

IN THE HIGH COURT FOR ZAMBIA  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA

COMP/IRCLK/478/2016

**BETWEEN:**

**NEBART PHIRI**

**AND**

**CEC LIQUID TELECOMMUNICATION LTD**



**COMPLAINANT**

**RESPONDENT**

**BEFORE:**

*Hon. Judge M. K. Chisunka in Open Court*

**APPEARANCES:**

✓ *For the Complainant: Mr. C. Muneku - Charles & Charles Associates.*

*For the Respondent: Ms. P. Nyati - CEC Legal Counsel.*

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**R U L I N G**

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**Legislation referred to:**

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

## **Introduction**

1. Mr. Nebart Phiri (Complainant) filed an amended Notice of Complaint on 8<sup>th</sup> September, 2017 against CEC Liquid Telecommunication Limited (Respondent) claiming that he was illegally and wrongfully dismissed from employment.

## **Basis for Complainant's claim**

2. The Complainant contends that his dismissal was unlawful and unfair because he was discriminated against, on account of his status, as a junior employee contrary to sections 108 (1), 108 (2) and 85 (4) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia. Further, that it was unfair for the Respondent to dismiss him on wrong charges. He further contends that his dismissal was wrongful because the Respondent failed or did not comply with the Disciplinary Code and Grievance Procedure that was in force and applicable to him.
3. The Complainant's prayer before this Court is for the following relief:
  - (a) Payment of salary arrears for the months of March, April, May, June and July 2016, and other benefits i.e. 2 GB data bundle and talk time of six hundred kwacha (600.00) for each of the aforesaid months.
  - (b) Compensation for loss of employment on discriminatory grounds.

- (c) Damages for wrongful dismissal.
- (d) Any other relief the Court may deem fit.
  
- (e) Interest at Commercial Bank lending rates on all sums due from date of dismissal to date of settlement as per section 2 of Act No. 16 of 1997 (An Act to amend the Judgments Act).
  
- (f) Costs.

### **Respondent's Defence**

- 4. In the Answer to the Complaint, the Respondent denies that the dismissal of the Complainant was illegal, unfair and or wrongful and contends that:
  - (a) The Complainant was properly charged and afforded an opportunity to be heard on the charges laid against him.
  - (b) The dismissal was neither discriminatory nor malicious as it was done in accordance with the Complainant's employment terms and conditions and also in accordance with the Network Operations Manual and Procedures.
  - (c) The claim lacks merit and the Complainant was not entitled to any of the remedies claimed, or at all.

### **Evidence (by the Complainant)**

- 5. The Complainant's evidence is contained in the Affidavits filed and the oral evidence that he gave in Court.
- 6. Essentially, the evidence was to the effect that during the course of his employment, in January 2016, he was charged with the offence of unsatisfactory performance. This arose out of a fault

that had occurred on the network to a customer which he and three other employees worked on as a team.

7. Prior to being dismissed, he was charged with two offences namely, unsatisfactory work performance and disorderly conduct. He testified that he was the only one charged out of the other employees that worked on the fault and he alleges that his dismissal did not comply with the applicable terms and conditions of employment and the Network Operations Fault Handling Procedure Manual which regulated his work.
8. According to his affidavit evidence, the Respondent did not comply with the appeals procedure because the Chief Human Resources Officer, who was part of the disciplinary committee which dealt with his case at first instance, also sat on the appeals committee panel which he considered to be unfair, inappropriate and irregular.
9. He told the Court that it was wrong for the Respondent's Managing Director to sit on the appeals committee as it violated clause 16.2.2 and 16.3 of the Respondent's Disciplinary and Grievance Procedure.
10. He further told the Court that he was discriminated against on account of being a junior officer as the other two people on the team were his seniors. He was also of the view that the punishment meted out for the offence he was charged with was too harsh. He should have been given a warning. He, however, conceded under cross-examination that, in terms of the applicable disciplinary code, it was not mandatory to progress

an employee through each step or level of sanctions in the order provided.

11. He further admitted that he was paid Base Bonus of K61,540.78 as reflected on his pay slip dated 29<sup>th</sup> February 2016 exhibited on page 67 of his Bundle of Documents. The Bonus for the year 2015 since Bonus was paid annually.

**Evidence (By the Respondent)**

12. The Respondent's position is outlined in the Answer and Affidavit verifying Answer filed on 17<sup>th</sup> November 2016 deposed to by Edgar Robert Mvula, the Respondent's Chief Human Resources and Administration Officer and his oral testimony.
13. The Respondent's testimony was to the effect that the Complainant was a Network Specialist from 2011 until 2016 when he was dismissed. That, prior to his dismissal, the Complainant was charged with the offence of Unsatisfactory Work Performance and Disorderly Behavior.
14. After the charge was raised, investigations were conducted, documented and a disciplinary committee hearing conducted. The Complainant was accorded an opportunity to be heard and a guilty verdict was arrived at after evaluating the evidence leading to the Complainant being summarily dismissed.
15. The Complainant was, thereafter, informed of his right of appeal and he appealed to the Managing Director who constituted an Appeals Committee which considered the appeal.

16. After due consideration of the grounds, evidence and other additional matters brought to the Committee by the Complainant, the Appeals Committee upheld the sanction of Summary Dismissal.
17. Under cross-examination, RW1 testified that Kelvin, one of the other employees who worked with the Complainant on the fault were on the same level and grade.
18. Regarding compliance with the disciplinary code, RW1 confirmed that the Respondent did not comply with the time frame of 10 days as provided for to hear the appeal because the Managing Director was not available at the material time. He also admitted that the letter which advised the Complainant on the outcome of the appeal did not state the reasons for the dismissal of his appeal and was therefore in breach of clause 16.6.5. He explained that it was an omission on the part of the Respondent.

### **Facts Not in Dispute**

19. From the evidence led before me and taking account the documentary evidence, I find the following facts as having been established:

19.1 The Complainant was employed by the Respondent as a Network Specialist.

19.2 During the course of his employment, specifically in January 2016, he was charged with the offence of

Unsatisfactory Performance following a fault that had occurred on the network to a customer which he had worked on.

19.3 The Complainant was afforded an opportunity to be heard on the charges laid against him and was found guilty as charged.

19.4 Following his dismissal, the Complainant was informed of his right to appeal and he appealed to the Managing Director who constituted an Appeals Committee.

19.5 The Appeals Committee upheld the sanction of Summary Dismissal.

19.6 In considering his appeal, the Appeals Committee did not comply with the stipulated 10 days' time frame to hear the appeal.

19.7 The Respondent did not state the reasons for dismissing the appeal. The failure was in breach of clause 16.6.5 of the applicable terms and conditions of service.

### **Issue for Determination**

20. From the record, the issue for determination, is whether or not, on the evidence before me, the termination of the Complainant's employment by way of summary dismissal was wrongful, unlawful and unfair. Further, whether or not he is entitled to the relief sought under the Notice of Complaint.

21. In determining the issue before me, I have addressed my mind to the written submissions filed by the parties in this case and I will refer to them in this judgment where necessary.
22. I must state, however, from the outset that it is a well settled principle that Courts in Zambia will not interpose themselves on decisions of employment tribunals. This Court, therefore, will not concern itself with the merits and demerits of the charges that were laid against the Complainant. The Courts' duty is to examine if there was the necessary disciplinary power and, whether it was exercised in due form.

From the evidence on record, I am satisfied that the Disciplinary Committee did have the necessary power and there was sufficient cause in this case to invoke the disciplinary procedure.

23. To resolve the issue at hand, I consider it imperative to review the general principles of law that underpin the concepts of wrongful, unlawful and unfair dismissal.

I do so below.

## **Whether the Dismissal was Wrongful, Unlawful and Unfair**

### **A. Wrongful Dismissal**

24. A claim for wrongful dismissal is in effect a claim for breach of contract. A Complainant alleging wrongful dismissal has to demonstrate and show to the Court that the employer breached a contractual provision at the time of effecting the dismissal.



25. In terms of the law, wrongful dismissal is concerned with the manner and form in which the employer carried out the dismissal. Thus, the procedure employed by an employer when effecting a dismissal is cardinal in a wrongful dismissal action.
26. In the present case, the Complainant alleged that the Respondent breached the 10 days' time frame stipulated in the disciplinary code for considering an appeal and also that the Respondent did not give reasons for dismissing the appeal contrary to the provisions of the disciplinary code. The Respondent, through the oral testimony of RW1 admitted both allegations. This means that the Complainant has proved the breach of contractual provisions of his employment contract by the Respondent.
27. It is a well settled principle in this jurisdiction that a disciplinary code of conduct forms part of the contractual provisions of an employment contract. It is plain to me therefore that the failure by the employer to adhere to the contractual provisions in the manner alleged rendered the dismissal wrongful and I so find.

**B. Unlawful Dismissal**

28. Unlawful dismissal is a cause of action that is founded in statutory law. Any act by an employer that is positively proscribed by law can amount to an unfair and unlawful dismissal.
29. In the case before me, the Complainant alleges that the dismissal was unfair and unlawful because he was

discriminated against on account of his status as a junior employee contrary to sections 108 (1), 108 (2) and 85 (4) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia. Section 108 provides:

*“108 (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 or affiliation, tribal extraction or status of the employee.*

*(2) Any employee who has reasonable cause to believe that the employee’s services have been terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee has been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the court*

*Provided...*

- (3) The court shall, if it finds in favour of the Complainant:*
- (a) grant to the complainant damages or compensation for loss of employment;*
  - (b) make an order for re-employment or reinstatement in accordance with the gravity of the circumstances of each case.*

30. The Respondent has countered the allegation by the Complainant, that he was discriminated against on account of his junior status, through the testimony of RW1 to the effect

that the other employees who worked with the Complainant on the fault were either on the same level and grade or lower. In particular, that Kelvin was on the same level with the Complainant while James Mugala and Michael Chisha were junior in rank. I accept the testimony of RW1 on this point as it was not challenged. The claim for discrimination on account of being junior in status therefore fails and is dismissed.

### **Unfair Dismissal**

31. Like unlawful dismissal, unfair dismissal also occurs where the termination violates the applicable statutory provisions.

A dismissal may also be adjudged to be unfair where the tenets of natural justice have been breached by the employer when arriving at the dismissal. The tenets of natural justice essentially, comprise the following:

31.1 The employee is charged or given notice of his wrongdoing.

31.2 The employee is given an opportunity to exculpate himself or be heard.

31.3 The employee is given a fair and impartial hearing during the determination of his matter;

31.4 The employee is accorded the right to appeal, where necessary.

32. In the instance case, the evidence on record shows that all the tenets of natural justice as outlined above were followed. The Complainant was charged, heard and informed of the decision

to dismiss him. He appealed, though unsuccessful. On the allegation that the hearing committee was not impartial on account of the Chief Human Resources Officer sitting on both the disciplinary committee and Appeals Committee in contravention of 16.2.2 and 16.3 of the Disciplinary Code, no evidence was led to support this. On the basis of this I dismiss the claim for unfair dismissal.

### **Relief Sought under the Notice of Complaint**

33. Having found that the Complainant's claim for wrongful dismissal succeeds, I now consider the relief prayed for under the Notice of Complaint in the order following:

33.1 Salary arrears for the months of March, April, May, June and July 2016 and other attendant perquisites and allowances

According to the evidence on record, (Letter of dismissal dated 30<sup>th</sup> March 2016, Page 105 of Complainant's Bundle of Documents) the Complainant was summarily dismissed on 30<sup>th</sup> March 2016. He appealed this dismissal on 13<sup>th</sup> April 2016 (Page 106 of the bundle). The claim for salary arrears for the months of April, May, June and July 2016 are therefore unfounded and are dismissed. The Complainant is only entitled for salary for days worked and leave days accrued as at date of dismissal. The

effective date of dismissal was 30<sup>th</sup> March 2016. In this respect, if the Complainant was not paid for March 2016, he should be paid.

33.2 Damages for loss of employment out of Discrimination

The claim for unlawful employment on account of discrimination did not succeed and therefore the claim for this remedy fails and is dismissed accordingly.

33.3 Damages for Wrongful Dismissal (breach of contract)

The claim for wrongful dismissal has succeeded. Under the applicable contract, the Complainant was entitled to three months' notice for normal termination. I award three (3) months pay as damages for wrongful dismissal.

33.4 Interest

48%  
I award interest at short term lending rates from 6<sup>th</sup> October 2016 to judgment date and thereafter at the commercial bank lending rates as determined by Bank of Zambia until full settlement.

**Orders**

34. In view of the above, I make the following orders:


34.1 the claims for unlawful and unfair dismissal are dismissed.

34.2 The Respondent to pay three months salary as damages for wrongful dismissal.

34.3 Each party to meet their own costs.

34.4 All amounts due under this judgment shall attract interest at short term lending rates from 6<sup>th</sup> October 2016 to judgment date. Thereafter, at the commercial bank lending rates as determined by Bank of Zambia from time to time until full settlement.

**Delivered at Lusaka this ..... day of.....2020.**

  
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**M. K. CHISUNKA**  
**HIGH COURT JUDGE**

