

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/04/2013

**HARARE, 5 SEPTEMBER 2013 &
28 FEBRUARY 2014**

CASE NO LC/H/304/2012

In the matter between:-

DELTA BEVERAGES

APPELLANT

Versus

PRINCE KWESHA & 2 OTHERS

RESPONDENTS

Before the Honourable B S Chidziva : Judge

For the Appellant

R Mutasa (Legal Practitioner)

For the Respondent

E Maponga (Legal Practitioner)

CHIDZIVA J:

The appellant is appealing against the honourable arbitrator M Mpango dated 26th day of March 2012. The accused was couched as follows:

"The respondent perpetrated unfair labour practices by treating claimants as casual workers after the expiry of six weeks in four consecutive months in violation of the relevant collective bargaining agreement. It is hereby ordered that the respondent re-instates the claimants or pay \$1741-00 to each of the claimants as damages in lieu of re-instatement. The respondent is also ordered to pay \$4 818-00 to each of the claimants in respect of underpayment of wages, overtime and allowances."

The brief facts of the matter are that the respondents were employed by the appellant as casual workers between August 2010 and July 2011. Their payment was based on the number of pallets produced and not the number of hours worked.

The respondents' contracts of employment were terminated and in April 2012 the matter was taken up for arbitration.

The appellant's grounds of appeal are that:

- i) The arbitrator erred on a question of law in determining that the employees were permanent employees when they were never intended to be permanent and did not pass the test in s 12 (3) of the Labour Act [Cap 28:01]. The employees could not be regarded as employees on contracts without leave of time.
- ii) The arbitrator erred on a question of law by awarding the respondents US\$4 818-00 each where there was no evidence before him to substantiate the claims of underpayment by the employees.
- iii) The arbitrator erred on a question of law in holding that the Labour Act applies between former employees and former employers.

The respondents in response told the court that:

- (i) The respondents entered into a contract of employment with the appellant as casual workers as at August 2010 to July 2011. The respondents worked for a period exceeding twelve (12) months uninterrupted. The contract was only unilaterally terminated during the twelfth month.
- (ii) The respondent worked for a total of six weeks for four consecutive months therefore they were permanent employees as provided for by s 12 (3) of the Labour Act [Cap 28:01].
- (iii) The appellant never disputed that:
 - (a) The respondents were working overtime but they were not paid for such overtime; and

- (b) The respondents were not paid employment Council rates.
- (iv) The Act applies to both former employers and former employees.
- (v) The appellants admitted that they were guilty by paying damages in *lieu* of reinstatement (see Annexure "C" and "D").

The respondent therefore prayed that the appeal be dismissed with costs. They also prayed that the appellant be made to pay back the back pays with interest at 15% prescribed bank rate, three months' notice pay and cash in *lieu* of leave days equivalent to a month's pay.

It is common cause that:

- (i) The respondents were employed by the appellant's from August 2010 to July 2011 as casual workers.
- (ii) Their service was not interrupted until the 12th month.
- (iii) Their payment was based on the number of pallets they produced.

What is to be decided is whether the appellants committed the enforced labour practice as alleged or not.

Section 12 (B) of the Labour Act [*Cap 28:01*] states that:

"A casual worker shall be deemed to have become an employee on a contract of employment without limit of time on the day that his period of engagement with a particular employer exceeds a total of six weeks in any four consecutive months."

Given the evidence before this court it is this court's view that the respondents worked the hours that they claimed

they worked. They also worked more than the four consecutive (4) four months without being interrupted.

The appellant has also paid damages in *lieu* of reinstatement. This was a voluntary act which is a clear sign of admission of guilty. When the unfair labour practice was committed the Labour Act was already in force. This Act therefore governs the issues raised in this case.

In the result therefore the appeal fails and the arbitral award by Honourable M Mpango dated 26th day of March 2012 be and is hereby upheld.

Dube Manikai & Hwacha, appellant's legal practitioners