

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO.

LC/H/20/2014

HARARE, 30 OCTOBER 2013

CASE NO.

LC/H/788/12

And 31 JANUARY 2014

In the matter between:-

MUNYARADZI HOVE

Appellant

And

ZIMPHOS (PVT) LTD

Respondents

Before Honourables Manyangadze J

Muzofa, J

For Appellant - Mr. G. Pendei (Legal Advisor)

For Respondent - Mr. E.T. Moyo (Legal Practitioner)

MANYANGADZE J:

This is an appeal against the decision of the Employment Council for the Chemicals and Fertilisers Manufacturing Industry (NEC) Appeals Committee, which upheld the dismissal of Appellant from Respondent's employment after he was found guilty of misconduct in terms of the applicable NEC Code of Conduct.

The Appellant was charged with contravening schedule 4, subsection (4) of Statutory Instrument 31 of 2011, which is the Collective Bargaining Agreement for the Chemical and Fertilisers Manufacturing Industry, the NEC under which the Respondent company falls. In terms of the cited section, the offence consists of;

“Misrepresentation, falsification or dishonesty that results or has the potential to result in serious consequences to the company and individuals.”

In particular, it is alleged that the Appellant wrote a statement which communicated misleading information on issues pertaining to workers’ leave days. The allegedly false statement was written on a chalk board in what is called the Dzapasi Mess room.

The company’s Grievance and Disciplinary Committee (GDC) found him guilty of the alleged misconduct, and imposed a penalty of dismissal from employment on 17 July 2012.

The Appellant appealed to the company’s General Manager, who dismissed the appeal and confirmed the GDC’s decision on 27 July 2012.

On 14 September, the NEC Appeals Committee dismissed the appeal as lacking in merit, and upheld the penalty of dismissal.

Having exhausted all the domestic remedies, the Appellant lodged his appeal with the Labour Court on 2 October 2012. The grounds of appeal read as follows:

“1. The Appellate authority erred in not finding that the Disciplinary Committee was not properly constituted in terms of S.I. 31 of 2011.

2. The appellate authority erred when it did not find that the essential elements of the charge leveled against the Appellant were not satisfied.

3. The Appellate authority grossly misdirected itself at the facts which misdirection culminated into an error of law when it failed to find that there was nothing misleading in the Appellant’s Communication as the Appellant was simply doing his duty as a

worker representative (reminding employees a previously communicated workers committee position).

4. The Appellate authority erred when it found no wrong in the actions of the disciplinary committee when it *mero motu* called in witnesses and had them cross-examined.

5. The Appellate authority failed to note that the penalty given to the Appellant even if one is to assume that he was guilty as charged (which is still largely contended) is unwarranted and excessive in the given circumstances.”

The first ground of appeal relates to the composition of the Disciplinary Committee. Appellant contends that the committee was improperly constituted as it had 3 management representatives and 2 workers representatives. This irregularity, argues Appellant, is so fundamental it must vitiate the proceedings.

The respondent, on the other hand, argues that there was nothing wrong in the composition of the GDC. It had the required equal number of management and worker representatives, with two members from each side. The chairperson, it is contended , is not part of management’s representatives on the fund. He is appointed separately, as an impartial presiding officer.

This point, in my view, turns on an interpretation of the applicable provisions of the NEC Code of Conduct (the Code). As already indicated, the relevant law is S.I. 31 OF 2011, in which the Code of Conduct is contained.

Both parties have made reference to paragraph 6 (3) (i) and (ii) of the Code. These are the provisions which govern the composition of the GDC.

Paragraph 6 (3) (i) provides as follows:

“There shall be established a disciplinary committee for each workplace composed of equal numbers of worker representatives of up to a maximum of four from either party. Unequal numbers means there is no quorum hence the hearing shall not proceed.”

In *casu*, the disciplinary committee had two representatives from management and two representatives from the workers, making it compliant with paragraph 6 (3) (i).

Appellant and Respondent have differed in their approach to paragraph 6(3) (ii), which deals with the appointment of the Chairperson. It reads as follows:

“The disciplinary committee shall be chaired by a member from management (provided he/she is not from the same department as the accused) who in the event of equality of votes, the chairperson shall exercise a casting vote.”

The Appellant, it seems to me, is treating the two sub-paragraphs as one provision, in which reference to “management” in (ii) is seen or read as reference to “management representatives” in (i). Thus, according to the Appellant, the chairperson is drawn from the representatives for management appointed in terms of sub-paragraph (i).

This is an erroneous interpretation of the clear provisions of the Code. If it was intended to have the chairman drawn from the representatives, this could have been specifically mentioned. Sub-paragraph (i) could have indicated that one of the management representatives shall be chairperson of the committee.

It seems to me, by providing for such an issue in a subsequent and separate provision, appearing in the statute as sub-paragraph (ii) the

intention was to make it a distinct and additional process from sub-paragraph (i).

There is no provision, in sub-paragraph (i) that the chairperson should be from the representatives appointed in terms of sub-paragraph (i). The only condition laid down, specified in the bracketed and italicized proviso, is that the chairperson should not be from the same department as the accused.

It only makes sense that the chairperson, who is intended to play a crucial role as an impartial presiding officer, should not be drawn from persons appointed as management representatives. I agree with Respondent's submission that;

"The only interpretation which is consistent with natural law is one which accepts that the chairperson is appointed outside the already constituted members of a disciplinary committee as was done in this case." (paragraph 10 of Respondent's heads of argument)

The Appeals Committee correctly found that "... it is not stated that the chairperson shall be selected from the management representatives who are already in the disciplinary committee".

I am, in the circumstances, unable to uphold Appellant's contention that the disciplinary committee was not properly constituted.

The second and third grounds of appeal are closely aligned, as they deal with the substantive aspects of the matter. They touch on the fundamental issue of whether or not the alleged misconduct was in fact proved.

On the second ground of appeal, Appellant avers that the statement he made was not misleading. He asserted that what he did was simply to

communicate “a previously communicated position of the workers committee”. It was a reminder of the position of the workers’ committee on the matter, and not a statement he himself had created. Nothing was therefore misrepresented, contended the Appellant (paragraph 14 b of Appellant’s Heads of Argument).

Further to that, Appellant contended that he communicated a correct position of the law. He pointed out that S.I. 31 OF 2011 did not provide for negotiations on overtime save for industrial holidays.

The Respondent contends that all the essential elements of the charge were proved. The statement which the Appellant wrote was misleading and as such infringed the provisions of the Code. It was not a correct exposition of the law, and was not also consistent with resolutions previously communicated by the workers committee, averred the Respondent.

A proper resolution of this ground of appeal, which seems to be the gravamen of the appeal, cannot be made without a look at the statement communicated by the Appellant. The statements read as follows:

“Reminder

No forced leave is being provided at law. Presently employees are encouraged to enjoy their vacation leave. Furthermore it is good to rest. However overtime leave is not subject to negotiations. Unless one initiates to enjoy such a leave there shall be no violation of law by either party to that agreement. Any challenges I.R.O. overtime please consult your leadership thank you!”

This is the statement the Appellant wrote on the chalkboard. It is not in dispute that he wrote the statement. It is the basis of the allegations of misconduct he is facing.

Since the Appellant is attributing the allegedly misleading statement to positions reached at Workers' Committee and Works Council meetings, it is critical to refer to such meetings. The record of proceedings does not contain minutes of all the meetings the issue was dismissed. It does, however, contain minutes of the works Council meeting of 4 May 2012. Apparently this is an issue that frequently featured in Workers' Committee and Works Council monthly meetings.

At the Works Council meeting of 4 May 2012, the matter was deliberated upon quite extensively under the item "payment of overtime". The Workers' side basically expressed concern over the accumulation of overtime, as payment for such overtime was long overdue. Management, whilst appreciating the concern by the worker representatives, pointed out that the company was facing financial constraints and was unable to meet the overtime payments.

Management referred to an agreement or practice accepted by the two parties whereby workers could convert overtime to leave days. The pertinent excerpt from the minutes reads:

"Management further said there was an agreement between the employer and employees to convert overtime to leave days. The exercise started in 2009 and the Human Resources engaged all employees through meetings held (sic) the Zimphos old Conference"

It is apparent from this that workers and management, by mutual agreement, concerted or could convert overtime to leave days.

The record also contains minutes of a Workers Committee monthly meeting held on 13 June 2012. Under the item "Leave Days", it is recorded:

“Some Heads of Department are forcing employees to go on overtime leave days as opposed to the agreement of the Works Council. The management said that they would negotiate with those with overtime leave days to go on leave so as to finish them.

Employees are not happy and feel that they are being prejudiced the overtime leave days because they want them paid in the form of fertilisers. As well as being paid before they go on such leave.”(emphasis added)

The position is also coming out that overtime leave was negotiable, as agreed at the Works Council meeting.

The issue was raised during the disciplinary hearing, with clarification sought from Mr. Washington. Gudo, the Works Council Vice Chairman. He emphasized this point that workers would agree with management on when to take leave. It “was being done on a mutual basis”

In respect of the Appellant’s chalkboard notice, the following excerpt is instructive:

“Q - Do you agree to the contents of the reminder?

A - Yes I understand but workers were not being forced to go on leave. They voluntarily agreed to go on leave.

Q - Are there any differences between the original works council feedback message and the reminder?

A - Some of the information is the same but we differ when there is talk about “No negotiation” whilst we were saying employees negotiate with their bosses.

Q - The question is whether what you originally said was different from the reminder?

A - Yes there is a slight difference in that the reminder said “no negotiation” when we said that employees should mutually agree with their bosses.”

The position is therefore coming out quite consistently, from the Works Council, Workers Committee, and Disciplinary Committee minutes cited, that overtime leave was subject to negotiation.

The pertinent question then is, looking at the “communiqué” posted by the Appellant on the mess room chalkboard, did it amount to misrepresentation, falsification or dishonesty?

As pointed out by Mr. Gudo to the Disciplinary Committee in some respects Appellant’s statement is consistent with the Works Council and Workers Committee position, but in some respects it is not. It seems the offending portion of the statement is the one which reads “However overtime leave is not subject to negotiations.”

This statement sound categorical. It gives the distinct impression that the non-negotiability of overtime leave is a fixed and final position. Even the one that follows; “Unless one initiates to enjoy such a leave ...” makes it the exclusive prerogative of the employee whether or not to go on such leave. It still reinforces the notion of non-negotiability. The matter starts and ends with the employee.

Thus, the overall impression created by the message is that overtime leave is not negotiable. That, it seems to me, is not consistent with the agreed position Appellant purported to convey in his communiqué. A much simpler and clearer message could have read something like “No employee shall be forced to take overtime leave. However, subject to mutual agreement between the employer and the employee, are employee may take overtime leave.” Instead, Appellant’s notice conveys a rigid and uncompromising message to the effect that overtime leave is not subject to negotiations. To this extent, it misrepresents the company position on the matter.

In the third ground of appeal, Appellant avers that there was nothing misleading in his communication as the Appellant was simply doing his duty as a worker representative, reminding employees of a previously communicated workers' committee position.

This averment sounds pretty much the same as the preceding one. What therefore has been said in respect of the second ground of appeal is equally applicable to this ground. The communication was misleading, for the same reasons stated above. What however, may require some attention in this ground of appeal is the claim by Appellant that he was doing his duty as a worker representative. Put differently, he had the mandate of the workers' committee to do what he did.

There is no evidence that has been placed on record, substantiating the Appellant's claim. He made reference to some workers committee meetings purportedly conferring such a mandate on him, but no minutes of such meetings have been placed on record. The onus is on him to provide evidence of the assertions he is making.

Appellant claimed that he posted the communiqué in his capacity as the "Day Workers' Committee Secretary". No evidence of his appointment to this position was produced.

Mr. Henry Korayi, Chairman of the Workers Committee, denied any knowledge of a "Day Workers' Committee Secretary". Mr. Gudo, the Works Council vice Chairman, also indicated he was unaware of any mandate conferred on the Appellant to represent the Workers Committee.

The Workers Committee Secretary, Mr. Chirume, distanced himself from the issue. He indicated he was not present in the meeting that gave Appellant the mandate to execute Worker's Committee Secretarial duties. In other words, he could not commit himself to whether or not such an appointment was made, leaving it up to those members of the Workers

Committee who were present to confirm that Appellant was authorized to carry out Secretarial duties of the Committee. No such confirmation is on record.

These three men are senior officials of the Workers Committee and Works Council. They all denied knowledge of the existence of the Day Secretary position.

With nothing to indicate the official capacity in which Appellant assumed the role of information and publicity Secretary for the Worker's Committee, the inference that can be reasonably drawn is that he was acting in his individual capacity. Consequently, he must be held to account as an individual.

The fourth ground of appeal deals with a procedural issue. It concerns the calling and examination of witnesses. There is, in my view, no basis on which to fault the NEC Appeals Committee's finding on this matter. The Appeals Committee "noted that the intervention of the Grievance and Disciplinary Committee was necessary as it had to establish the facts of the matter. As the adjudicator in your case, the grievance and disciplinary committee must gather the facts first in order to come to "fair decision ... by questioning your witnesses the disciplinary committee was not taking over the role of the complainant but it was a process of establishing facts."

In my view, the Appeals Committee was correct in its finding that the permanent consideration of the disciplinary committee is the proper establishment of the facts "in order to come to a fair decision" in this regard, it has a fairly wide latitude in the conduct of the proceedings, for as long as the fundamental principles of natural justice are adhered to.

The fifth and last ground of appeal is on the penalty of dismissal, if being submitted that it is excessive in the circumstances.

The well established position is that penalty for misconduct is a matter largely within the discretion of the employer in **County Fair Foods (Pvt) Ltd v CLMA & OTHERS (199) 201 IJ 1701 (LAC)** the court stated.

“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.”

In Mashonaland Turf Club v George Mutangadura SC 5/12

An employee who had been employed for 20 years was dismissed for being a spokesman in, and facilitating, an unlawful industrial action. Upholding the penalty of dismissal, the court stated that:

“The record clearly shows ... that the respondent committed serious acts of misconduct which went to the root of his contract of employment. The law is clear that in a situation such as this the employer is entitled to dismiss the employee ... In the exercise of their powers in terms of Section 12 B (4) of the Labour Act, the Labour Court and Arbitrators must be reminded that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer’s discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment.”

In *casu*, minutes of the Works Council meeting looked at show that the company was going through training times, with no money to meet some of its financial obligations. In order to avoid extreme measures such as retrenchment or closure, it was looking at ways and means of reducing costs. One of the measures was to negotiate with employees’ conversion

of overtime into leave. The misrepresentation by the Appellant had the potential to close the door to shun cost - saving negotiations. It therefore had serious consequences to the company and individual employees. The misconduct went to the root of the employment conduct. In the circumstances, the NEC's dismissal of Appellant's appeal cannot be faulted.

In the circumstances, it is ordered that:

1. The appeal be and is hereby dismissed in its entirety.
2. Each party shall bear its own costs.

Manyangadze J

Muzofa J