

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/23/2014

**HARARE, 21 OCTOBER 2013 &
31 JANUARY 2014**

CASE NO LC/H/161/2013

In the matter between:-

CITY OF HARARE

APPELLANT

Versus

INNOCENT MAKEDENGE

RESPONDENT

Before The Honourable R F Manyangadze : Judge

**For the Appellant Mrs R P Chinhenga (Principal Legal Officer
City of Harare)**

For the Respondent T Thondhlanga (Legal Practitioner)

MANYANGADZE J:

This is an appeal against an arbitral award granted on 4 February 2013, in which it was ruled that the appellant was committing unfair labour practices against the respondent and should stop such practices immediately. It was further ruled that the appellant should promote the respondent to the position of Divisional Officer and that the rotational leave days the respondent was entitled to be granted, and that such leave days be encashed should the respondent leave employment.

The factual background to the matter is that the respondent was employed by the appellant as a Fire Fighter. In April 2011, the respondent lodged a complaint with the Designated Agent for the Employment Council for the Harare Municipal Undertaking, alleging unfair labour practices. The basis of the complaint was that he was not being given work to do, and was denied leave and off days.

After conciliation failed, the Designated Agent referred the matter to compulsory arbitration, leading to the arbitral award which is the subject of this appeal.

There are three grounds of appeal. The appellant contends that the arbitrator should not have determined the issue of promotion, as this was not within the terms of reference and was therefore outside his mandate.

The appellant further contends that the issue of promotion is *res judicata*, as it was disposed of in this court in case number LC/H/103/2008.

Finally, the appellant avers that the respondent is not entitled to encash rotational leave days, as this is contrary to the provisions of the applicable Collective Bargaining Agreement: Harare Municipal Undertaking (Leave Agreement) Statutory Instrument 390 of 1992. There is no provision for the encashment of rotational leave days, which are rest days granted to fire-fighters and cannot be encashed like annual leave days, argued the appellant.

In his response to the appeal, the respondent contends that the arbitrator properly decided all the issues brought before him. He avers that the arbitrator correctly ordered the promotion, as an appropriate remedy to the unfair labour practices complained of. The respondent also contends that he should be compensated in monetary terms in the event that he leaves employment without utilising all his rotational leave days.

In my view, a satisfactory resolution of this matter must start by looking at the unfair labour practices complained of. What is it that the respondent (then claimant) brought before the arbitrator for redress? Did the arbitrator correctly attend to the issues raised? These are the pertinent questions

that should enable the court to determine whether or not the arbitrator misdirected himself in his award.

On the nature and extent of the alleged unfair labour practices, these were clearly summarised by the respondent (claimant) in his closing submissions before the arbitrator. The issues were itemised as:

- (a) He is not allowed to go on vacation leave;
- (b) He is not allowed to take off days;
- (c) He is not allowed to go on rotational leave;
- (d) He is not being given any work to do at his workplace and that;
- (e) The fact that the issues raised in subparagraphs (a) - (d) are happening is because he is being discriminated against.

These are the grievances that were placed before the arbitrator. They are, as I see it, the particulars of the unfair labour practices alleged. Were it a civil action in the Magistrates Court or the High Court, these would be the particulars of the plaintiff's claim. This is what the arbitrator was urged to look at. This was his mandate in this matter.

It is now necessary to look at how the issues were resolved.

It appears the issue of vacation leave and off days is a grievance that has since been resolved. The submissions on record show that the respondent was granted leave which covered his outstanding leave days. The appellant submitted that leave was approved for the period 11 May to 13 July 2011 and 14 July to 9 November 2011. This of course may have been done after a complaint had been raised. The fact however,

remains that it is a grievance that was attended to, and has ceased to be an issue between the parties.

On the issue of rotational leave days, it is significant that the respondent appreciates that the applicable collective bargaining agreement, S I 390 of 92, does not give an express entitlement to encash rotational leave. He, however, argues that since it does not expressly prohibit the encashment of rotational leave, the benefit should be extended to encashment in lieu of the rotational leave days.

The papers filed of record show that the appellant is not objecting to the respondent being granted rotational leave days to the extent that he was prejudiced of the same. In essence the appellant is conceding the validity of the grievance, and is prepared to have it redressed by granting any such leave days the respondent may have been denied. That, in my view, disposes of this issue.

I do not think it is competent for the appellant to go outside the four corners of the applicable statute, viz SI 390 of 1992, and grant encashment that is not provided for in the regulations that govern this type of leave. There is no need to overstretch the rules. The appellant has not objected to the respondent's claim that he be allowed to take the rotational leave days that he was denied. It would simply be a matter of computing any such days available, and allowing him to proceed on the leave. The arbitrator's award, it seems to me, should have ended at this point. Instead, he went further and resolved a grievance that had not yet arisen, of compensating the days in cash in the event that the respondent leaves employment for any reason. The respondent has not claimed for something in the nature of terminal benefits, such as cash in lieu of leave. It is not clear on what basis the

arbitrator anticipated that such a grievance will arise, and decided to provide for it in advance.

I now turn to the issue of promotion. This, it seems to me, is the gravamen of the respondent's grievances.

As already pointed out, the issue that was placed before the arbitrator was that of not being given work to do. It appears, from the papers on record, the respondent was re-instated sometime in 2009. Details of the dispute leading to his re-instatement are not relevant to this matter. What is of concern is that after his re-instatement, a grievance arose that he was not being assigned any work. This was among the grievances referred to compulsory arbitration. It constituted the unfair labour practices complained of. It seems it was the major complaint, among the other complaints looked at.

Again, from the papers on record, it appears there is no objection to the respondent's claim that he was not being given work to do. This is clear from the last paragraph in the appellant's (then respondent) closing submissions before the arbitrator.

This paragraph reads:

"However, it cannot be denied from evidence led in the hearing that claimant is not being given work due to some reasons. However, the reasons are not legal reasons and as such the respondent has no objection if this tribunal orders the respondent to provide work for the claimant."

The appellant is conceding the respondent was not being given work to do and that there were no legally valid reasons for not assigning him work.

With this concession, it seems to me there was then no issue between the parties. The concession touched on a

fundamental aspect of the dispute. In the light of such concession, the Arbitrator was entitled, as he in fact did, to order that this unfair labour practice be stopped forthwith.

Having made a finding that the appellant was committing an unfair labour practice, and having gone on to order cessation of the unfair labour practice, the Arbitrator went further and ordered that the respondent be promoted to the post of Divisional Officer with immediate effect. This, in my view, he was not entitled to do.

Having redressed the unfair labour practice by ordering its immediate cessation, he went on to tackle an issue that was principally the prerogative of the employer, whether or not the respondent should be promoted.

In this regard, the appellant referred to its promotion regulations, SI 18/2007, as read with Clause 2.1 (a) of its Promotions Policy and Procedures which read:

"No employee shall claim right or entitlement to promotion/upgrading/advancement."

The appellant buttressed this policy with the well-established position of the law on this issue, as enunciated in the case of **Muwenga v PTC 1997 (2) ZLR 483 (S)** in which it was held:

"There is need for Courts to avoid undue interference in the administration of public authorities. Indeed it could be contended with some persuasion that the promotion of an employee is a privilege, left to the discretion of the employer. It is not a right an employee is entitled to claim, unless his contract of employment so provides."

By focusing on this issue, I think, the Arbitrator went beyond his terms of reference. He had pronounced himself sufficiently on the unfair labour practices raised, as already

indicated. There was no basis to extend the pronouncement to promotion.

It is significant to note that the respondent agrees with the legal principle on promotion, as cited by the appellant. He, however, contends that the issue of promotion has cropped up as the appropriate remedy. The Arbitrator apparently also took this view, that he could order promotion as an appropriate remedy to the unfair labour practice. I am unable to uphold this contention. It is stretching matters too far.

Promotion, it seems to me; is a distinct and separate issue from the unfair labour practices specifically raised. A finding that the respondent was not being given work to do should not inevitably lead to a finding that he should be promoted. Even if he was given work to do during the material period, there is no guarantee he would have performed to levels warranting promotion. Other factors, whose assessment lie within the discretion of the employer, would have come into play. Ordering his promotion in the circumstances, makes the unjustified assumption that he will have been a deserving candidate for such promotion, should the post have been advertised and interviews held. There is nothing on record to show that the post was advertised and interviews held, in the course of which he was unjustifiably denied the promotion. The Arbitrator, with respect, misdirected himself by determining an issue he had no mandate to deal with.

In the light of the above finding, I consider it unnecessary to delve into the question of whether or not the matter was *res judicata*. It would not alter the outcome of this judgment, wherein it has been found that the Arbitrator had no mandate to decide the issue of promotion. Even if it were to be found that he had such a mandate, it has been found

that it was improperly exercised in the light of the well settled legal principles governing the issue of promotions.

In the circumstances, the arbitral award cannot stand as it is. Some portions thereof have to be altered. In fact, this appeal seeks that part, not the whole, of the arbitral award be set aside.

Having regard to the findings in this judgment, the arbitral award must reflect that the unfair labour practice to be rectified is that of not assigning work to the respondent. It must not incorporate an order for the promotion of the respondent. It must also not include an order for the encashment of rotational leave. In the result, it is ordered that:-

1. The appeal be and is hereby allowed.
2. The arbitral award dated 4 February 2013 be and is hereby set aside.
3. The applicant is committing an unfair labour practice by not assigning any work to the respondent and such unfair labour practice should cease forthwith.
4. The respondent be allowed to proceed on rotational leave for the period prejudiced.
5. Each party shall bear its own costs.

Thodhlana Associates, respondent's legal practitioners