

IN THE LABOUR COURT OF ZIMBABWE
LC/H/47/2014
HARARE, 24 & 31 JANUARY 2014
LC/H/217/2013

JUDGMENT NO.

CASE NO.

In the matter between:-

CITY OF HARARE

Appellant

And

JUDITH CHIWESHE

Respondent

Before The Honourable F.C. Maxwell, Judge

For Appellant

Ms C. Maunga (Chief Legal Officer)

For Respondent

G. Nyamupanedengu

MAXWELL J:

In August 2009 Respondent was employed by the Appellant as a Dental Therapist. In 2011 she applied for study leave to pursue a degree in Dental Surgery at the University of Zimbabwe. The application was recommended by

- the Director Health Services (Mungofa)
- the Human Resources Director (Mubvumbi)
- the Human Resources Director (Chimombe)
- the Town Clerk (Mahachi)

Respondent did not get any indication that Council had made a decision on her application. She subsequently applied for annual leave for the period 30 August 2011 to 21 September 2011. The first Semester of the degree programme commenced on 5 September 2011. Respondent

did not report for work after the expiry of the annual leave she returned to work on 19 December 2011. She was subsequently charged with absenteeism and appeared before a disciplinary committee. The disciplinary committee found her guilty and imposed a penalty of dismissal. The penalty of dismissal was approved by Council.

Respondent was aggrieved and referred the matter to the Employment Council for the Harare Municipal undertaking for conciliation. The parties failed to agree and the matter was referred to arbitration. The arbitrator ordered the reinstatement of the Respondent without loss of salary and benefits with effect from the date of dismissal. Appellant was aggrieved and noted this appeal. The ground of appeal is

“The Arbitrator erred at law in overturning the decision of the Appellant’s Disciplinary Committee on dismissing the Respondent who proceeded on study leave without Appellant’s authority in contravention of the Appellant’s Code of Conduct S.I. 171/10”

Appellant prayed for the setting aside of the arbitral award and the confirmation of the Respondent’s dismissal as fair. In response Respondent simply stated that the Arbitrator did not err as the Respondent had justifiable grounds to be away from the workplace. Respondent prayed for the upholding of the arbitral award. In heads of argument Respondent raises the issue of legitimate expectation. She argues that since all the relevant people had recommended that she should go on study leave she had a legitimate expectation that her study leave was going to be approved by council. She further contended that it was an unfair labour practice for the Appellant not to respond or communicate with her on the status of her application.

The question is whether or not Respondent had a lawful excuse for not resuming work after her annual leave. It was submitted on her behalf that she was left with no option because she had already paid her school

fees and Appellant did not communicate with her regarding her application. It was also submitted that she had followed the procedure that needs to be done when one is applying for study leave hence recommendations from all those in authority. None of these facts gives lawfulness to Respondent's action. In the case of **City of Harare v Zimucha** 1995 (1) ZLR 285 the Court refused the excuse of a valid reason for absenteeism. It held that

"However attractive that reasoning may sound, it does not stand up to analysis.

"valid reason" means a reason which is lawful in terms of the contract"

See also **Mwanyisa v Minister of Finance & Others** SC 6/02.

In *casu* what was required was approval by Council itself. It mattered not that recommendations had been made. They remain recommendations. Moreover Respondent did not dispute the submission that she knew what was required before one could proceed to study leave, that is, that she needed to be sure that leave has been approved by council. I do not find merit in the submission that Respondent had a legitimate expectation that her leave would be approved. Council does not rubber-stamp whatever has been recommended. As submitted for the Appellant, there are various stages in the process where the recommendation can be varied or rejected. It was submitted that after approval by Council an employee can then fill in leave forms and seek approval by the head of department. If the head of department does not approve the leave, in my view, it is only then that one can argue legitimate expectation. The expectation would be from the fact that Council would have approved the leave.

The Arbitrator found that Respondent had justifiable grounds to be away from the workplace. He comments that the management chose to support the decision made by the claimant's head to withdraw the application without even bothering to communicate with her for her input.

The Arbitrator disregarded the fact that there are management decisions for which employees are not consulted.

For the above reasons the Arbitrator's decision cannot stand. Wherefore the appeal succeeds and it is ordered that

1. The Arbitrator's award be and is hereby set aside and is substituted with the following order

"Claimant's claim be and is hereby dismissed for lack of merit."

2. Respondent's dismissal be and is hereby confirmed.
3. There shall be no order as to costs.