salary advances he got.

When asked why he was issuing cheques on the Monze Branch, knowing fully well that he had insufficient funds and

accessed the funds immediately, he said each time he issued a cheque he made arrangements to ensure that funds were there to accommodate the cheques. When asked whether or not he was aware that by accessing the funds immediately, he was using bank money, he admitted that he used bank funds but had no intention of defrauding the Bank, adding that he was tempted to do what he did because of the pressing personal problems he was facing.

And when asked whether or not he knew his salary advance entitlement as per the conditions of service, he admitted that he knew his salary advance entitlement and that the amounts he got were above his entitlement. He also admitted having compromised procedures of obtaining and granting salary advances.

Therefore, we fail to comprehend how the dismissal could have been wrongful or unfair or how the court below can be faulted for holding that the appellant dealt with matters of the bank in a very unscrupulous manner and that he was not honest in his dealings regarding his employer's business.

Admittedly, the respondent did not lose any money and the court below is mandated to do substantial justice. However, substantial justice is for both the employee and the employer.

Employees have a right not to be treated unfairly or be dismissed unfairly but employers also have a right to expect acceptable conduct and satisfactory performance by company employees, especially senior managers.

As argued by Mr. Gondwe, this was not a one off incident but a prevalent and constant state of irregularity by a senior manager running a branch. We cannot accept the argument that the misconduct was condoned by the employer and could not be relied on to dismiss the appellant. The authorities cited by the appellant cannot assist him. On the facts of this case, the appellant had failed to prove that he was unfairly treated or that he was wrongfully and unfairly dismissed from employment.

In the event, we find no merit in this appeal and we dismiss it with costs.



E.M. HAMAUNDU
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE



J.K. KABUKA
SUPREME COURT JUDGE