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Judgment No. SC 71/04

Civil Appeal No. 165/03

AUSTIN SIMUDZIRAYI v

CFX BUREAU DE CHANGE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JULY 8 & SEPTEMBER 10, 2004

The appellant in person

M Gwaunza, for the respondent

MALABA JA: This is an appeal from a judgment of the Labour Relations Tribunal ("the Tribunal") delivered on 15 May 2003 dismissing an appeal by the appellant against his dismissal from employment by the respondent ("CFX").

The appellant ("Austin") was employed by CFX as a teller. CFX was in the business of buying and selling foreign currency. On 9 February 2000 Austin used a wrong rate of exchange to buy foreign currency in the course of his employment from a customer, resulting in actual prejudice of $3 700 to CFX. He later tampered with the record of the transaction by altering the type of foreign currency purchased from British pounds to United States dollars to create the impression that the correct amount in local currency had been paid out. The overpayment and alteration of the record of the type of foreign currency purchased was discovered by the accounts department.

On 11 April 2000 Austin appeared before a designated officer charged with a Group III offence (dishonesty and other related offences) as defined in the National Employment Code for the Commercial Sectors (Statutory Instrument 45 of

1993) ("the Code"), it being alleged that he had on 9 February 2000 deliberately falsified records and given false or incorrect information on the transaction he had conducted. Although he argued that the use of a wrong foreign exchange rate was a result of a genuine error, Austin was nonetheless found guilty on 12 April 2000 and given a final written warning which was to remain valid for twelve months.

On 5 December 2000 Austin bought US$120 in the course of his employment from a customer using a wrong rate of exchange. The official rate which he ought to have used was Z$52.5 to one US dollar. Had he used this rate, he would have bought the foreign currency for Z$6 300. Instead, Austin bought the foreign currency at his own rate of exchange of Z$120.025 and paid out $14 403, thereby prejudicing his employer of $8 103.

On 7 December 2000 Austin purchased FRF (French francs) 1 000 in the course of his employment at the rate of Z$30.74 and paid an amount of $30 740. The rate of exchange used was of his own creation. The prejudice to CFX was $23 610.

On 20 December 2000 Austin appeared before a designated officer facing two charges under the Code of having committed two Group III offences, the allegations being that on 5 and 7 December 2000 he had unlawfully taken the employer's money with the intention of depriving CFX permanently. At first, he said the overpayment he made on 5 December 2000 was as a result of a genuine mistake. When he realised that there could be no mistake when he fixed the exchange rate himself, he suggested that the overpayment could have resulted from the calculator he was using developing a technical fault. On realising again that this explanation was nonsensical, he suggested yet another foolish answer, to the effect that he might have failed to clear a previous figure.

On the overpayment he made on 7 December 2000, Austin had said

that he had used a rate used for Swiss francs ("CHF") by mistake. But it was clear that the CHF exchange rate for the previous day was $30.45. The CHF exchange rate for the day in question was $30.84. He had not used either of these CHF exchange rates, but used the exchange rate he fixed on his own at $30.74.

The designated officer found him guilty of the offences charged. Because Austin was still serving the final written warning imposed on 12 April 2000, he was liable under the Code to dismissal.

The designated officer suspended him from duty without pay whilst submitting the record of the evidence gathered by him and the summary of facts found and his decision to the employer. On 10 January 2001 the employer upheld the decision of the designated officer and dismissed Austin from employment with effect from 20 December 2000.

Austin then took his case through each stage in the system provided under the Code for appeal by a party dissatisfied with a decision of a body hearing his case until he reached the Tribunal on 4 December 2002.

The question for determination by the Tribunal was whether or not CFX had established on a balance of probabilities that the overpayments in local currency for the foreign currency purchased by Austin on 5 and 7 December 2000 were acts of dishonesty on his part, designed to deprive CFX permanently of the money and not results of genuine mistakes in the execution of his duties. The Tribunal, in dismissing the appeal, held in effect that Austin had deliberately created the overpayments in order to steal the money from his employer.

It is clear from the grounds of appeal that the contention is that the finding by the Tribunal was on the evidence grossly unreasonable. The appellant's position is that the evidence adduced by CFX established nothing more than that the overpayments were a result of genuine mistakes in the use by him of wrong foreign currency exchange rates. It was in the light of the contention by the appellant that the determination by the Tribunal was irrational, in that it was unsupported by the evidence adduced, that we accepted that the appeal raised a question of law and entertained it.

A perceptive examination of the evidence indicates that CFX proved that there was in each case of overpayment a taking of its money by Austin which he gave to the customer, who was not entitled to it and for the payment of which it owed

the customer no obligation.

Austin was under a duty to his employer to avoid the overpayment he made in each case by using the prevailing official exchange rate for the day to purchase the foreign currency. The credible evidence was that he did not use the official exchange rate in each case and did not suggest that he did not know what it was. The explanation he gave, that the overpayment made on 5 December 2000 might have been a result of the calculator he was using developing a technical fault, was clearly false because the issue was the use of a wrong foreign currency exchange rate and not error in calculating the amount to be paid using a correct exchange rate.

Austin's explanation that on 7 December 2000 he had used the CHF exchange rate was also false, because the CHF exchange rate he would have used was $30.84. If he had been mistaken as to which CHF exchange rate to use, he would, at least, have used the previous day's CHF exchange rate of $30.45. The fact of the matter is that he chose to use his own exchange rate of $30.74. He did not say where he got it from.

It appears to me that the plea that the use of wrong foreign exchange rates should be ascribed to genuine human error in the execution of duty and not to outright dishonesty was, on the evidence, properly rejected by the Tribunal. Austin had no less than four years of experience in performing foreign exchange related duties. He had worked for a commercial bank for two years and had spent two years working for CFX. He had received training in the proper discharge of his duties, so much so that the use of wrong exchange rates to purchase foreign currency on behalf of his employer would have been too obvious a mistake to be committed by an employee of his experience and skill. The only reasonable inference drawn from all the circumstances by the Tribunal, and correctly so for that matter, was that he was dishonest in using the wrong foreign currency exchange rates. He had been shown on a balance of probabilities to have stolen the money from his employer.

The appeal is without merit. It is accordingly dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Wintertons, respondent's legal practitioners