

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/77/14

HELD AT HARARE 17TH OCTOBER 2013

CASE NO LC/H/332/13

& 14TH FEBRUARY 2014

In the matter between:-

ZINDOGA TATENDA

Appellant

And

CMED (PVT) LTD

Respondent

Before The Honourable L Kudya, Judge

Appellant

In person

For Respondent

T.K. Hove (Legal Practitioner)

KUDYA, J:

This is an appeal by the Appellant against the decision of the Respondent's Managing Director dismissing the Appellant from employment. On the date of hearing parties agreed that the matter be decided based on the submissions filed of record. To that extent no oral submissions were made by the parties hence this judgment is based on what is contained in the record of proceedings before it only.

The background of the case is that, the Appellant who was in Respondent's employ was charged with a breach of the Respondent's Code of Conduct. In particular, he was charged among other charges with theft/fraud. He was found guilty on 2 of the charges, given a final warning and demoted at

first. He lodged his appeals internally. The appeals finally saw him being dismissed from the job. Aggrieved by the appeal decision at the last rung of the internal process that is at the Managing Director's level, he lodged the instant appeal to this Court.

The grounds of his appeal are;

1. Managing Director (MD) erred by ignoring fact that the General Manager's decision was based on misleading and inaccurate record. In that case the Disciplinary Committee erred by not calling for oral evidence to rectify the anomalies complained about.
2. The Managing Director grossly misdirected self by justifying the delay experienced in the outcome of the hearing on the basis that an addendum to the appeal grounds filed by the appeal had occasioned the delay. The delay was a procedural irregularity which vitiated the proceedings.
3. Appellant re-stated the grounds of appeal which he used before the General Manager (GM) and the Managing Director and prayed that there be an unbiased consideration of the case by the Labour Court.
4. Appellant denies any wrong doing. He believes that the record was belatedly submitted to distort facts to his detriment.
5. Disciplinary Committee relied on contradictory and unreliable inconsistent testimonies and records. Respondent's material witness turned hostile but he was not availed for cross examination.
6. The Respondent's Code of Conduct negates natural justice by denying a party to the proceedings, legal representation.

In response to the appeal Respondent maintained that:

1. Managing Director did not err. He abided by the record and heard the matter afresh.

General Manager's decision was not based on misleading record but accommodated Appellant's addendum to reach a determination. Oral evidence is not mandatory per Code hence matter could be validly decided on the papers as happened in this case.

The oral evidence argument cannot be used as a valid ground of appeal.

2. Managing Director correctly held that General Manager's delay was justified since the Appellant's addendum arrested the prescribed 5 day period and caused its extension to now accommodate the addendum.
3. There was no bias and Appellant has not demonstrated the alleged bias which he seeks to rely on.
4. Record was not distorted. Appellant submitted before close of hearing but does not show how the record was biased. The belatedness was of Appellant's making due to the addendum which he submitted. The addendum had the effect of extending the existent 5 day period.
5. Appellant was facing 5 charges but convicted of only 2 by differently constituted committees hence the probability that he committed the infraction was there. Appellant admitted receiving the money but did not receipt it. The hostility of the witness should have worked in his favour as he could call those witnesses to bolster his case. As per the record only 2 witnesses were adjudged reliable.
6. Legal representation is ousted by the Respondent's Code of Conduct given the informal nature of the disciplinary proceedings at the workplace.

In the result, Respondent prayed that the appeal; be dismissed with costs.

A reading of the appeal grounds shows that both appeal and review grounds were mixed up. Since respondent did not take issue with that, it was the Court's considered view that the grounds could parts for what they were worth so that matter could be concluded on the merits.

For clarity of record, each ground will be addressed in turn. Before an in-depth discussion of the grounds it is pertinent to state the law that, an Appellant Court can only interfere with the exercise of the discretion of a lower tribunal where it has been exercised in a grossly unreasonable manner or such discretion has been abused. See **Nyahondo v Hokonya** 1997 (2) ZLR 475 (SC).

Applying the legal principle enunciated in the above case, to the facts of the instant case the Court found as appears hereunder:

Ground One

As correctly observed by the Respondent, the Code under which Appellant fell did not oblige a tribunal to call for oral evidence. It was thus not a misdirection for the Managing Director not to call for oral evidence. Further to that, the exercise of entertaining or hearing the matter afresh by the General Manager was clear testimony of the Respondent's desire to see that Appellant gets as for a trial as could be. To that extent, the argument that the Managing Director relied on unreliable doctored evidence becomes baseless and does not support this ground. The ground should therefore fail.

Ground 2

This touches on the procedural irregularity of the delay in the conclusion of the appeal by the General Manager. From a factual perspective, when Appellant adduced further evidence in the form of an addendum it was imperative that the General Manager look into it before concluding the matter. There was therefore nothing remiss about the delay outside the 5 day limit neither can the delay on its own be concluded to mean that it was for doctoring of the record. This ground also lacking in merit should fail.

Ground 3

The re-stated grounds of appeal baldly asserted that the trial bodies were biased. There was nothing further from the Appellant which could demonstrate the alleged bias. If anything the endeavours to even have some of the hearings denovo are all testimony of the Respondent's desire to give the Appellant a fair day in Court before his fate was decided upon. It is worth noting that, it is settled law that, institutional bias cannot be ruled out in any disciplinary proceedings See **Jerry Musarira v Anglo American Company** SC 53/05. From the above, it is clear that no good case for bias was made out by the Appellant, hence this ground should also fail for want of merit.

Ground 4

This is intricately linked to ground 3 discussed above. The delay was adequately explained and it could not be used to mean that evidence was doctored. This ground also lacking in merit should fail

Ground 5

The argument about contradictory and inconsistent evidence flies in the face of Appellant's own admission of taking the money and not receipting it. It is

important to note that, standard of proof in such cases is proof or a balance of probabilities See **Zesa v Dera** 1998 (1) ZLR 500.

In this respect, the evidence which was tendered was sufficient to found the Appellant's guilt and the Managing Director cannot be faulted for confirming this position. This ground being meritless should also fail.

Ground 6

As regards legal representation, the law is settled, and that cannot be used as an excuse to say a party was not guilty when evidence pointed out to his guilt. See **Musarira** case (supra). In the result the Court is satisfied that this argument has no bearing on the Appellant's guilt and attendant dismissal. This grounds should therefore also fail.

IT IS ORDERED THAT

Appeal being devoid of merit in its entirety, it be and is hereby dismissed with costs.

The Managing Director's decision is accordingly confirmed.

L KUDYA

JUDGE-LABOUR COURT

Hove & Partners, Respondent's Legal Practitioners