

HH 167-03
HC 11125/2000
 TUSSY MASHONGANYIKA
 versus
 AIR ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
 HUNGWE J,
 HARARE, 26 September, 2001 and 8 October, 2003

Opposed Application

Ms Siveregi for the applicant
Mr Foroma for the respondent

HUNGWE J: This is an application for a declarator that respondent's decision to suspend applicant without pay and benefits be and is hereby declared null and void, as well as an order for costs. Respondent opposes the grant of the order sought.

The background to this application is as follows -

On 21 March, 2000 applicant's employer the respondent wrote to applicant in the following terms -

"Following the alleged misconduct that has been levelled against you, you are by copy of this letter prohibited from duty with immediate effect until the outcome of your hearing.

The alleged misconduct arises from the handling of ten passengers who did not hold valid travel documents on Austrian Airlines flight OS534/19 March 2000. The hearing will take place in the Senior Manager Ground Operations' office on Thursday 23 March 2000 at 0900 hours.

This misconduct is classified under schedule Part 5 of the Air Zimbabwe Code of Conduct and Disciplinary Procedures, Sections 2(c), 3(e), 3(n) and 4(i).

You are allowed representation by a Workers Committee member and a Union Representative of your choice".

Following upon this letter and as undertaken in that letter a hearing of sorts took place in the writer's office on 27 March, 2000. Those proceedings were fraught with procedural irregularities.

The main ground upon which applicant claimed the proceedings to have been procedurally irregular was that the Industrial Relations Officer who had some other role than participating in the proceedings, took an active role in the hearing. Another was that there were two conflicting recommendations. That notwithstanding, the Chairman of that disciplinary inquiry wrote yet another letter suspending application from duty without pay or other benefits.

Applicant wrote to first respondent pointing out that the step taken was unlawful and asked that the matter be regularized. It was not regularized. She seeks a declarator to that effect.

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Respondent denies that its letter of 21 March, 2000 constituted an act of suspension of the applicant. It denied that it was obliged to act in terms of the registered Code of Conduct as that Code of Conduct applied to and bound its predecessor in title not itself. It maintained that applicant was suspended after an enquiry and that this was an exercise of its common law right to dismiss applicant. In any event, respondent argued that applicant has approached the Court without first advertising her domestic remedies and on that ground alone her application ought to be dismissed. Further it was argued that this matter is pending in the Labour Relations Office.

Dealing with the last issue raised by respondent first, I am satisfied that applicant is within her rights in seeking this Court's intervention in her matter on the basis that what is before the Labour Relations Office is not the issue whether her suspension was lawful but rather whether the respondent is entitled to dismiss her on the basis of the allegations she faces. The nature of the remedy sought is not that which a Labour Relations Office could competently give.

The real issue before me is whether or not the applicant was lawfully suspended and if so on which date.

Where an employee of the respondent is suspect of misconduct, and respondent decides to act against that employee it does so in terms of the registered code of conduct. The question whether that Code of Conduct binds the respondent was answered in the positive in this Court (see *L Kanodwekwa v Ministry of Transport, Air Zimbabwe Corporation and Air Zimbabwe (Private) Limited and the Attorney-General HC 6058/98*.

(Section 5 of the Air Zimbabwe Corporation (Repeal) Act No 4 of 1998). No change of conditions of employment for the employees of Air Zimbabwe was contemplated in the privatization of the Corporation. It stands to reason that every employee to whom the code of conduct was applicable, continued in employment on the same terms and conditions.

In my respectful view, the respondent continues to be bound by the registered code of conduct.

As such it cannot seek recourse to common law when dealing with its employees. Section 107(1) of the Labour Relations Act [Chapter 28:01].

Therefore any action taken against or in respect of an employee must be measured against the provision of the registered code of conduct. The legality or otherwise of such action fall to be determined against the provisions of the Code.

Thus where the complaint is that the action taken by an employer against an employee at a work place where there is in place a Code of Conduct, that action stands to be adjudged by the standards set out in the Code.

As for the initial suspension, respondent denies that it in effect suspended applicant with pay but merely waived its right to receive service in return for a wage during the period. Whatever respondent may have thought of its action, it in effect put applicant on suspension. That suspension had no basis in law as that course of action is not provided for in the Code. The act of suspending the applicant was therefore *ultra vires* the Code.

The subsequent act of suspension as argued, was based on the findings of an inquiring with allegations of misconduct held and the common law right of an employer to dismiss an employee. The fact of the matter is simply that in its present form, the

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Code of Conduct applicable to the respondent did not provide for any suspension of an employee. Clause 8 at page 7 of the Code applied.

In the absence of the provision permitting the respondent to suspend an employee without pay from the registered Code of Conduct, such an action would be *ultra vires* the code and therefore illegal.

In the premises I am satisfied that respondent's suspension of the applicant without pay and other benefits is null and void and it has no force or effect.

Applicant is entitled to her costs.

***Dube, Manikai & Hwacha* , applicant's legal practitioners**

***Sawyer & Mkushi* , respondent's legal practitioners**