

THE ATTORNEY-GENERAL v RICHARD JACKSON PHIRI (1988 - 1989) Z.R. 121 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG. J.S.
14TH DECEMBER, 1988 AND 20TH FEBRUARY, 1989
(S.C.Z. JUDGMENT NO. 2 OF 1989)

Flynote

Administrative law - Appeal - Challenge of decision of statutory body - Circumstances when Appeal Court can interfere - Principles of.

Employment - Civil Service - Power of Court to intervene after hearing.

Headnote

The respondent was employed as an assistant personnel officer in the civil service. After he declined to move from one branch of his ministry to another branch he requested a transfer to another ministry. He also lodged a complaint alleging unjust treatment. This complaint was found unjustified. Thereafter, he refused to transfer to other ministries and again lodged a complaint. The Public Service Commission directed his ministry to suspend him and preferred charges against him. Eventually he moved to a new ministry after his name was deleted from the ministry pay-roll where he was working.

The charges preferred related to insubordination, misconduct, and absence without leave. He was suspended without pay and was dismissed from the service. He issued a writ in the High Court alleging, inter alia, wrongful dismissal. The court found the discharge imposed by the Public Service Commission was excessive and wrong. The appellant appealed.

Held:

- (i) 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 any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.
- (ii) The court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or reasonable. The court ought to have regard only to the question whether the Public Service Commission had valid disciplinary powers and, if so, whether such powers were validly exercised.

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Cases referred to:

- (1) Kangombe v The Attorney-General (1972) Z.R. 177
- (2) The Attorney-General v Kangombe (1973) Z.R. 114
- (3) Miyanda v The Attorney-General (1985) Z.R. 185

For the appellant: G.S. Phiri, Senior State Advocate.
For the respondent: H.Silweya, Silweya and Company.

Judgment

NGULUBE, D.C.J.: Delivered the judgment of the Court.

We propose to refer to the respondent as the plaintiff and the appellant as the defendant which is what they were at the trial. This is an appeal by the defendant against the decision of a High Court commissioner who determined that the plaintiff had been wrongfully discharged from employment in the Civil Service and that the plaintiff must be reinstated and paid salary arrears right down to the date of judgment. The plaintiff has cross-appealed against the order of reinstatement (which he had specifically requested in his pleadings and at the trial) and instead asks that this be substituted with an order declaratory of the parties' rights. The salient facts were that the plaintiff was employed as an assistant personnel officer in the then Ministry of Power Transport and Works. Sometime in 1975 the plaintiff declined a transfer from the Ministry headquarters to its buildings branch. After disciplinary action was threatened and he had offered an explanation (which was not accepted), he wrote a letter on 25th June, 1975, requesting Personnel Division to transfer him to another Ministry. At about the same time the plaintiff lodged a complaint with the Commission for Investigations against some of his senior officers for alleged unjust and inhuman treatment, which complaint was ultimately found to have been unjustified. Meanwhile, on 4th September, 1975, the Public Service Commission directed Personnel Division to notify the plaintiff's ministry of the decision made by them to transfer him to the then Ministry of Rural Development. By a letter dated 23rd December, 1975, the plaintiff refused to transfer to the said Ministry and indicated that he would not accept any transfer to that Ministry nor to the Ministries of Education, or Lands and Natural Resources. The Commission for Investigations sanctioned the plaintiff's transfer by their letter of 28th November 1975. By his letter of 12th December, 1975, the plaintiff refused to transfer on a 'non-promotional basis'; he protested rather warmly and declared that he expected no further correspondence on the subject. Rather fortuitously, the two posts of assistant personnel officer at Rural Development had since been filled and the plaintiff could no longer transfer there. By 16th February 1976, Personnel Division decided that the plaintiff should immediately transfer to the then Ministry of Information and Broadcasting and the Permanent Secretary at the Ministry of Power Transport and Works duly notified the plaintiff by a letter dated 17th February, 1976. The plaintiff replied on 19th February, 1976, refusing to transfer. The plaintiff had lodged another complaint with the Commission for Investigations and when finally he was again asked to proceed on such transfer he wrote letters on 3 and 10th August 1977, refusing to move. In his letter of 3rd August, 1977, in particular, the plaintiff refused to transfer without promotion and listed the ministries (including information and

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Broadcasting) to which he would not agree to transfer and also listed those to which he would be willing to go. He also made it a condition of transfer that Personnel Division must also transfer one of his senior officers. To cut a long story short, the plaintiff finally moved on 15th September, 1977, to his new ministry after his former ministry had caused his name to be deleted from their pay-roll and added to that of the new ministry, a matter over which the plaintiff protested. However, it should be pointed out that the plaintiff moved after the Public Service Commission had already

directed his former ministry to suspend him and to prefer three charges. He was duly suspended with effect from 15th September, 1977, and the three charges levelled against him by his former ministry, acting on the instructions of the Public Service Commission, were these:

- "(a) Statement of Offence
Insubordination

Particulars of Offence

In refusing to transfer to the Ministry of Information Broadcasting and Tourism, you disobeyed lawful orders of your senior officer contrary to General Order D1 (a). I attach herewith photostat copies of your letter dated 3rd August 1977 and 10 August, 1977 to confirm your refusal to transfer as lawfully directed by me.

- (b) *Statement of Offence*
Misconduct
Particulars of Offence

You lied to me that you reported for duty in the Ministry of Information, Broadcasting and Tourism on 18th August, 1977, when, in fact, you are said to have reported to that Ministry on 15th September, 1977, the date on which you had been suspended from the performance of your duties. I attach herewith a copy of my minute no. MIBT/53/9/4 from the Permanent Secretary, Ministry of Information Broadcasting and Tourism stating that you reported to them on 15th September, 1977.

- (c) *Statement of Offence*
Absence without leave.
Particulars of offence

During the period 18th August, 1977, to 14th September, 1977, you absented yourself from duty without any leave, contrary to the Provisions of General Order D. 7. Your allegation that you reported to the Ministry for Information Broadcasting and Tourism on 18th August 1977 has not been supported by the Ministry who have advised me that you reported to that Ministry only on 15th September 1977."

The plaintiff had been suspended without pay and according to the documents from the Public Service Commission which are on record, this was in accordance with Regulation 34 (3) of the Public Service Commission Regulations, as amended by Statutory Instrument No. 250 of 1973 which authorises the withholding of the entire salary when an officer has absented himself without leave for more than ten days.

The plaintiff tendered an exculpatory statement which was duly considered by the Public Service Commission which decided that he be discharged from employment. The plaintiff sued. The learned trial commissioner found that although the plaintiff had earlier refused to transfer, he finally accepted the transfer and actually transferred to his new ministry before the discharge. The

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learned trial commissioner further considered that discharge was an excessive penalty and that the Public Service Commission ought to have imposed a less severe punishment since the plaintiff had

finally reported for duty before such discharge. The learned trial commissioner also found that although the plaintiff had absented himself from duty without leave, this was understandable as he had suffered bereavements and must have forgotten to file leave forms in the agony of the moment. By this finding the learned trial commissioner implicitly rejected the plaintiff's contention that he was on leave during the period complained of. We add only that the explanation and the arguments raised to this effect on this appeal that he was on leave from 1st August 1977 3rd to October 1977, was in the teeth of all the evidence including the plaintiff's own evidence, which was that he reported for duty right in the middle of the alleged leave. Furthermore, no such defence was offered to the Public Service Commission. The learned trial commissioner ordered that the plaintiff be reinstated and paid his salary for the affected period as already indicated.

There was a ground of appeal alleging error in ordering the reinstatement, the argument being that this was tantamount to ordering specific performance against the State. By his cross-appeal, the plaintiff concedes that such a mandatory order infringed section 16 of the State Proceedings Act Cap. 92, and instead he requested this court to substitute the same with a declaration regarding the rights of the parties and to declare that the plaintiff's rights were infringed and disciplinary proceedings null and void. The defendant's ground of appeal in this respect must succeed and the cross-prayer will be considered when we come to deal with the other points at issue. For the moment, we mention only that there can be instances when a failure to comply with, or the breach of, the applicable statutory regulations (which are to be found at the back of the Constitution) may result in declaratory relief which may have the effect of continuing the employment: See, for example, *Kangombe v The Attorney-General* (1) and the appellate decision in the same case in *Attorney-General v Kangombe* (2). Since a declaration is discretionary, it will not always follow that a termination in breach of a statute will result in reinstatement: see, for example, *Miyanda v Attorney-General* (3)

Although the plaintiff began his action by writ claiming damages for wrongful dismissal which was extended in his statement of claim to include the relief of reinstatement and payment of salary, it was incumbent upon the learned trial commissioner to have regard to the general principle which was conceded by Mr *Silweya*, that the court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or just or reasonable. In a case such as this, the court ought to have regard only to the question whether there was power to intervene, that is to say, the question whether the Public Commission had valid disciplinary powers and, if so, whether such powers were validly exercised. In this regard, there was no justification for the learned trial commissioner to have expressed the opinion that discharge from employment was harsh and that some lesser penalty should have been imposed. As Mr *Phiri* pointed out, there was no dispute that the Public Service Commission had jurisdiction and power over the disciplinary proceedings and

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they can impose the penalty of discharge. The only issue which remains to be considered is whether, in exercising the power which they undoubtedly have, such powers were validly exercised.

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. This brings us to consider the facts as they emerged. However before we do so, we feel that we should dispose of an argument by Mr. *Silweya* to the effect that the proceedings were bad simply because, instead of withholding half of the salary as provided in certain regulations, the defendant withheld the whole salary. As already noted elsewhere in this judgment, this argument was misleading because one of the charges alleged absence without leave for more than ten days in which event Regulation 34 (3), which was introduced by Statutory Instrument No. 250 of 1973, allowed the complete withholding of the whole salary. We should also perhaps suggest that it is advisable for counsel and all those required to refer to the statute laws to keep up with the amendments since it is obvious that Mr. *Silweya's* volume did not reflect the regulation as amended.

With regard to the charge of insubordination, the learned trial commissioner had accepted as a fact that the plaintiff had refused to transfer. The charge is based on letters which he himself wrote. It follows, therefore, that the argument put forward on behalf of the plaintiff to the effect that he had moved by 15th September, 1977, overlooked the fact that the offence had already been committed on the dates of the letters. It also overlooked the fact that the plaintiff was deleted from the payroll of the Ministry of Power Transport and Communications without his consent. The completeness of the offence by that date would perhaps have been appreciated had the plaintiff not laboured under the misapprehension that the disciplinary proceedings were at the instance of his former ministry which was directing the proceedings. With regard to the second charge, that is of misconduct, this related to the fact that the plaintiff lied to his former Permanent Secretary. No defence seems to have been offered capable of rebutting that charge. The third related to absence from duty without leave. The learned trial commissioner accepted this fact but sought to find excuses for the plaintiff on account of the bereavements which he had suffered. We agree with Mr *Phiri* that, it was wrong for the learned trial commissioner, in the face of these facts, in effect to substitute his own conception of what would be a fair way of disciplining the plaintiff. We find that the plaintiff was clearly shown to have committed

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the offences. He was given all his rights to a hearing and that there is accordingly, no basis for awarding him a declaration.

It follows from what we have said that the whole of the defendant's appeal must be allowed. We reverse the judgment below and enter judgment for the defendant, with costs both here and below to be taxed in default of agreement.

Appeal allowed.
