

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/44/2014

**HARARE, 24 JULY, 15 OCTOBER 2013 &
JANUARY 2014**

CASE NO LC/H/183/201331 31ST

In the matter between:-

MUSA NDHLOVU

APPELLANT

Versus

AFRICAN SUN

RESPONDENT

Before the Honourable L Kudya : Judge

For the Appellant T Mberi (Legal Practitioner)

For the Respondent A K Maguchu (Legal Practitioner)

KUDYA J:

This is an appeal against the decision of the Respondent Company's Appeals Committee which confirmed the Appellant's dismissal following allegations of breaching the Respondent's Code of Conduct.

Facts of the case are that the Appellant who was in the Respondent's employ as a front office manager based at Great Zimbabwe Hotel Masvingo was charged with contravening s 2 and 7 of the respondent's Code of Conduct which reads:

Offence Number 2 as (Code of Conduct)

"Any act, conduct or omission inconsistent with the fulfilment of the express/implied conditions of his or her employment".

Offence Number 7 as (Code of Conduct)

"Any act or omission which leads to gross financial loss."

She appeared before the Disciplinary Committee which found her guilty of the alleged infractions and dismissed her from employment. She was said to have failed to take adequate

measures to address the problem of guests who had checked into the hotel using an RTGS cheque which eventually was returned for lack of funds to meet it.

The problem had been brought to her attention a day after it was discovered that the guests had been checked in irregularly taking into account the standing instruction which was available then that on no account were guests to be accommodated on uncleared RTGS documents.

The guests in question left unceremoniously without settling their dues thus prejudicing the hotel to the tune of \$1260-00. Aggrieved by her dismissal, the Appellant appealed internally without success until she lodged the instant appeal which is the subject matter of this judgment.

Her grounds of appeal are as follows:

- 1) The Respondent erred by charging her with two offences instead of one since the evidence to prove one was the same evidence to prove the other one. To that extent the impression created was that the offence was very serious when it was not so.
- 2) The Respondent erred to dismiss the Appellant on offence number 2 yet a written warning could have sufficed as a penalty on that charge especially if regard had been had to the mitigation tendered on the Appellant's behalf.
- 3) The Respondent erred to conclude that gross financial loss had been suffered by it as a result of the Appellant's actions/omissions.

In the Appellant's view that made the offence appear more serious than what it actually was.

- 4) The Respondent failed to give due weight to the mitigation given by the Appellant to the extent that it ended up dismissing her from employment. If the Respondent had noted that the Appellant had been absent when the guests were checked in, there was no mechanism to verify the authenticity of the RTGS and the option which the Appellant could have employed to solve the problem would have been against hospitality practice hence she was left without any option at all.

In response to the appeal the Respondent maintained that:

- 1) The Appellant was properly charged with two separate offences as the offences are distinct from each other. The first one merely touched on the Appellant's general performance of her duties whereas the second one referred to the actual loss which was occasioned by the Appellant's conduct/omission.
- 2) The Respondent did not err to dismiss the Appellant since the penalty of dismissal was also competent on the charges in question notwithstanding the mitigation which was proffered by the Appellant.
- 3) The gravity of the loss which was suffered by the Respondent could not be measured against the Appellant's earnings hence there was no misdirection in the light of that finding on the loss to the hotel.
- 4) The Appellant's mitigation was duly considered but dismissal was still found to be the appropriate penalty given the facts obtaining in the case in question.

In the result the Respondent prayed that the appeal be dismissed with costs.

A reading of the grounds of appeal and the responses thereto demonstrate that only two major issues fall for decision in this matter. These are:-

- (1) Whether there was an improper splitting of the charges and if there was the consequences of such on the case; and
- (2) Whether the dismissal penalty was appropriate given the cumulative effect of the facts of the case in particular, the mitigatory features which were raised by the Appellant before the Disciplinary Committee.

On splitting of charges, the Respondent demonstrated in its heads that, there was no split if one takes into account that the first charge of conduct inconsistent could still be a stand-alone charge without the pleading of the financial loss to the hotel.

The Court is persuaded by that argument given the fact that, in essence the employer's complaint on the first count was that by not taking the necessary steps to address the problem which had been brought to her attention the Appellant thus acted contrary to what was expected of her position.

As regards the loss, the argument was now that, due to the Appellants failure to act per her job properly the Respondent was exposed to the loss which it suffered. Whilst the

offer to make good the loss which was suffered by the hotel is a laudable move it however, did not detract from the fact that the Appellant's conduct had occasioned financial loss to the Respondent. To that extent, the Court is of the view that there was nothing irregular by the Respondent charging the Appellant with the two offences.

In any event, even assuming for a while that such charging was irregular the next question to be answered is what prejudice was suffered by the Appellant. A reading of the charges in question shows that either of them carried dismissal as a possible penalty hence it is neither here nor there that they were split or that only one of them could have been laid down as the only charge.

A reading of the facts of the case demonstrates clearly that the RTGS problem was brought to the Appellant's attention at the earliest convenient time and at a time where she was privy to the instruction that no uncleared RTGS had to be used given the prevalence of related frauds during the festive era. Armed with all that, it was surely inexcusable for the Appellant to go ahead and do nothing about the problem which had been brought to her attention let alone confer with the guests on the issue to try and minimise the harm that could ensue from the transaction in the event that it was found out that the RTGS was not regular.

In the result, the Court is satisfied that no good case for appeal has been made on the issue of the charges. The appeal based on these grounds should therefore fail.

Turning to the dismissal argument, the law is clear that the meting out of a penalty is the prerogative of the employer. See **Malimanji vs CABS 2007 (2)77 (SC)**.

Whilst dismissal is not mandatory where it is provided for See **NEI Zimbabwe vz Makuvaza LC-H-248-04**, if the employer takes a serious view of the infraction complained about the Appellate Court is not likely to interfere with such a penalty unless, it is shown that, the meting out of such a penalty was activated by malice or bias or it demonstrates a clear abuse of discretion by the employer.

In the instant case, it is clear that, even though the Appellant had worked blamelessly for a long period of time and the loss could be styled minimal she committed the offence in circumstances where she could have acted more diligently if she had decided to do so.

She was well aware of the instruction against acceptance of uncleared RTGS payments for bookings and when the error occurred it was brought to her attention. She however, did not do anything to at a least avert the loss or minimise it. The serious view taken by the employer of her misconduct can thus not be faulted. To that extent the appeal ground on dismissal as a penalty should also accordingly fail.

All the appeal grounds being devoid of merit, the appeal should consequently be dismissed and the Appeals Committee's decision to dismiss the Appellant should be upheld accordingly.

IT IS ORDERED THAT:

- 1) Appeal being devoid of merit it be and is hereby dismissed in its entirety.
- 2) The Appeals Committee's decision to dismiss the Appellant is to stand.
- 3) Each party to bear its own costs.

L KUDYA
JUDGE – LABOUR COURT

Hogwe, Dzimirai & Partners, Appellant's Legal Practitioners
Dube, Manikai & Hwacha, Respondent's Legal Practitioners