

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/52/14

HELD AT HARARE 17TH JANUARY 2014

CASE NO LC/CON/H/72/13

& 31ST JANUARY 2014

In the matter between:-

AUXILLIA T SAMURIWO

Appellant

And

CITY OF HARARE

Respondent

Before The Honourable B.T. Chivizhe, Judge

For Appellant

Mr S Katsunga (Harare Municipal Workers Union)

For Respondent

Ms S Zeure (Legal Officer)

CHIVIZHE, J:

The matter was placed before me as an application for condonation of late noting of an appeal.

The background facts to the matter are as follows;

The Appellant was employed by the Respondent as Senior Clerical Officer (Grace 11) based at Glen View Revenue at the time of alleged misconduct.

According to Respondent, Appellant absented herself from work without authorisation from 4th May 2008 until 21st June 2010. She presumably went to South Africa during the period. The Appellant resurfaced on the 15th of June 2010. She wrote a letter to the Respondent (copy produced by consent

and marked Annexure A in these proceedings) requesting to be re-engaged. On 17th June 2010 the Respondent responded to Appellant advising her to resume duty on Monday 21 June 2010. The Appellant accordingly reported for work. On 20th of January, 2011 the Appellant was charged of 'absenting' herself from duty without lawful authority and a breach of Part VI, category four, clause 11.5 () of the relevant Collective Bargaining Agreement i.e. Harare Municipal Undertaking (Employment Code of Conduct) Statutory Instrument 171 of 2010. She pleaded guilty to the charge and was dismissed. The Disciplinary Committee found her guilty of the charge and imposed a dismissal penalty.

The Appellant was aggrieved and referred a complaint of unfair dismissal to Designated Agent. Upon failure to conciliate the matter was then referred to compulsory arbitration. The issue for determination was whether or not the Appellant was unfairly dismissed.

It was Appellant's submission firstly that she was wrongly charged under Harare Municipal Undertaking (Employment Code of Conduct) Statutory Instrument 171 of 2010 as the misconduct took place in 2008 she ought to have been charged under Statutory Instrument 15 of 2006 as by then ZINWA had no registered Code of Conduct. Secondly it was Appellant's submission that the Respondent by re-engaging her Respondent condoned the misconduct and finally the Respondent should not have charged her as the matter had prescribed in terms of Section 94 of the Labour Relations Act [Chapter 28:01]. The Respondent did not agree with all three submissions.

The Arbitrator in his award found that the Appellant had pleaded guilty to the charge; that the two year period had not expired and Respondent had a

right to evoke the provisions of its own Code of Conduct; the Appellant had during her absence been transferred back to City of Harare Water Department therefore she was properly charged under provisions of Statutory Instrument 171 of 2010. The Arbitrator consequently confirmed Appellant's dismissal from Respondent's employment. Dissatisfied with the arbitral award the Appellant intends to appeal the decision. Because however the appeal was noted six months out of time the Appellant has placed the present application for condonation before the Court. The application is opposed.

In determining where there is good cause for a delay in noting an appeal the court has to consider the following factors; Extent of the delay; reasonableness of the explanation; prospects of success on appeal if leave to appeal out of time is granted; importance of the case; conveniences of the Courts; and avoidance of the unnecessary delay in the administration of justice.

See **Kombayi v Berkhou** SC 30/1988 and **Bishi v Secretary for Education** 1989 (2) ZLR 240 (H) at page 243 B.

I am satisfied upon perusal of the record that the period of delay is not inordinate, the explanation tendered for the delay is reasonable. In my view Appellant also has good prospects of success on appeal. The employer by its conduct may have clearly waived its right to discipline the Appellant considering that it took a whole year after re-engaging Appellant to level charges of misconduct. On that basis I would therefore grant the application for condonation of late noting of appeal.

Harare Municipal Workers Union, Appellant's Representative