

JAMESON MUNDOMWE HAPEEZA v ZAMBIA OXYGEN LIMITED (1988 - 1989) Z.R. 202 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND CHAILA, J.J.S.
21ST MARCH, 1989.
(S.C.Z. JUDGMENT NO. 24 OF 1989)

Flynote

Employment - Wrongful dismissal - Employment (Special Provisions) Regulations-Dismisal for misconduct without notice to proper officer -Effect of.

Headnote

The appellant was dismissed from his employment for misconduct and was given the reason for his dismissal. He issued a writ in the High Court alleging breaches of the Employment (Special Provisions) Regulations in that he had been dismissed without approval of a proper officer or that the proper officer had not been informed and that his dismissal was null and void. It was agreed no notice of the dismissal had been given to the proper officer. The court found there had been misconduct and dismissed the claim. The appellant appealed. arguing that under Regulation 4 (1) (b) it was necessary for notice to be given to the proper officer when he had been dismissed for misconduct and that without such notice the dismissal was null and void.

Held:

Failure to notify the proper officer of dismissal for misconduct would render the employer liable to prosecution but would not affect the validity of the dismissal.

Cases referred to:

- (1) Lengwe Mubanga v Zambia Tanzania Road Services Limited (1987) Z.R. 43
- (2) Francis v Municipal Councillors of Kuala Lumpur [1962] 3 All E.R. 633
- (3) Ridge v Baldwin [1963] 2 All E.R. 66
- (4) Kang'ombe v Attorney-General (1972) Z.R. 177

Legislation referred to:

1. Employment (Special Provisions) Regulations

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For the appellant: D. M. Luywa, D.M. Luywa.
For the respondent: A. Kinariwala.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal against a judgment of the High Court dismissing a claim by the appellant for a declaration that his dismissal from employment was null and void and in the alternative damages

for wrongful dismissal.

The facts of the case were that the appellant was employed as a store-keeper by the respondent, and in July 1982, he was suspended on suspicion of having taken part in a fraud against the respondent. He was told that he was suspended while investigations were being carried out. After these investigations the respondent alleged that the appellant had been involved in the fraud, and, as a consequence, he was dismissed for misconduct. The appellant issued a writ against the respondent claiming a declaration that his dismissal was wrongful and null and void, and in the alternative, damages for wrongful dismissal. In his statement of claim stating the facts of his employment and dismissal, the appellant averred that he had not been involved in any misconduct.

In an amended statement of claim the appellant put forward a further claim that, as he was engaged at the relevant period during which the Employment (Special Provisions) Regulations applied to him, he had been dismissed without the approval of a proper officer under the provisions of regulation 4 (1) (a) in the alternative, that the proper officer had not been informed of his dismissal immediately thereafter.

At the trial of the action the appellant gave evidence in chief to the effect that he was a store-keeper, and that when he was dismissed he was not given grounds for his dismissal, the letter of dismissal was not copied to anyone and the labour officer was not notified and had not been informed of his dismissal. In cross-examination he gave evidence as to his duties as a store-keeper.

In reply two witnesses were called by the respondent. The first of such witnesses could not give any helpful evidence and his evidence was ignored by the trial commissioner. The second defence witness, however, a depot supervisor in charge of the appellant at Kitwe, gave evidence that there had been a fraud on the respondent as a result of which goods and money had been lost, and he specifically said that the appellant was involved in the fraud as a result of which he was later dismissed. In cross-examination this witness agreed that the appellant physically had nothing to do with the Chingola branch of the respondent's company from where the goods had been fraudulently taken.

There was a bundle of documents in which a letter terminating the appellant's service was included. This letter, after stating that it had been found necessary to terminate the appellant's service, set out in four paragraphs the reasons for the appellant's dismissal, namely the fraud alleged to have been committed by the appellant.

In his judgment dismissing the claim, the learned trial commissioner said that he was quite satisfied on the evidence that there was evidence of misconduct by the appellant and that such evidence had not been rebutted by the appellant. Dealing with the claim that there had been a breach of

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regulation 4 of Employment (Special Provisions) Regulations, the learned trial commissioner found that the failure to report the plaintiff's dismissal to the labour officer when such dismissal was based on misconduct did not in itself make such dismissal null and void, because there were penal sanctions imposed by the regulations. It was for this reason that the learned trial commissioner

dismissed the appellant's claim.

Mr Luywa on behalf of the appellant argued, as he did in the court below, that the dismissal was null and void and that in any event there was no evidence of misconduct to justify the dismissal of the appellant for that reason. He cited Regulation 4 (1) (a) which reads as follows:

- "4 (1) No person shall dismiss or otherwise terminate the employment of any employee irrespective of whether previous notice of such dismissal or termination has been given to the employee or not unless:
- (a) approval of the proper officer in writing has been given to such dismissal or termination:
or
 - (b) the employee is dismissed on the grounds of wilful disobedience, misconduct, neglect or incompetence and
 - (i) The person by whom the employee is dismissed would, but for the provisions of these regulations, have been entitled to dismiss the employee on such grounds summarily and without due notice of the payment of wages in lieu of notice: and
 - (ii) The person by whom the employee is dismissed notifies the proper officer forthwith of the fact of such dismissal and the circumstances surrounding it.
- (2) Any person who contravenes the provisions of sub-regulation (1) shall be guilty of an offence."

It was conceded by Mr Kinariwala on behalf of the respondent that there had been no notification of the respondent's dismissal. Mr Luywa argued that the first words of the regulation, that is, 'no person shall dismiss or otherwise terminate the employment' affect the application of the whole of that regulation, and the result, he argued, is that, if there is a purported dismissal under (b), that is, when an employee is purportedly dismissed for misconduct, the first words of the regulation affect the situation, making it impossible for the dismissal to take effect unless the proper officer is notified forthwith. He argued that a dismissal for misconduct without an immediate report to the proper officer subsequently would be null and void. In support of this argument Mr Luywa referred us to a judgment of this court, in *Lengwe Mubanga v Zambia Tanzania Road Services Limited* (1), in which, on dealing with the appeal on a preliminary point, this court held that, on the assumption that there had been no approval of a proper officer before dismissal under regulation 4 (1) (a), the regulation must not be ignored, and that it had been wrong for the learned trial judge in that case to have found that the regulation need not be complied with. In that case we remitted the matter to the judge for him to decide the issue of compliance with regulation 4 and for him to use his discretion, if necessary, whether or not to make a declaration which would have the effect of re-instating the appellant in that case having regard to the principle, set out in the case of *Francis v Municipal Councillors of Kuala Lumpur* (2), that such declarations are rarely made.

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We also referred to the case of *Ridge v Baldwin* (3) relating to the re-instatement of dismissed employees and a similar Zambian case of *Kang'ombe v The Attorney-General* (4).

Mr. Luywa further argued that there was in fact no justification for the dismissal of the appellant for misconduct, and it followed therefore, he argued, that the approval of the proper officer should have been obtained under regulation 4 (1) (a). In support of this argument our attention was drawn to the

evidence of the second defence witness, who gave evidence that the appellant did not collect the goods and could not prepare invoices for Chingola, from where the goods which were the subject of the fraud had been obtained. Mr. Luywa also argued that the letter of dismissal setting out the particulars of the fraud alleged to have been committed by the appellant was not evidence of that fraud.

In this last respect Mr. Kinariwala replied that he did not seek to put forward the letter as evidence of the fraud, but as an indication that the appellant was told the reasons for his dismissal which justified the learned commissioner's findings that the appellant had not been speaking the truth when he said that he had not been given such reasons. Mr. Kinariwala supported the findings by the learned trial commissioner and argued that even had a report been made to the labour officer under regulation 4 (1) (b) there was no action that the labour officer could have taken, under the regulations or the Act itself, in order to change the situation, in the event that he did not agree with the dismissal of the appellant. Mr. Kinariwala further maintained that the evidence of the second defence witness that the appellant had been involved in the fraud was not affected by anything that the witness said in cross-examination about the appellant's access to Chingola.

In deciding this appeal, it is necessary for this court to construe the effect of regulation 4 (1) (b) (ii). In so doing we must bear in mind the intention of the legislature in enacting this regulation. Applying that principle to this case we note that the legislature saw fit to provide for the procedure to be allowed in two distinct circumstances of dismissal. We accept that it was the purpose of the legislature, at a time of shortage of employment to protect innocent workers from being made redundant. We also accept that regulation 3 (1) (a), which requires approval of the proper officer before any ordinary dismissal, is there for the purpose of such protection, and a failure to obtain the appropriate approval of the proper officer in such a case would render such dismissal contrary to the law. As we have said before, regulation 4 (1) (a) protects innocent employees from being made redundant without the approval of the appropriate officer. Regulation 4 (1) (b) (ii), however, does not relate to innocent employees. It provides for the procedure to be adopted in the case of the employees who are guilty of misconduct. If there are insufficient grounds for such dismissals the courts are always available to put matters right. Indeed, the appellant in this case has asked the court to find that there was no misconduct on his part. In our view the legislature did not intend that a failure to notify the proper officer after a justifiable dismissal of an employee for misconduct should make such dismissal null and void. The fact that the legislature saw fit to provide a remedy to employers by way of application to the Employment Review Tribunal

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to approve any matter which a proper officer has refused to approve under regulation 4 (1) (a), but made no specific provision for application for remedies by employees, indicates that the legislature did not intend to provide any remedies additional to those already available at common law otherwise to an employee dismissed for misconduct. In our view a failure to notify the proper officer after the dismissal of an employee for misconduct would render any employer liable to a penalty if the authorities saw fit to prosecute, but would not affect the validity of the dismissal. This ground of appeal, therefore, fails and we decline to find that the dismissal of the appellant was null and void for failure to comply with regulation 4 (1) (b) (ii).

As to the argument on the facts, we have already noted that the evidence-in-chief of the appellant did not in itself deny any misconduct but concentrated solely on whether or not notice had been given to the proper officer. As to the evidence of the second defence witness, we cannot accept the argument of Mr. Luywa that the evidence indicated that because the appellant conducted no business in Chingola he could not have been involved in the fraud as alleged by the respondent. On the contrary we are satisfied that the evidence of fraud was substantiated by the evidence of the second defence witness, and such evidence was not rebutted by the appellant. In this respect, therefore, we find that there was no misdirection by the learned trial commissioner.

Having regard to our finding both on the question of the construction of regulation 4 (1) (b) (ii) and on the facts, the other cases cited by Mr. Luywa have no relevance.

For the reasons we have given the appeal is dismissed with costs to the respondent.
Appeal dismissed.
