

HH 54-03
HC 4759/02

EDMORE CHINOWAITA
and
TARIRO PATSIKADOVA
versus
AIR ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 25 February and 26 March, 2003

Mr D Foromator respondent

SMITH J: The applicants were employees of the respondent. They were charged with misconduct and, after a hearing, were discharged. They have filed this application seeking a declaratory order that their discharge is null and void. The grounds on which the application is based are as follows -

- (a) the Code of Conduct used by the respondent has not been registered in terms of s 3 of the Labour Relations (Employment Codes of Conduct) Regulations, 1990;
- (b) the Disciplinary Committee which discharged the applicants usurped the functions of the hearing committee by hearing the matter itself;
- (c) the hearing committee was improperly constituted in that it was not chaired by a Head of Division and some members thereof were not employees of the respondent;
- (d) the charges were not properly formulated in that it was not clearly indicated how the factual allegations constituted misconduct;
- (e) the decision was not based on the allegations and the evidence.

The applicants were employed by the respondent, one as a cargo checker and the other as a cargo officer. They were on leave and flew to Mauritius for a wedding. Both of them took, as part of their baggage, a bag containing cigarettes. When they arrived at Mauritius they discovered that their bags, which should have been placed in

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the hold of the aeroplane, were missing. They had been seized by the customs officials because they contained "excess cigarettes" which had not been declared. The allegation was that the applicants were attempting to smuggle cigarettes out of Zimbabwe into Mauritius.

After their return from their holiday the applicants were both charged with misconduct in terms of the Code of Conduct that was being used by the respondent. There were two charges raised against each applicant, firstly under Part 5 item (a) of the Code, acting in a manner which brings or is likely to bring unjustified scorn or disrepute on the Corporations image; secondly, under Part 4 item 3(1) of the Code, abuse of staff travel cargo carriage concessions as per Staff Regulations Manual. The applicants appeared before the Departmental Hearing Committee. Their cases were then referred to the Disciplinary Committee which found that the findings of the Departmental Hearing Committee were incomplete and did not itemise their findings. The Disciplinary Committee then proceeded to call the applicants and questioned them about what had happened. They were asked whether they had seen the bulletin written by Mr Donohoe, who was then the Chief Executive Officer of Air Zimbabwe, in 1995 or 1996 about the smuggling of cigarettes and both said that they had not seen the bulletin. The findings of the Disciplinary Committee were as follows -

1. Bulletins are not always seen by everyone. They should be incorporated in the code of conduct and the staff regulations manual.
2. The accused were not on duty.
3. The accused were not aware that carrying cigarette to Mauritius is not allowed by the Airline.
4. The accused went through all legal processes. They did not evade or attempt to evade Zimbabwean or Mauritian customs.
5. The two were remorseful after finding out what they had done was wrong.
6. Patsikadova joined in 1999 way after the bulletin on cigarettes was issued.

The members of the Disciplinary Committee were divided as to the punishment that should be meted out to the applicants. The Chairman exercised his casting vote and the decision was that the applicants should be dismissed.

I will deal *seriatim* with the grounds on which the application is based.

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Code of Conduct

The Code of Conduct used by the respondent is that of the Air Zimbabwe Corporation (hereinafter referred to as "the Corporation") which was registered by the Labour Relations Registrar on 12 November, 1991. Mr Foromas submitted that the applicants' conditions of service include the right to be disciplined in terms of the registered Code of Conduct that was in force at the time. As the respondent had taken over the business of the Corporation as a going concern in terms of s 16 of the Labour Relations Act [[Chapter 28:01](#)], that included the Code of Conduct. If the respondent did not like that Code of Conduct, it could have had it substituted or amended. The applicants contend that since the Code of Conduct purports to apply to employees of the Corporation, it cannot and does not apply to employees of the respondent. They conceded that the Minister of Transport and Communications did write to the respondent as follows -

"You are hereby directed to re-employ all the employees without exception on the same terms and conditions as applied to them under their pre-existing contracts with Air Zimbabwe Corporation with uninterrupted continuity of service and subject to the provisions of the Labour Relations Act [[Chapter 28:01](#)]".

However, they submit that such letter could not have the effect of overriding the Labour Relations Act [[Chapter 28:01](#)].

The Labour Relations (Employment Codes of Conduct) Regulations, 1990 (S I 379 of 1990) provide for the registration of employment codes of conduct and the subsequent amendment thereof. An application for the registration or amendment of such code must be made by an employment council or a works council. The code must provide for the settling of any dispute or unfair labour practice at a workplace, undertaking or industry. When the Registrar registers an employment code of conduct, he is required to return to the applicant a copy endorsed with his signature and issue to the applicant a certificate of registration. The Code of Conduct used by the respondent was issued on application by the works council of the Corporation. It purports to apply to all employees of the Corporation. I can find no basis in law for applying that Code of Conduct to the respondent and its employees, even if the respondent has taken over the functions of the Corporation. The Air Zimbabwe Corporation (Repeal) Act, 1998 (No 4 of 1998) provides for a successor company (which is the respondent) to take over all the assets and liabilities of the Corporation. Section 8 of that Act provides for the automatic termination of all employment contracts between the Corporation and its employees and requires the successor company to endeavour to re-employ as many of the Corporation employees as is possible without prejudicing the successor company's efficiency and economic viability. In the light of that specific legal provision, the direction by the Minister of Transport and Communications that it re-employ all such employees is clearly *ultra vires*. Subsection (2) of the said s 8 provides that all the rights and obligations of the Corporation in its capacity as employer and any contract of employment terminated by that section shall vest in the successor company. Although that provision might possibly have the effect of continuing in force *vis-à-vis* employer and employee the Code of Conduct, it would not have the legal effect of overriding the provisions of the Relations (Employment Code of Conduct) Regulations, 1990. Although the Corporation no longer has any assets, liabilities or employees, it still exists as a body corporate. The Air Zimbabwe Corporation Act [[Chapter 13:02](#)] which establishes the Corporation has not yet been repealed. That can only be done by the President publishing a statutory instrument in terms of s 11 of the said Act when he is satisfied that the assets and liabilities of the Corporation have been transferred to the successor company and nothing remains to be done under the said Act.

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Section 16 of the Labour Relations Act [Chapter 28:01] provides for the rights of employees on the transfer of an undertaking. That section merely provides that whenever an undertaking in which any persons are employees is alienated or transferred, the employment of such persons shall be deemed to be transferred on terms and conditions which are not less favourable than those which applied before the transfer. Those provisions cannot possibly be interpreted as applying to an employment code of conduct. It would be anomalous to hold that a group of employees who are absorbed by another undertaking would continue to be bound by the code of conduct registered in respect of their former employer, whilst the rest of the employees would be bound by a different code of conduct. Apparently another company called National Handling Services (Pvt) Ltd has been established to take over the Cargo Services Department of the respondent. It has taken over some of the former employees of the Corporation. Surely it cannot be argued that the employer code of conduct registered by the Corporation will also apply to that company and its employees.

For the reasons given above, I considered that the Code of Conduct that applied to the Corporation does not apply to the respondent and its employees. Accordingly, the discharge of the respondents is unlawful. In terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (S I 371 of 1985) no employer shall terminate a contract of employment with an employee unless he has obtained the prior written approval of the Minister of Labour. That provision is only excluded in the case of employees to whom the provisions of a registered employment code of conduct apply. There is no registered employment code of conduct applicable to employees of the respondent.

Procedural Defects

I do not consider that there is any merit in the submission that the Disciplinary Committee usurped the functions of the hearing committee. I can see no wrong in the Disciplinary Committee making the inquiry it did. As regards the complaint that members of the hearing committee were not employees of the respondent, I consider that that is not a fatal defect. The persons complained of were on secondment from National Handling Services (Pvt) Ltd, a company which was formed to take over, lock, stock and barrel, the running of the Cargo Services Department of the respondent. As regards the complaints that the charges were not clearly formulated and that the decision was not based on the allegations and the evidence, I consider that there is some merit in them. According to the Code of Conduct, smuggling goods whilst on duty is defined as an act of misconduct. Because of the qualification that the employee must be on duty, it follows that smuggling when off duty is not *ipso facto* an act of misconduct. Therefore, even if it is accepted that the Departmental Hearing Committee and the Disciplinary Committee found that the applicants had tried to smuggle cigarettes out of Zimbabwe, that was not the end of the inquiry as those committees appear to have thought. In order for the smuggling to have constituted an act of misconduct, it was necessary to find that the smuggling was "likely to bring scorn or disrepute upon the Corporation's image" or that it constituted an "abuse of staff travel cargo carriage concessions as per Staff Regulations Manual". No such inquiry was held and consequently no findings were made in that regard. That being the case, the findings that the applicants were guilty of misconduct cannot stand.

It is ordered that -

1. The discharge of the applicants is set aside;
2. The respondent reinstate the applicants without loss of benefits and pay them their full salary and benefits from the date of their discharge;
3. The respondent pay the applicants' costs.