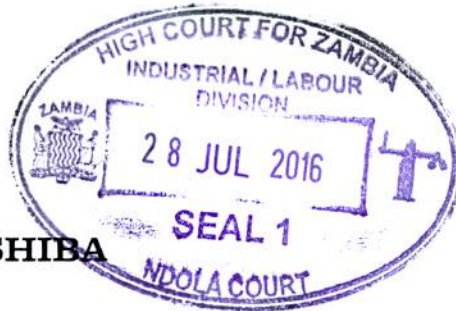


**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA**



COMP/14/2015

BETWEEN:

CHRISTOPHER CHISHIBA

COMPLAINANT

AND

TOTAL ZAMBIA LTD

RESPONDENT

BEFORE:

**Hon. E.L. Musona
JUDGE**

MEMBERS:

- 1. Hon. W.M. Siame**
- 2. Hon. J. Hasson**

For the Complainant : Mrs I.C. Banda of Messrs Legal Aid Board

For the Respondent : Mr. E.C. Banda S.C of Messrs E.C.B Legal Practitioners

JUDGMENT

Date : 28th July, 2016

Cases referred to:

- 1. William Ng'uni v Kitwe City Council 2005 ZR**

This Complaint was filed by M/Christopher Chishiba against Total Zambia Limited. We shall, therefore, refer to M/Christopher Chishiba as the Complainant and to Total Zambia Limited as the Respondent which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

- (a) a declaration that the dismissal was unlawful and wrongful;
- (b) damages for unlawful and wrongful dismissal;
- (c) damages for loss of expectation of income, embarrassment, pain and anguish;
- (d) any other relief which the court deems fit and just under the circumstances;
- (e) interest;
- (f) costs.

The duty for this court is to ascertain whether or not the Complainant has proved his claim.

The Complainant gave evidence on his own behalf. We shall refer to the Complainant only as CW.

CW told this court that he was employed by the Respondent on 15th December, 2008 as a Trainee Depot Manager. He was appointed Depot Manager for Ndola in April, 2010.

On 20th August, 2014, the Complainant received an e-mail from Mr. Sihan Cengen who was Operations Manager asking if there was a way to dispose of used drums. According to CW, the history is that the Respondent had opened a depot at Solwezi for Jet A1 fuel. Before finding a building in Solwezi the Respondent started trading using drums because the Respondent did not have storage facilities for fuel. These drums have a life circle after which they would be disposed of. The drums would be sold to staff and the selling point was Ndola depot. Forty five (45) drums were brought to Ndola and later another forty five (45) drums were again brought to Ndola. These added up to ninety (90) drums all of which were used empty drums. Mr. Sihan Cengen who was Operations Manager sent an e-mail to the Complainant to find a way of getting rid of those empty drums. Based on that e-mail, the Complainant purchased thirty (3) empty drums at K25.00 each and paid K750.00 for those thirty (30) empty drums but collected forty five (45) empty drums. That was on 28th August, 2014. On 10th September, 2014, the Complainant consigned those forty five (45) empty drums to Masala Market within Ndola using a truck which the Respondent had a transportation contract with. He paid for the rest of the drums on 17th September, 2014.

Some of those drums were later sold at Masala Market.

Later, those drums were identified by personnel for the Respondent at Solwezi. They were loaded with AV Gas in Puma premises at Solwezi but still branded 'Total'. Those Total branded

drums were traced to Ndola and as the same which the Complainant had consigned to Masala Market.

The Complainant (CW) was then charged with two (2) counts. These were:

1. Breach of code of conduct or code of ethics.
2. Unauthorized removal of company property or conspiracy to remove company property without authority.

A disciplinary hearing was held and the Complainant (CW) was dismissed after being found guilty on those charges. He appealed against his dismissal but lost the appeal.

During cross examination the Complainant admitted that what he bought and paid for were ex additive empty drums but he collected Jet A1 empty drums. This is evidenced by a delivery note dated 5th September, 2014 which was produced by the Complainant (CW) and exhibited as 'CC3'. It is also evidenced by a receipt dated 28th August, 2014 also produced by the Complainant and exhibited as 'CC3' as well. These 'CC3' exhibits show that the Complainant paid for ex additive drums yet the Complainant (CW) collected Jet A1 empty drums. There is no dispute that the Complainant collected Jet A1 empty drums instead of ex additive empty drums but this was attributed to the cashier who allegedly did not feed the computer system with "Jet A1" information but instead relied on the old input of "ex additive" drums which was already fed into the computer system.

The Respondent called one witness. We shall call this witness as RW.

RW was M/Mfula Kafula Ernest a Human Resource and Corporate Affairs Manager for the Respondent.

The evidence for RW was that the Respondent is part of Total group whose activity is largely distribution, marketing and selling of petroleum products. The Respondent has a Head Office in Lusaka, one office in Ndola and distribution depots across the country.

RW further stated that the Complainant was a Depot Manager at Ndola. The Complainant was charged with breach of code of ethics and unauthorized removal of company property. A disciplinary hearing which was held found the Complainant guilty of those allegations and was accordingly dismissed. When the Complainant appealed against dismissal the appeal was dismissed. RW informed this court that on 20th August, 2014 an e-mail was sent to the Complainant by Mr. Cengen who was the Operations Manager asking the Complainant to find a way of disposing the used Jet A1 drums. By then, the Respondent had opened aviation facilities in Solwezi to serve aviation customers with Jet A1 fuel. Before storage tanks were put in place the Respondent made a decision to start operations and used specifically coated drums for the storage of Jet A1 fuel which is used in planes with turbo engines. These drums can only be used once because epoxy coat inside these

drums is damaged after a single use. Upon receipt of that e-mail the Complainant purchased the drums without getting back to his supervisor who was the author of that e-mail. He purchased them as ex additive drums but instead got the Jet A1 fuel empty drums. He paid for 30 empty ex additive drums but instead collected 45 Jet A1 used drums. Some of these drums were later discovered at Solwezi Airport filled with Aviation gas (AV gas) while still labelled Jet A1 fuel within the same aviation facility at Solwezi. At Solwezi, there were also similar drums labelled Jet A1 fuel which actually contained Jet A1 fuel. This meant that the same type of drums all labelled Jet A1 fuel, some in fact contained AV gas instead. The risk posed with this situation is that if an operator got a drum labelled Jet A1 fuel but in fact contained AV gas this AV gas would end up being put in a Jet A1 propelled plane and the consequences would be fatal.

RW denied that the e-mail from Mr. Cengen to the Complainant was authorization by Mr. Cengen to the Complainant to dispose of Jet A1 empty drums.

We have gone through the whole of the evidence in this case.

We are satisfied that Mr. Cengen originated an e-mail to the Complainant asking the Complainant to find a way to dispose of the Jet A1 empty drums. That e-mail did not authorize the Complainant to dispose of those drums. It was a request to the Complainant to help find a way to dispose of those drums. We have looked at that

e-mail. It was produced and marked 'CC2'. That e-mail reads as follows:

"We cannot use those drums more than one time. If you can check inside the drums it is obvious to see that epoxy coat damaged partially already.

Christopher, pls kindly help us to find a way of dispose those drums."

Upon receipt of that e-mail the Complainant proceeded to purchase the drums himself without reverting to Mr. Cengen with a suggestion of how to dispose of those drums as suggested in the e-mail. There was, therefore, clearly no authority to sell those drums. This is where he was charged with breach of code of conduct or ethics.

We have also noted that the Complainant paid for 30 empty drums but exited the Respondent's premises with 45 of such drums. The excess 15 drums was not paid for. This removal of the 15 drums is what fits the charge of unauthorized removal of company property or conspiracy to remove company property without authority. The excess 15 drums were paid for long after their removal from the Respondent's premises.

Having analyzed the evidence in this case we must now determine the relief sought.

a. **Declaration that the dismissal was unlawful and wrongful**

This claim is in two (2) parts. The two (2) parts are (1) unlawful and (2) wrongful.

1. Unlawful dismissal

Unlawful dismissal is dismissal which is in breach of a Statutory Provision. The Complainant did not show which Statutory Provision was breached

On those basis this claim fails.

2. Wrongful dismissal

Wrongful dismissal is dismissal which is in breach of a contract of employment or dismissal which is anchored on allegations which were not proved against the Complainant.

We have seen no breach of any contractual provisions in this case.

We have looked at the charges which were preferred against the Complainant by the Respondent. The first charge was breach of code of conduct or code of ethics. This charge was proved because the Complainant breached the code of conduct when while occupying the most senior position as Manager for Ndola Depot he sold the empty drums to himself without the authority of his supervisor at

Head Office. We have looked at the disciplinary procedure code which was exhibited at page 22 of the Respondent's bundle of documents. According to that code, the offence of breach of code of conduct or ethics does not carry the penalty of dismissal on first breach. The penalty for first breach is written warning. Dismissal is the penalty for second breach. The Complainant was a first offender. A dismissal based on this charge for a first offender is wrong.

The second charge was unauthorized removal of company property or conspiracy to remove company property. This charge was proved against the Complainant because he paid for 30 empty drums. He, therefore, had authority or implied authority to remove those 30 empty drums from the Respondent's premises and custody because they had impliedly become his property. However, we note that the Complainant removed from the Respondent's custody and took ownership of 15 excess empty drums which he did not pay for. The taking of those 15 excess empty drums was unauthorized because he had not paid for them. He paid long after he had taken the drums. We have seen no evidence to prove or suggest that the Complainant had authority to remove from the Respondent's custody the 15 excess empty drums without prior payment. This is what constituted unauthorized removal of company property.

We have looked at the disciplinary code, we have noted that the charge of unauthorized removal carries a penalty of dismissal on first breach. Since this charge was proved against the Complainant by the Respondent, a dismissal based on this charge is valid even if the Complainant was a first offender. On this basis the claim for wrongful dismissal fails.

b. **Damages for Unlawful and wrongful dismissal**

We have already ruled that there was no unlawful dismissal. We have also already ruled that the dismissal based on the charge of unauthorized removal of company property was valid. We have also given the reasons above.

On those basis the claim for damages for unlawful and wrongful dismissal fails.

c. **Damages for loss of expectation of income, embarrassment, pain and anguish**

A court cannot award damages for loss of expectation of income in the circumstances of this case because the Complainant did not work for that income. Expectation of un-earned income is not sufficient reason for a court to grant an award of damages solely on those basis. We have looked at the case of **William Ng'uni v Kitwe City Council (1)**. In that case the Supreme Court held that it is illegal to award a salary or

pension benefit for a period not worked because such an award has not been earned and can properly be termed as unjust enrichment. The claim for damages for loss of expectation of income, therefore, fails. The Complainant also claimed for damages for embarrassment, pain and anguish. This claim also fails because, firstly, the Complainant has not succeeded on the whole of his complaint and, secondly, because the Complainant did not lead evidence to prove the nature and extent of the embarrassment, pain and anguish suffered. It is not enough just to make a claim of this nature as the Complainant did, the claimant should lead evidence to prove the claim, this, the Complainant did not do. It follows, therefore, that the claim for embarrassment, pain and anguish fails.

d. **Any other relief which the court deems fit and just under the circumstances**

We have seen no other relief to deem fit and just under the circumstances.

e. **Interest and costs**

The net result is that the Complainant has lost his case in total. There is, therefore, no cause for interest and costs.

Leave to appeal to the Supreme Court within 30 days from today is granted.

J12

Delivered and signed at Ndola this the 28th July, 2016.



Hon. E.L. Musona
JUDGE



Hon. W.M. Siame
MEMBER



Hon. J. Hasson
MEMBER