

CIMAS MEDICAL AID SOCIETY
v
TAPIWA NYANDORO

SUPREME COURT OF ZIMBABWE
MALABA DCJ, HLATSHWAYO JA & MAVANGIRA AJA
HARARE, MARCH 27, 2015 & FEBRUARY 25, 2016

F Girach, for the appellant

W Zhangazha, for the respondent

MALABA DCJ: This is an appeal against the whole judgment of the Labour Court dated 28 February 2014. The question for determination relates to the rights on an employee who is on suspension before a disciplinary hearing is instituted and is found not guilty of the acts of misconduct preferred against him or her at the hearing.

The terms of reference on arbitration were:

- (1) Whether or not the employer committed acts of unfair labour practice by not reinstating the claimant.
- (2) Whether or not the matter is prescribed.
- (3) And to determine the appropriate remedy in the matter.

The background facts are as follows:

The respondent was employed by the appellant as a Managing Director for the Health Care Division. On 23 July 2008 he was suspended from duty on allegations of misconduct for contravention of provisions of the Labour (National Employment Code of Conduct) Regulations S.I. 15/2006 (“the Code”) that is to say:

(a) Section 4(a): act or conduct or omission inconsistent with the express or implied conditions of service.

(b) Section 4(b): wilful disobedience of a lawful order:

The hearing officer appointed by the appellant, found the respondent not guilty of the charges. In his ruling he stated: “For the reasons set out above, I find the employee not guilty on both charges”.

After the respondent was acquitted of the charges, he wrote to the appellant requesting payment of money which he said would form part of a package to be agreed upon. The respondent did not insist at that time on being taken back to work. The appellant went ahead and deposited the money into the respondent’s bank account. The appellant did not respond to the respondent’s letter of what he suggested would be an exit package to be agreed upon by the parties. It did not make a counter-offer on the exit package. While on suspension, the respondent was doing work for Graniteside Chemicals (Pvt) Ltd. It was however argued on behalf of the respondent that he was engaged by Graniteside Chemicals (Pvt) Ltd as a *locum tenens*.

After the respondent was found not guilty of the alleged misconduct for which he was suspended, the appellant did not act in terms of s 6 (2)(b) of the Code which provides that:

“(2) Upon serving the employee with the suspension letter in terms of subsection (1), the employer shall, within 14 working days investigate the matter and conduct a hearing into the alleged misconduct of the employee and, may according to the circumstances of the case—

(a)

(b) serve a notice, in writing, on the employee concerned removing the suspension and reinstating such employee if the grounds for suspension are not proved.” (the underlining is mine)

The respondent took the view that the appellant was not reinstating him because of the letter it had written to him indicating that it was considering reinstating him on the payroll. He had interpreted the letter to mean that the appellant wanted to reinstate him in his former position. He approached a Labour Officer accusing the appellant of an unfair labour practice in that it had refused to reinstate him into his job. The matter was referred to compulsory arbitration. The arbitrator found for the respondent and ordered the appellant to reinstate him in his former position without loss of salary and benefits. The arbitrator also ordered payment of damages in lieu of reinstatement should the working relationship between the parties prove to be untenable. The appellant appealed to the Labour Court and the respondent cross-appealed alleging that the arbitrator had erred in his computation of the damages in lieu of reinstatement. The Labour Court dismissed both the main appeal and the cross appeal. The appellant has appealed against the judgment of the Labour Court.

Having regard to the issues that were referred to arbitration it is important for the Court to first decide whether the appellant committed an unfair labour practice by failing to reinstate the respondent after being acquitted of the charges that were pressed against him. If it is established that indeed the appellant committed an unfair labour practice by not reinstating the Respondent, the other grounds of appeal will be dealt with.

The question is whether the order of reinstatement without loss of salary and benefits and payment of damages *in lieu* of reinstatement was competent considering the provisions of the Code.

Depending on the circumstances of the case an employer whose employee was on suspension on allegations of having committed an act of misconduct may serve a notice in writing on the employee reinstating him or her in the job if the grounds of suspension are not proved at a disciplinary hearing. Whilst an employer is under an obligation in terms of s 6(2)(b) of the Code to investigate the allegations of misconduct leveled against an employee and conduct a disciplinary hearing within fourteen days following the employee's suspension, the employer is not under an obligation to serve the employee with a notice of removal of the suspension after he or she is found not guilty of the alleged misconduct for which he or she was suspended. The respondent must have been aware of what the appellant could have done. Whether the appellant decided to serve the respondent with the requisite notice depended on the circumstances of the case and the exercise of its discretion. The appellant was not under an obligation to serve the notice on the respondent reinstating him to the job following his acquittal of the charges of misconduct if the circumstances of the case did not allow for such a reinstatement.

Failure to serve a notice of removal of a suspension in terms of s 6(2)(b) of the Code is not necessarily an unfair conduct. Whether it is unfair conduct will depend on the circumstances of the case. An employer may be entitled not to serve the employee with a notice of removal of the suspension if the behavior of the employee is such that it would satisfy any reasonable employer that he or she regards the relationship between the parties to have broken down to the extent that he or she no longer wants to work for the employer. The

word reinstatement in s 6(2)(b) of the Code does not have the same meaning it has when it forms the content of an order directed at an employer following a finding that the employee was unfairly dismissed. In the case of the respondent he had been suspended. He was not dismissed. There had been no termination of the relationship of employment between the parties. Reinstatement to the job would have the limited meaning of removal of the suspension so that the employee could resume work. There cannot be a question of payment of damages *in lieu* of reinstatement. The ordinary meaning of reinstatement is the restoration of a person in his or her former job with no loss of salary and benefits.

In *Chegutu Municipality v Manyora* 1996(1) ZLR 262(S) it is stated that “reinstatement” means only “putting a person again into his former job as of the present or some future date”. In its wide sense an employee who is allowed to resume work upon the removal of suspension is reinstated.

Where an order of reinstatement is accompanied by an option to pay damages in lieu of reinstatement it means that there has been a determination by the tribunal that the employee had been unfairly dismissed. In other words an order of reinstatement coupled with an option for payment of damages *in lieu* of reinstatement is evidence of the fact that the tribunal was faced with the question of the fairness or otherwise of a dismissal of an employee.

The authorities suggest that ordinarily, reinstatement in the mould contemplated by the respondent is only possible where it is preceded by a finding of wrongful dismissal. In *Blue Ribbon Foods Limited v Dube No & Anor* 1993 (2) ZLR 146 (SC) the court held:

“Blue Ribbon Foods, after all, had sought authority to dismiss him and had been given that authority by the Labour Relations Officer. Gonyora had a right of appeal against the whole, or, presumably, part of that order. Once he exercised that right, and subsequently took alternative employment, it seems to me that he was doing no more than waive part of his right, namely his right to claim reinstatement and his right to claim pay and allowances beyond the date of his assuming other employment. His taking alternative employment was, in short, not to be seen as a breach of contract but as a partial waiver of his right.”

The same position is confirmed in *United Bottlers (Pvt) Ltd v Murwisi* 1995

(1) ZLR 246 (SC) wherein it was held in part:

“It will be apparent that the procedure under s 3 of the Regulations arises when the employer has suspended the employee without pay. He has not dismissed the employee. So no question of wrongful dismissal arises. The application by the employer to the LRO is an application for an order terminating the contract of employment. It is logical that, if that application fails, the contract of employment is not terminated. The employee's suspension is found to have been unjustified. He is reinstated. There is no provision for any other treatment. The employee is regarded as never having been suspended, because the grounds for suspension were the same as the grounds for dismissal. If the grounds were insufficient to justify dismissal, they were, by the same token, insufficient for suspension.”

Back-pay is associated with reinstatement following a determination that the dismissal of an employee was unfair because back-pay forms a large portion of damages payable in *lieu* of reinstatement. So an order of payment or reimbursement is evidence of a finding by the tribunal that the employee was unfairly dismissed. These statements cannot be validly made where the issue before the tribunal was not one of unfair dismissal. The concept of back-pay was defined in *Leopard Rock Hotel Company (Pvt) Ltd v Van Beek* 2000(1) 251 (SC) as follows:

“Back-pay” is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back-pay. If she succeeds in proving wrongful dismissal, but is not reinstated, she will be entitled to “damages”, a major element of which will be back-pay. Perhaps, more correctly, one should say the damages will be assessed by reference to the back-pay lost. But here the back-pay

will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment. See *Ambali supra* and *Myers supra*.”

An employee who is suspended is not dismissed from employment *ipso facto*. Suspension and dismissal are different though related concepts. The respondent adverted to being reinstated to his job in his submissions before the arbitrator. A suspended employee does not lose his employee status. The respondent lost sight of the real issue and claimed the wrong thing. At the same time, the arbitrator related to mitigation of damages. The concept is explained in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) as follows:

“I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.”

The moment the arbitrator related to the concept of mitigation of damages he believed that the matter before him was one of unfair dismissal and yet the respondent had not been dismissed from employment.

Reinstatement is a remedy which is used to place an unfairly dismissed employee into a position he would have been had the unfair dismissal not been committed. An order for reinstatement is therefore usually accompanied by an order of back pay. The employee is reinstated to his former position without loss of salary or benefits and the reason for back pay is to compensate the employee for the period he would have been on wrongful

dismissal. Reinstatement in its ordinary meaning suggests that the period of service between dismissal and resumption of service is deemed unbroken. See *John Grogan Workplace Law 11th Ed p 199*.

Irish authorities also confirm the understanding of reinstatement as detailed above. Reinstatement is an order that ‘the employer shall treat the complainant in all respects as if he had not been dismissed, *John Bowers, Bowers on Employment Law, 2nd ed, 1986, 238*. An order for reinstatement is defined as an order that the employer restores the employee to his former position treating him in all respects as if he had never been dismissed, S.D Anderman, *The Law of Unfair Dismissal, 2nd ed, 1985, 281*. There is advertence to ‘dismissal’ and ‘former position’ in the authorities. Reinstatement of this kind cannot be understood outside the context of a severed employment relationship.

The arbitrator gave an order for reinstatement with an alternative of damages in *lieu* of reinstatement should reinstatement prove to be no longer an option. He understood the issue as being that of reinstatement in the ordinary sense of the word. The arbitrator could not have made the order in the terms in which he made it if he did not consider that the respondent had been unfairly dismissed.

That was also the understanding the respondent had when he made an unfair labour practice complaint to the Labour Officer. If the respondent was genuine in his allegation that he did not regard himself dismissed, he ought to have cross appealed to the Labour Court seeking the setting aside of the order of damages in lieu of reinstatement because the only claim he could have made under s 6(2)(b) of the Code was for an order that

the circumstances of his case justified the removal of the suspension and his reinstatement in the sense of being allowed to work.

If this case was about 'reinstatement to the payroll' as alleged, the respondent would have distanced himself from that part of the judgment which related to damages in lieu of reinstatement, a concept associated with dismissal. All this points to the respondent bringing a claim predicated on a perceived dismissal from appellant's employ. The respondent cross appealed to the Labour Court alleging that the arbitrator erred in reducing the claim for damages in lieu of reinstatement from 10 years to 5 years. The respondent had made a claim for damages as an alternative to reinstatement in his submissions before the arbitrator. The respondent deemed himself dismissed because damages in *lieu* of reinstatement do not arise where there is no termination of employment. That is the case the arbitrator understood and determined. The respondent did not place before the arbitrator a case of 'reinstatement on the payroll' as he now contends. All the facts show that the respondent regarded himself as no longer the appellant's employee. This attitude started when he took employment with another company whilst under suspension.

There is an allegation by the respondent that the damages in lieu of reinstatement were adverted to in the award only because the appellant had at that stage shown that it was not going to take the respondent back. This could not have been the case because the law is clear on this point. The terms of reference to arbitration became important at this point. At any rate, the fact that the appellant had declared its unwillingness to comply with s 6 (2)(b) of the Regulations is what gave rise to the dispute.

A suspended employee does not lose employment simply because he or she is suspended. He or she remains employed and can be called upon any time by the employer to perform work, *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S). If an employee who has been suspended and charged with an act of misconduct in terms of the Labour (National Employment Code of Conduct) Regulations is found not guilty and the employer refuses to lift the suspension, the remedy lies in the procedure for conciliation and compulsory arbitration. The dispute the respondent would have taken to a Labour Officer in terms of s 93 of the Labour Act [*Cap. 28:01*] would have been over the continued treatment of himself as a person on suspension when his acquittal on the charges of misconduct by the disciplinary authority had the effect that he had to be treated as if he had not been suspended.

The circumstances of the case show that the appellant did not act unfairly in not serving the respondent with a notice of removal of the suspension. The respondent behaved in a manner that showed that he no longer regarded himself as the appellant's employee. Not only did he take employment with another company whilst on suspension, he wrote to the appellant soon after he was found not guilty of the alleged misconduct for which he had been suspended requesting for an advance payment of part of a severance package. The respondent could not have been proposing a severance package if he genuinely wanted to be accepted back at work. Once the appellant accepted the respondent's request for an advance payment of money to be deducted from a severance package to be agreed upon by the parties as proposed by the respondent it was entitled not to serve him with a notice of removal of the suspension in terms of s 6(2)(b) of the Code. Whilst s 6 (2)(b) of the Code contemplates a preventive suspension, the circumstances of the respondent's conduct after he was found not guilty of the alleged misconduct for which he was suspended satisfied the appellant that he was no longer interested in working for it. The arbitrator and the Labour

Court failed to appreciate the fact that a wrong remedy was being pursued by the respondent.

The appeal must succeed.

IT IS ORDERED THAT:

- (1) The appeal be and is hereby allowed with costs.
- (2) The order of the court *a quo* be and is hereby set aside and in its place the following is substituted:
 - “(i) The appeal is allowed with costs.
 - (ii) The arbitral award is set aside and substituted with the following:
 - (a) The appellant is not guilty of unfair labour practice as claimed.”
- (3) The cross-appeal is dismissed with costs.

HLATSHWAYO JA: I agree

MAVANGIRA AJA: I agree

Gill, Godlonton & Gerrans, appellant’s legal practitioners

Chinogwenya & Zhangazha, respondent’s legal practitioner