

PAUL GARWE
v
THE PUBLIC SERVICE COMMISSION

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA & MAVANGIRA JA
HARARE, MARCH 5, 2015 & OCTOBER 16, 2017

Appellant in person

H. Magadure, for the respondent

MAVANGIRA JA: This is an appeal against a decision of the Labour Court which dismissed an appeal against the appellant's dismissal from employment.

BACKGROUND

The appellant was employed by the respondent as the Senior Payroll Clerk in the Audit Division of the Salary Services Bureau. Sometime in 2002 the appellant applied for a loan from a moneylender, Dollartech Finance, hereafter referred to as Dollartech. He furnished Dollartech with his pay slip in support of the application. His application was successful and he was granted

the loan. Dollartech faced difficulties in having the monthly repayment deducted from the appellant's salary as his net salary was insufficient for the purpose.

The matter was brought to the attention of the respondent by Dollartech. The appellant was charged with misconduct in terms of paragraph 13 (d) of the First Schedule (Section 2) of the Public Service Regulations, 2000 - dishonesty including falsifying or attempting to falsify any document with fraudulent intent or uttering forged document. The allegation was that he used a fake September 2002 pay-slip to borrow money from Dollartech Finance and the amount could not be deducted because his net salary was insufficient.

The appellant was called upon to submit a written reply to the allegations. He complied. He wrote a letter on 21 February 2003.

A disciplinary hearing was held on 2 July 2004. The disciplinary committee found the appellant guilty of the misconduct charged and recommended his discharge from employment. The pertinent portion of the record of the disciplinary committee's proceedings reads:

“The Committee noted that:-

- (1) Mr Garwe, in his letter of response to the allegations had shown that he felt ashamed of all what happened, he apologized, in the same letter, to the whole Department and Government as a whole for the image that could have been tarnished by his actions. He made an assurance that he would not do it again. (sic)
- (2) ...
- (3) ...
- (4) ...
- (5) Mr Garwe's response before the Committee was inconsistent to his letter of response to allegations leveled against him. (sic)

...

The committee found Mr Garwe guilty of an act of misconduct of dishonesty including falsifying or attempting to falsify any document with fraudulent intent or uttering forged

document. This is in terms of s 13(d) of the First Schedule (Section 2) of the Public Service Regulations 2000. (sic)

Committee's Recommendations

The Committee recommended that Mr Garwe be discharged from the Public Service Commission Secretariat.”

After the disciplinary committee hearing, the appellant allegedly fell ill from August 2004 until sometime in early 2005. During this period of illness, and specifically on 29 October 2004, the appellant submitted a letter from his doctor to his employer, requesting early retirement on medical grounds.

On 11 May 2005 the appellant received a letter of even date by the Salary Services Bureau informing him of the decision of the employer, following the disciplinary hearing of 2004, to dismiss him from the public service. The final paragraph of the letter advised the appellant as follows:

“Section 51 (1) (b) of the Public Service Regulations 2000 provides that if you are not happy with this determination and penalty, you are free to either appeal against this determination and penalty or both to the Labour Relations Tribunal or request the Commission in writing, through the Secretary, to review the determination or penalty or both within 21 days of this minute.”

The appellant requested a review of the proceedings. The appellant's request for review does not form part of the record. His grounds for review are captured in the Public Service Commission's record of proceedings of April 2006 as follows:

“Mr Garwe submitted the following as his grounds for review:-

- that there was an inordinate delay in the manner in which the case was handled. He was charged in February 2003, a disciplinary committee was appointed more than a year later and the determination was made in May 2005. This prejudiced him as memories fade and witnesses changed residence;

- that the disciplinary committee was chaired by Mr Chitambara who had earlier on received the complaint from Dollartech finance. He investigated the matter and actually promised the complainant that disciplinary action was going to be taken. He was therefore biased;
- that members who constituted the disciplinary committee were appointed by the Secretary to the Commission even though the Commission was not the disciplinary authority;
- that the disciplinary committee found him guilty without the production of the alleged fake pay-slip. The pay-slip was not produced as documentary evidence when he was charged and neither was it produced at the disciplinary hearing;
- that Salary Service Bureau concerned itself with dishonesty that was not directed at the employer and had not arisen during the course of duty. Further, failure to repay a loan was only misconduct if the loan was owed to the State, a statutory fund or a local authority;
- that the department should not have concerned itself with what members do with their pay-slips;
- that the misconduct charge was not properly framed to enable him to respond from an informed position. It was not defined how fake the pay slip was and there were no witnesses at the hearing to explain why the pay-slip was thought to be fake;
- that a pay-slip just shows how earnings for that month were intended to be disbursed. The disbursement plan could be varied before the pay-slip was issued. The pay-slip therefore did not as a matter of fact, show what the member's net income for the month or the following months will be. The fake pay-slip did not prejudice the money-lender."

The record of proceedings also highlights the following:

"Mr Garwe prayed that he be reinstated into the service without loss of benefits. He also urged the department to concentrate on its core business of paying salaries rather than assist debtors of civil servants (sic) to recover monies they are owed.

In a letter dated 20 May 2005, Mr Garwe submitted that his discharge from the service was in complete violation of the recommendations of a medical board that had recommended his retirement on medical grounds."

The Public Service Commission convened to consider the matter and on 12 April 2006 the Acting Secretary wrote to him confirming the determination of his guilt and the imposition of the penalty of discharge. The letter reads in part:

“REQUEST FOR REVIEW: MR PAUL GARWE: E.C. NO.1253558 M: FORMER SENIOR PAYROLL CLERK: SALARY SERVICE BUREAU: PUBLIC SERVICE COMMISSION

The above matter refers.

Be advised that the Commission, acting in terms of section 51(3) of S.I. 1 of 2000 as amended, confirmed the determination of guilt and the penalty of discharge which was imposed on you.

In arriving at the above decision, the Commission took into account the following:-

- that in your response to the misconduct charge, you admitted having submitted a fake pay slip to Dollartech Finance. You submitted that the pay slip had been done by tricksters. The foregoing was considered an unequivocal admission that you deliberately used an incorrect record of your earnings in order to obtain a loan from Dollartech Finance;
- that there was no shred of evidence to support the claim that Dollartech Finance had a hand in the misconduct charges that were preferred against you;
- that the fake pay slip on record showed that you had a net salary of \$48 026,54. However, the correct record of your net salary for September 2002 was \$51,53;
- that after you had been charged with misconduct on 12 February 2003, you subsequently paid the money that you owed the moneylender on 20 February 2003. It was therefore not in dispute that you received a loan from Dollartech Finance. In light of the above, the fact that you were not availed a copy of the fake pay slip which you had submitted to Dollartech Finance and which pay-slip you did not request from the disciplinary authority was considered immaterial and not an irregularity;
- that you did not explain why you did not request Mr. Chitambara to recuse himself from the hearing if you were aware that he had investigated your case and could have been partial in the hearing. Furthermore, you did not prove that he was biased as the chairman of the hearing. Your argument that the chair of the disciplinary hearing was biased could therefore not be sustained;
- that the Commission neither declared itself the disciplinary authority in your case nor did it appoint members of the disciplinary committee which heard your case; and
- that you could not be retired on medical grounds before the conclusion of your misconduct case. There was nothing wrong with the Paymaster, Salary Service Bureau determining your misconduct case before considering the recommendations of the medical board.”

Aggrieved by the decision of the Public Service Commission, the appellant appealed to the Labour Court seeking, in his notice of appeal, the relief that the respondent “be compelled

to determine whether the appellant is still fit to remain in service and if appropriate retire him on medical grounds.

In his heads of argument before the Labour Court he sought more extensive relief. He prayed for his appeal to be allowed with costs and for the determination appealed against to be set aside and substituted with a finding that he is not guilty of misconduct; an order that he be paid the full amount of his salary, bonuses and benefits that he ought to have been paid during the period of suspension and discharge; that he be reinstated without loss of salary and benefits or grade and that steps be taken in terms of s 18 (5) to retire him from service on grounds of ill health.

The appellant's grounds of appeal in the Labour Court were basically that the disciplinary committee was improperly constituted; that the chairperson of the disciplinary committee was biased as he had been involved in the investigation of the matter; that his disciplinary hearing was not conducted by a disciplinary authority for the reason that as he was engaged in the middle grade, only the head of Ministry could appoint a disciplinary committee to consider the allegations against him; that the respondent had failed to prove its case against him and that the issue of the fake pay-slip had nothing to do with his employer or his employment.

It was the appellant's contention that the essential elements of the misconduct with which he was charged were not proved as it was not established that he had been dishonest in the course of his employment or that there had been any prejudice caused as he repaid the loan in full. He further contended that the Public Service regulations do not concern themselves with misrepresentations that take place outside employment.

Another ground raised by the appellant was that an improper motive had caused or resulted in the charges being preferred against him and contended that this was borne out by the fact that the misconduct process was selectively applied amongst employees who had conducted themselves in a similar fashion.

In his submissions to the Labour Court the appellant alleged among other things, that there are about ten other employees who had done exactly what he had done but were still in employment. He is recorded as stating:

“I just want to add that other people are still employed but were also investigated **but had done exactly what I did**. There are about 10 or so. I actually investigated and I have copies.”
(my emphasis)

He also alleged that the respondent terminated his employment in order to avoid retiring him on medical grounds.

The Labour Court found that his appeal lacked merit and dismissed it.

THIS APPEAL

Aggrieved by the dismissal of his appeal by the Labour Court, the appellant appealed to this court.

His lengthy grounds of appeal raise the following issues to be determined by this court:

1. Whether or not the procedural irregularities raised by the appellant are so fatal as to warrant the disciplinary proceedings being rendered a nullity.

2. Whether or not there was sufficient evidence to prove appellant's guilt and to justify his dismissal.

Procedural Irregularities

Authority to discipline a member of the Commission

The functions of the Public Service Commission are provided for in s 8(1) of the Public Service Act [*Chapter 16:04*]. The section reads:

- “Subject to this Act and any other enactment, the functions of the Commission shall be-
- (a) to **appoint persons** to the Public Service, whether as permanent members or on contract or otherwise, to **assign and promote them to offices, posts and grades** in the Public Service and to fix their conditions of service
....
 - (b) to inquire into and deal with complaints made by members of the Public Service;
....
 - (e) subject to Part V, to **exercise disciplinary powers in relation to members of the Public Service ...**” (emphasis added).

The appellant's post of Senior Payroll Clerk is graded by the respondent as middle grade (page 54 of the record). In his oral submissions before this court, the appellant said that he had merely assumed that as he was a Senior Payroll Clerk and it translated to him being in the senior grade. His assumption was erroneous. In any event, and curiously so, the submission is contradictory of his previous stance in the Labour Court that he was a middle grade employee.

With reference to disciplinary authorities for the different employment levels or grades in the Public Service, s 42 of the Regulations provides as follows:

- “(1) The **disciplinary authority for the purposes of appointing a disciplinary committee** in terms of section 43, determining any allegations of misconduct by a member in terms of section 46 and imposing a penalty in terms of section 50 shall be-
- (a) in the case of a member in a senior grade, the Commission;

- (b) **in the case of a member in a middle grade, the head of Ministry;**
- (c) in the case of a member in a junior grade, the head of department;

Provided that the Commission may determine that it shall be the disciplinary authority in any particular case.

- (2) The disciplinary authority for the purposes of sections 44, 47 and 48 shall be-
 - (a) in the case of a member in a senior grade, the Commission;
 - (b) **in the case of a member in a middle grade, the head of Ministry or the head of office in charge of the member;**
 - (c) in the case of a member in a junior grade, the head of department or the head of office in charge of the member.”

The respondent gave a clear explanation of how this provision was adhered to. The Commission is, for administration purposes, a ministry in its own right. The authority for this is found in the definition section (section 2) of the Public Service Regulations which states:

“‘head of Ministry’, in relation to a member of the Public Service, means the Secretary of the Ministry in which he is employed or the occupier of any other office or post which the Commission, with the concurrence of the appropriate Minister, directs shall constitute his head of Ministry ...”

In *casu*, the Secretary of the Commission holds this post, and in exercising the role of disciplinarian of middle grade employees, the Secretary appointed a disciplinary committee.

The appellant was charged on 12 February 2003. The committee was appointed on 2 June 2004. It sat on 2 July 2004 and the determination was assented to by all the members in August 2004. The appellant never challenged the disciplinary authority at the hearing. He subjected himself to it. If he had challenged the disciplinary committee at the hearing, its members would have been the best placed to deal with whatever submissions or evidence would have been presented to them on the issue.

The appellant's contention or alleged irregularity under this heading lacks any basis and is thus of no consequence.

Alleged improper constitution of the disciplinary committee

Regarding the allegation of improper constitution of the disciplinary committee, s 43 provides:

- “(1) A disciplinary authority shall appoint a disciplinary committee to hear allegations of misconduct against members and make appropriate recommendations to the disciplinary authority.
- (2) A disciplinary committee appointed by-
- (a) the Commission shall consist of –
 - (i) a chairman who shall be any head of Ministry appointed by the Commission; and
 - (ii) two other members appointed by the Commission who are in a senior grade **from any Ministry other than the one in which the allegation of misconduct arose.**
 - (b) A head of Ministry shall consist of-
 - (i) a chairman who shall be the principal establishment officer of the Ministry or a member of equivalent rank; and
 - (ii) two other members appointed by the head of Ministry who shall be confirmed members;
 - (c) **a head of department shall consist of-**
 - (i) **a chairman who shall be the deputy head of department or a member nominated by the deputy head of department to act on his behalf who is approved by the head of department; and**
 - (ii) **two other members appointed by the head of department who shall be confirmed members.”**

In *casu*, the disciplinary hearing was chaired by the deputy head of the department. In terms of the Regulations no irregularity was occasioned thereby. The appellant's view that the other two members of the disciplinary committee were not qualified by reason of their not being members of his department is clearly erroneous. The Regulations merely provide that the other two members of the committee should be confirmed members. A confirmed member is defined in s 2 of the Regulations thus:

“Confirmed member means a member who is confirmed in the appointment after a period of probation, or was established officer in accordance with section 5 of the Public Service (General) Regulations, 1992, before the date of commencement of these Regulations.”

The section does not preclude members from other departments from being appointed in the disciplinary committee.

The appellant’s contention or alleged irregularity on this aspect is also baseless and lacks merit.

Alleged bias of the chairman of the disciplinary hearing

The appellant alleged that the chairman of the disciplinary committee was biased because he was the same individual who investigated the matter when it was brought to the attention of the Commission.

There is no record of the appellant requesting the recusal of the chairman as he would have been expected to do in such circumstances.¹ There is no reason on record why he did not raise his concerns at that stage. To the contrary, he is on record thanking the committee for facilitating the hearing and imploring them to allow him to resume his duties. The hearing continued to finality.

¹ See *Mupandasekwa v Green Motor Services (Pvt) Ltd* SC 30/15 at p15 of the cyclostyled judgment where the following was stated: “... The likelihood of bias can only, logically, be raised before or perhaps during the proceedings in question. In such cases an affected party would normally be expected to request that the person suspected of such bias recuse him or herself from participation in the proceedings in question. There is no record that *in casu* such a request was made by the appellant in respect of the chairperson of the disciplinary proceedings. Consequently proceedings continued to finality. The appellant could only, after that, have relied on demonstrated bias to request that the proceedings be set aside. The court *a quo* found that he had failed to do so.”

The onus rests upon the person alleging bias to establish the allegation. The appellant made an unsubstantiated allegation against the chairperson of the committee and only did so after the conclusion of the hearing leading to his conviction and dismissal. He has failed to show that he suffered prejudice because of the alleged irregularities. In *Musarira v Anglo American Corporation* SC 53/05, the following was highlighted:

“I would point out here that as long as a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. However, this happens to be the situation in all misconduct cases. What is important is that the misconduct matters are dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. The rules of natural justice in such a case are that the party concerned – (a) must be given adequate notice; (b) must be heard or be able to present his/her side of the story; and (c) should be allowed to call witnesses if he/she so wishes.”

Equally pertinent is the following statement that was made in *Watyoka v ZUPCO* SC 87/05:

“The appellant also raised a complaint about the composition of the disciplinary committee, but it was not shown that there was any bias or prejudice at all. The composition of the committee is a technicality that cannot be allowed to nullify the proceedings which, according to the record, reflect that he had a fair hearing.”

The same position at law was also highlighted in *Nyahuma v Barclays Bank of Zimbabwe* SC 67/05 in the following statement:

“...it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a procedural irregularity it must be shown that the party concerned was prejudiced by the irregularity.”

The *dicta* in all the above cases can be applied with equal force in *casu*. The appellant has not shown that the chairperson was biased; neither has he shown that he suffered prejudice

because of his involvement in the case. He has thus failed to substantiate the procedural irregularities that he raised.

There have thus not been shown to be any procedural irregularities that warrant that the disciplinary proceedings be rendered a nullity.

Whether or not there was sufficient evidence to prove appellant's guilt and to justify his dismissal.

The following paragraphs from the affidavit of the Chairman of the Public Service Commission attached to the respondent's notice of opposition in the court *a quo* captures important aspects of the relevant evidence. They read:

“9.1 The findings of the Disciplinary Committee were based on facts and his response to the charge. He did not dispute during the hearing that he authored the letter. In his written response he unequivocally admitted to the charge and apologized for tarnishing the image of the Public Service. He submitted that the fake pay-slip had been done by “tricksters” who had also conned him. He also admitted that he was in financial problems. It is quite apparent that appellant submitted the fake pay-slip to obtain a loan hence the apology. He does not mention why the so called “tricksters” would have submitted a fake pay-slip on his behalf to further his own interests. The committee relied on this evidence in their findings. The findings were proper and grounded on facts. His offer to repay the loan using another arrangement other than the stop order facility provides corroborative evidence.
9.2 Appellant's contention that it was not established that he was dishonest in the course of employment is immaterial because the fake document was produced at his workplace. He was a payroll clerk responsible for the production of pay-slips. He was expected to discharge his duties honestly. The Salary Service Bureau lost credibility due to his dishonest conduct and this tarnished the image of the Public Service. The evidence clearly established that he was dishonest in the course of his duties which constitutes an act of misconduct in terms of the Public Service Regulations.” (emphasis added).

A large part of the appellant's contention is that the alleged misconduct was of no consequence to his employer, and his employer had no reason or justification to involve itself in his dealings with the money lender. The appellant is unfortunately ill advised in holding this view.

The appellant was charged under s 13(d) of the first Schedule of the Public Service Regulations which renders the following an act of misconduct:

“...falsifying or attempting to falsify any document with fraudulent intent or uttering a forged document...”

The appellant failed to explain the origins of the fake pay-slip and the employer reasonably and understandably deduced it was the appellant who had it made. The pay-slip purports to have originated from the employer. When presented, the pay-slip gave the impression that it was conveying facts as held to be true by the employer. In essence, the appellant was including his employer in his fraudulent activity, for it was on the strength of the “employer’s assurance” being the fake pay-slip that the loan was issued.

The appellant, therefore, cannot successfully contend that his activities outside of employment had nothing to do with his employer in this regard. As to the evidence that ought to have been considered by the disciplinary committee, the appellant was given the opportunity to present his argument and substantiate it, before both the committee and the court *a quo*. At those junctures he could have called a representative of Dollartech to present the information he believed vital. It was not the respondents’ duty to argue his case for him.

This renders the appellant’s second, third and fourth grounds of appeal meritless. These grounds attack the judgment of the court *a quo* on the bases that the behavior complained of, even going by the employer’s version, did not constitute misconduct; that the person who determined the matter erred by finding that the pay advice, which was not produced in evidence, was falsified; that the disciplinary committee ought to have heard the evidence of the moneylender

and that the disciplinary committee did not appreciate that it was not part of the department's function to assist moneylenders in recovering their money. The conviction was thus warranted.

The appellant claimed that his penalty was too severe, to the extent of lacking reasonableness. It is settled that the courts do not act to usurp the discretion of the employer in deciding whether or not to terminate the employees' contract. This discretion can only be interfered with where it is shown that the employer improperly exercised its discretion. A plethora of cases have been decided in this court in this regard.²

More specifically, in the case of *County Fair Foods (Pvt) Ltd v CLMA & Ors* (199) 201 IJ 1701 (LAC) the court stated as follows:

“It lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and to determine the situation with which, non-compliance will be visited, interference therewith is only ... in the case of unreasonableness and unfairness.”

The appellant has failed in his grounds of appeal to present valid justification for the granting of the relief that he seeks. The appellant persisted in the view that whatever he engaged in after his work hours should not be a concern to his employer, whether it be morally reprehensible or not. He went to the extent of highlighting other acts of dishonesty that an employee could engage in in his free time and which acts, the employer, in his view, should not concern itself with.

² See, among others, *Celsys Ltd v Ndeleziwa* S-49-15; *NEC Catering Industry v Kundeza & Ors* SC26/15; *ZB Financial Holdings v Manyarare* S7/12.

The appellant fails to realise that an employee's conduct can impact negatively on the impression that the general public develops of his employer. The appellant therefore portrays a lack of honesty in his dealings and the respondent in its heads of argument to the court *a quo* rightly posits the rhetorical question "why should they be made to continue to employ such a person?"

In *casu*, the respondent expressed its concerns in an affidavit deposed to by its Chairman wherein he stated:

"A pay-slip is an official record of how the earnings and deductions for a particular month have been applied. It remains a permanent record in the payroll system. A member is expected to produce an official and authentic document of his earnings. Faking a pay-slip impacts negatively on the respondent as it results in loss of public confidence in the Public Service payroll system."

It is not unreasonable for an employer to expect an employee to conduct himself with honesty at all times. The employer stated that the appellant was the senior payroll clerk and in that capacity would be responsible for creating pay-slips. The company expected him to carry out his duties honestly, and was of the view that as a result of the appellant's actions it lost credibility and its image was tarnished.

It cannot, in the circumstances, be said that the employer exercised its discretion unreasonably. There is therefore no merit in the appellant's fifth ground of appeal which attacks the penalty imposed on the appellant as being grossly excessive on the basis that the misconduct complained of, if anything, is of an academic nature as it did not take place in the course of employment and the employer was not injured or prejudiced in any way.

Accordingly, the appeal is dismissed with costs.

GWAUNZA JA: I agree

HLATSHWAYO: I agree

Civil Division of the Attorney General's Office, Respondents Legal Practitioners