IN THE LABOUR COURT OF ZIMBABWE HARARE, 12TH OCTOBER, 2023 AND 12TH OCTOBER, 2023

JUDGMENT NO. LC/H/364/23 CASE NO. LC/H/423/22

PEARSON KUNAKA **APPELLANT**

And

ZIMBABWE REVENUE AUTHORITY **RESPONDENT**

Before the Honourable Kachambwa, Judge;

For Appellant: **T. Machaya (Legal Practitioner)**

For Respondent: **S. Tazviwana (Legal Practitioner)**

KACHAMBWA, J:

Background

1. At the end of the hearing of this matter on the 12th October 2022, the court gave an *ex temporae* judgment in the presence of both counsels. The judgment was very

   precise on the reason for dismissal of the appeal. On the 28th of September 2023 the appellant wrote a letter asking for a full judgment. The appellant said that he made

   a follow up and was promised that the judgment would be ready by the 6th or 7th of November 2023. Come the day he says that he was told that there was no judgment and that it would be only available in December 2023 or January 2024. This led to the appellant writing a letter of complaint to the JSC Secretary in which he cast aspersions against his counsel and the court for a delayed judgment since October 2022. Consequently a directive was

given by the Chief Justice that the judgment be delivered by the 13th of December 2023. It is a good thing to have litigants who chase

up their matters as this keeps the system in check. Unfortunately sometimes the truth

as in this case is spared. The requested judgment was already in the making and in

any event after the request we would be looking at least three months for it to be

ready. Fortunately here be it by the 11th of December 2023.

The Charges and the Appeal

2. The appellant was charged of eighteen (18) counts of gross negligence and convicted of six (6) of them. He also faced four (4) counts of carrying out any act which is inconsistent with the express or implied conditions of the contract of employment. He was convicted of only one count. A global penalty of discharge was imposed. The appellant appealed to the appeals committee without success hence the present appeal which is against both conviction and penalty.

The Grounds of Appeal

3. On the six counts from the first charge the appellant's argument was that the evidence presented proved that the appellant was requested to disarm the seals and had authority to disarm. The request to disarm was in line with appellant's duties. There was also wrong emphasis on the effect of the absence of a few emails, the absence of which had been explained satisfactorily.

4. On the 2nd conviction the appellant's ground of appeal was that there was no evidence to show that the appellant was the only one who entered the database on the day in question.

5. On the penalty the appellant said that it was excessive and a lesser penalty would have met the justice of the case. Enough weight was not given to the fact that there was no prejudice suffered.

6. The appellant prayed for a setting aside of the conviction and penalty and for reinstatement without loss of salary and benefits. In the event

of reinstatement being no longer possible the appellant prayed for damages in *lieu* thereof. The

quantum of damages would be agreed on by the parties failing which either party

could approach the court for quantification.

The Response

7. The respondent raised a point in *limine* to the effect that the appeal was filed out of time and as such should be struck off. Respondent referred to time in its code and not the court's Rules. (This point was withdrawn on the date of hearing).

8. On the merits of the appeal the respondent said that there was no error in the convictions. On count 2 on gross negligence the email came after the act of disarming the seal and therefore could not exonerate the appellant. On count 4 there was no request. On counts 9-12 disarming was done 4 days after the expiry of the emails and therefore there was no request authorising the action. One cannot claim authority arising from communication that has expired.

9. On the issue of deletion of records the respondent said that the evidence led showed that the appellant was the only person who had logged into the system on the relevant day. Consequently there was adequate evidence to convict.

10. On the issue of too much emphasis on the emails the respondent said that the ground was too broad and in any case was not a true reflection of the facts. The appellant had in fact been exonerated in other counts where there was the same issue of the absence of email requests. Therefore it was said that this ground of appeal did not have merit.

11. On the issue of penalty this was said to be appropriate. The absence of prejudice on itself was said not to be enough to obviate a penalty of dismissal. The respondent was said to have exercised its discretion appropriately in imposing the penalty of dismissal.

12. The respondent asked for dismissal of the appeal with costs.

The Brief Facts

13. The appellant was employed by the respondent as a Systems Developer based at Kurima House in Harare. His duties did not include disarming of seals on his own initiative. His duty in that regard ie on seals was maintenance and troubleshooting. However he could disarm seals on authorisation by his supervisor or when requested to. Thus on the eighteen counts of gross negligence in the execution of his duty it was said that he had disarmed the seals without authority or any request.

14. On the four counts of carrying out any act which is inconsistent with the express or implied conditions of the contract of employment the appellant was accused of not following procedures laid down for making certain changes and of deleting information from the database. This information was for trucks that were in transit and for whose seals he had unprocedurally disarmed.

15. On the six counts of gross negligence that he was found guilty of it was found that he had disarmed these seals without prior authority or without request. That is the finding of fact. The times of the emails and those of disarming show this. On the one count he was convicted for any act inconsistent with the express or implied conditions of the contract of employment it was found that he was the only person who had accessed the database on the day in question.

Appellant's Argument

16. On the point in *limine* the appellant said that the applicable rules were those of the Labour Act as the appeal was to the Labour Court where the time is 21 days as opposed to the 14 days of the employment code of conduct.

17. On the disarming of the seals the appellant argued that he had authority by way of the emails that were produced. The fact that the authority was post the

disarming was said to be irrelevant as long as the requests were eventually received. The respondentargued that the burden of proof had not been discharged.

18. On the penalty the argument was that the penalty was excessive in view of the fact that the appellant was a first offender and that, there was no actual prejudice. It was said that corrective action was the appropriate penalty - a written warning. Dismissal was said to be inappropriate for a contrite first offender. Dismissal would cause more harm than a rehabilitatory penalty.

19. The appellant also argued that the gravamen of the charge was that it was not part of appellant's duties to disarm the seals. Therefore once it was proved that it was part of them and that he had emails asking him to disarm the charges had collapsed.

Respondent's Position

20. In short the respondent's position was simply that it was conceded that the appellant's duties included disarming the seals but only if requested to. That position was agreed by the parties. The appellant would be requested via emails. The point of departure was that the emails produced by the appellant were not tallying with the times of disarming. Consequently they were not authority for such disarming. The purpose of placing seals was to monitor goods in transit so that they would not be offloaded in the country. By disarming the seals before the vehicles had reached the exit points the appellant was exposing the respondent to possible heavy loss of revenue as per the figures supplied.

21. On the penalty the respondent's position was that this was discretionary and unless the discretion was improperly applied the penalty stands.

The Court's Analysis

22. At the end of the hearing the court made a very clear *ex temporae* ruling in order to avoid keeping the parties, more so the appellant, in suspense. It is clear as day and night that the convictions were on the discrepancy of the emails. Once the emails were not in appellant's knowledge when he removed the seals then he was not authorised. If they had expired he was not authorised either. It is of no support to his case that he eventually received an email requesting him to disarm. Thus his conviction in that regard is correct. This point was made clear in the *ex temporae* judgment and explains counsel's attitude when the appellant asked him to file an appeal. It is unfortunate that the appellant cast aspersions on the counsel and the court for his loss.

23. On the penalty the law is very clear. It is discretionary on the part of the employer. It must be within the limits provided by the law. The appellant did not argue that the penalty was a misdirection, an abuse of discretion as such. His argument is merely that a less severe penalty should have been imposed. He did not say that the imposed penalty was incompetent at law and indeed it is competent. The law reports are full of cases that say that the court does not interfere with a discretion properly applied. One of the constantly cited one is **Passmore Malimanji v CABS** SC 47/07 where the court said that-

> *"It is trite that an appeal court does not interfere with the exercise of discretion by a lower tribunal unless it is shown that the discretion was improperly exercised. As contended for the respondent, the penalty imposed must show a serious misdirection to justify interference by the appeal court."*

24. The implications of the appellant’s actions are certainly very serious. The charge is one where a penalty of dismissal is provided. There is nothing untoward that is

germain from the facts or the record. There is nothing that was alleged, only to

argue that an alternative and less severe penalty would have been preferable.

That is no reason for interfering with a decision of a lower court.

Disposal

25. From the observations that have been made it is clear that the appeal has no merit. Accordingly it must fail.

26. On the costs these normally follow the results unless the facts say otherwise. No argument was made for the court to depart from the usual consequences.

No case appears from the facts for the court to depart either.

Therefore the appellant should bear the respondent’s costs. It is therefore ordered that:

The appeal be and is hereby dismissed with costs.