

REPORTABLE (35)

**NATIONAL EMPLOYMENT COUNCIL FOR THE CATERING
INDUSTRY**

v

**(1) RICHARD KUNDEYA (2) PANGANAI DANIEL MARUFU (3)
EPHRAIM TAWANA
(4) WILLIAM MUSIWA**

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA & BHUNU JA
HARARE, NOVEMBER 6, 2015 & AUGUST 18, 2016**

L Madhuku, for the appellant

T Mpofu, for the respondent

BHUNU JA: This is an appeal against the whole judgment of the Labour Court which upheld the arbitration award overturning the decision of the disciplinary committee dismissing the four respondents from employment.

There is no material dispute of facts as most issues forming the basis of this appeal are common cause. The undisputed facts are that the respondents were employed as chief designated agents by the appellant. On 16 August 2012 the appellant gave written notices to transfer the respondents to various work stations in the country with effect from 1 January 2013.

The envisaged transfers were in line with the employer's policy and practice to rotate designated agents after serving in a particular area for a given period. This was meant to promote effectiveness, accountability and exposure of employees to new challenges.

The notice provided the respondents with at least 3 months grace period for them to wind up their business and personal affairs in Harare for a smooth transfer to their respective new work stations.

The respondents were however disturbed and not amused by the impending transfers. They thus vigorously objected to the transfers citing personal hardship and inconvenience. In their concerted effort to resist and abort the intended transfers they roped in the services of lawyers.

Despite the spirited resistance and intervention of lawyers, the appellant insisted on the transfers as ordered. The respondents were however equally adamant and unmoved as they steadfastly refused to obey the employer's lawful orders given in accordance with their respective contracts of employment.

The net result was that when the date of compliance came to pass all the four respondents were not at their new work stations. Their failure to transfer as ordered was in open defiance of the employer's lawful orders given in terms of their respective contracts of employment. The disobedience was wilful and deliberate.

A stalemate having been reached, the appellant charged the respondents with wilful disobedience to a lawful order in contravention of s 4 (b) of the National Employment Code of conduct, S.I. 15 of 2006, alternatively, any act or omission inconsistent with the fulfilment of the express or implied conditions of his or her employment contract in

contravention of s 4 (a) of the statutory instrument. Both offences constitute serious dismissible acts of misconduct.

The disciplinary committee found all the four respondents guilty as charged and ordered their dismissal from employment. The dismissals were premised on the finding that the aggravating features outweighed the mitigating factors.

Aggrieved by both conviction and penalty, the respondents referred the matter for conciliation in terms of Part XII of the Labour Act [*Chapter 28:01*] without success. The matter was then referred for arbitration in terms of s 12B (4) of the Act.

The arbitrator confirmed the convictions but reduced the penalties from dismissal to final written warnings on the basis that the mitigating factors outweighed the aggravating features.

Dissatisfied with the arbitration award, the appellant appealed to the Labour Court which dismissed the appeal and upheld the arbitration award hence this appeal.

The appellant's complaint is that both the Labour Court and the arbitrator misdirected themselves and fell into error when they reversed the disciplinary committee's determination in the absence of any error or misdirection.

The need for employees to submit to their employers' authority is firmly grounded in common law. Section 4 of the National employment Code of conduct merely codifies common law. Thus both at common law and statute an employer/employee relationship can only subsist in an environment where the employee is ready and willing to submit to the employers lawful authority.

Subordination to the employer's lawful orders is a fundamental ingredient of the contract of employment without which it cannot exist. This emerges quite clearly from the definition of labour law where Dr *L Madhuku*¹ says:

“Labour law is concerned with labour work which is done in a position of subordination, that is, when an employee works under the command, the control and the authority of an employer, when the work is not carried out in a position of subordination, as in the case of self-employment, labour law does not apply.”

That definition is consistent with what has come to be known as the ‘*supervision and control test*’ formulated in the *Blismas v Dardagan*² case as follows:

“It is the essence of a contract of master and servant that the servant should submit to the direction of the employer and obeys his employer's instructions not only in the things he has to do but as to the time and manner in which he has to do them.”

I might as well add, “... *and place where he has to do his employer's work.*”

*M Gwisai*³ in his book refers to the supervision and control test as the ‘hallmark’ of the employment relationship. This is a fundamental indispensable ingredient of the employment contract.

In light of the law and the respondents open defiance of their employer's lawful orders, there is no dispute that they were correctly found guilty as charged by the disciplinary committee. The only bone of contention is the severity of the punishment. In other words, the simple issue for determination is whether or not after balancing the aggravating and mitigating factors in the circumstances of this case the disciplinary committee acted reasonably in upholding the employer's decision to penalise the respondents with dismissal.

¹ L. Madhuku, Labour Law in Zimbabwe p 2

² 1950 SR 234

³ M. Gwisai, Labour and Employment Law in Zimbabwe, p 53

Section 4 of the National Code of Conduct classifies both offences as serious and warranting dismissal. Where however, an employee commits a dismissible act of misconduct dismissal is not mandatory but discretionary on the part of the employer in terms of s 7 (3) of the code which provides thus:

“The dismissal penalty to be imposed for an offence in section 4 is not obligatory but is meant as a guide to employers and ***an employer may, at his or her discretion apply a lesser penalty*** for example, a written warning.” (My *emphasis*)

It is important to note right from the outset, that where an employee commits a dismissible act of misconduct under s 4 the law vests the discretion whether or not to dismiss the offending employee on the employer alone and no one else.

The test for wilful disobedience to a lawful order warranting dismissal was laid down in the familiar case of *Matereke v CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 at 211 where GUBBAY JA as he then was had this to say:

“... wilful disobedience or wilful misconduct, the words in my view connote a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial – not simply an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and the employee, going to the very root of the contract of employment.”

In this case, the respondents received at least 3 months written notice of the order to transfer. They challenged the lawful order through their lawyers on moral and compassionate grounds without success. After their pleas for a reprieve from transfer had been turned down, they all knew as a matter of fact that their employer required them to be at their new work stations at all costs by 1 January 2013. Upon consideration of the respondents’ representations the appellant bent over backwards and extended the date of compliance to 1 April 2013. Despite that indulgence the respondents with full knowledge,

defied the order. The disobedience was wilful and deliberate, therefore going to the root of their respective contracts of employment.

The transfers were being done in accordance with their respective contracts of employment to enhance the employer's operational efficiency. As chief designated agents they were managerial employees profoundly aware of the employer's transfer policies and requirements. The requirement to submit to regular periodic transfers was therefore, a material term of their respective contracts of employment. As such, their refusal to obey the employer's order in this respect could only amount to wilful refusal to do the work they were employed to do. In this regard, the disobedience constituted a serious negation of their respective contracts of employment.

Such conduct undermined and paralysed the employer's work thereby constituting a fundamental breach of their respective contracts of employment. By refusing to go where the employer's work was to be performed the respondents were virtually rendering themselves incapable of performing their employer's work thereby repudiating their respective contracts of employment. The disobedience was not in error nor on the spur of the moment, but carefully considered and relentless over a long period of time. Under the circumstances, can it seriously be contended that the employer's decision to dismiss was unreasonable considering that the respondents had persistently refused to go where the employer's work was to be done?

Ordinarily for an employer's election to dismiss to be vitiated for irrationality, the unreasonableness has to be gross or so outrageous in its defiance of logic that no reasonable employer properly applying his mind would have made such a decision.

I now turn to consider the reasonableness or otherwise of the penalty of dismissal in the circumstances of this case. In justifying that penalty the chairman of the disciplinary committee had this to say at p 323 of the record of proceedings:

“PENALTY

...

It was the unanimous view of the disciplinary authority that the wilful disobedience of the respondent was in a very serious degree and was seriously aggravated. The mitigation was not of sufficient weight to operate to an extent as to excuse the penalty of dismissal. There was no offer by the respondent to do the correct thing nor was there any expression of regret by the respondent.”

With respect, I am unable to find any fault with the above line of reasoning which is logical and consistent with all the facts which are common cause. Although the above remarks were specific to the fourth respondent, they apply equally to all the four respondents.

In reversing the disciplinary committee’s penalty of dismissal the arbitrator reasoned at p 448 of the record of proceedings as follows:

“A careful analysis of the record of proceedings reveals that the disciplinary committee made justifiable findings in substantiating breach of the said sections of the national code.

However I differ with them in the penalty they gave for such contravention given the mitigatory factors and the circumstances of the case. **I am of the view that the claimants’ mitigatory factors were very pertinent to persuade the adjudicating authority to mete (out) a less punitive penalty than dismissal and further compel them to obey the lawful order.”** (*Emphasis added*)

The court *a quo* in a brief cryptic judgment considered and approved the above line of reasoning saying:

“The arbitrator’s preceding analysis shows that she was alive to her powers as well (as) the relevant factors to consider. **My own assessment is that the mitigation outweighed the aggravation.** The offence is by definition a serious offence.

However the manner in which it manifests is what needs to be examined...” (*My emphasis*).

What emerges quite clearly from the above line of reasoning is that both the arbitrator and the court *a quo* were arrogating to themselves a discretion which they did not have thereby usurping the discretion of the employer under s 4 of the National Employment Code of Conduct.

As I have already stated, once an employer has established that an employee committed a dismissible act of misconduct as happened in this case, the discretion whether or not to dismiss lies solely with the employer. Generally speaking, it is not for the appellate court, arbitrator or tribunal to substitute its own discretion for that of the employer. The point was brought home by MALABA DCJ in *Innskor Africa (Pvt) Ltd v Letron Chimoto*⁴ where the learned Deputy Chief Justice observed thus:

“A principle has now been firmly established to the effect (that) an appellate court should not interfere with an exercise of discretion by a lower court or tribunal unless there has been a clear misdirection on the part of the lower court. In this case the Labour Court did not even appreciate that it was dealing with a case of discretion by the arbitrator.”

Having regard to the circumstances of this case and the totality of the undisputed evidence placed before the disciplinary committee, it can hardly be said that it acted unreasonably. Both the arbitrator and the Labour court fell into error by applying the wrong test. The correct test on appeal was whether the disciplinary committee on the facts before it had acted unreasonably in ordering dismissal and not whether the mitigating factors outweighed the aggravating factors as postulated by the arbitrator and sustained by the court *a quo*.

⁴ SC 64/2012 at p. 2

In *Matereke's* case (*supra*) it was held that the existence of a moral excuse would not assist an employee guilty of a serious act of misconduct going to the root of his contract of employment if the employer was intent on dismissal as happened in this case. Both the arbitrator and the court *a quo* therefore, fell into error and misdirected themselves by fastening onto and reversing the penalty of dismissal on moral and compassionate grounds.

Whether or not the mitigating factors outweighed aggravating circumstances was therefore an irrelevant consideration, unless the manner in which that decision was arrived at was shown to be unreasonable. Once the employer had proven that the respondents had committed a serious dismissible act of misconduct and in the absence of any error, gross unreasonableness or misdirection, their fate lay firmly in the hands of the employer in terms of s 7 (3) of the National Employment Code of conduct. The discretion whether or not to extend mercy lay with the appellant in its capacity as the employer.

It is apparent that both the Labour Court and the arbitrator were labouring under a serious misapprehension of the law in assuming that they could substitute their own discretion for that of the employer in the absence of any error or misdirection on the part of the disciplinary committee. In *Mashonaland Turf Club v Mutangadura*⁵, ZIYAMBI JA was at pains to remind Labour Court Judges and arbitrators that it was not open to them to alter a penalty of dismissal in the absence of misdirection or unreasonableness on the part of the employer.

That caution appears to have found no takers as it continues to be disregarded. What is especially alarming and of serious concern is the belief by some authorities, that they

⁵ SC 5/12

can replace the employer's discretion to dismiss with their own to reinstate and then compel the employees to obey the employer's orders.

Given the respondents' transgressions amounting to a fundamental breach of their respective contracts of employment, the decision to dismiss the respondents from employment was eminently reasonable.

For the foregoing reasons this Court came to the unanimous conclusion that both the arbitrator and the court *a quo* being creatures of statute without inherent jurisdiction, fell into error and misdirected themselves by exercising a non-existent discretion. In the result the appeal can only succeed.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and in its place is substituted the following:-

“(a) The appeal be and is hereby allowed.

(b) The arbitrator's decision be and is hereby set aside.”

GWAUNZA JA: I agree

HLATSHWAYO JA: I agree

G. Machingambi Legal Practitioners, appellant's legal practitioners
Matsikidze & Mucheche, respondents' legal practitioners