

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

PETER W. CHAKWANA.....COMPLAINANT

AND

MINISTRY OF LANDS AND NATURAL RESOURCES.....RESPONDENT

INQUIRY NO: 57/2017

FILE NUMBER - OMB/BT/C/148/2009

DETERMINATION

CORAM

Hon. Martha Chizuma-Mwangonde	-	Ombudsman
Mr. Peter W. Chakwana	-	Complainant
Mr. Alfred Butao - Ministry of Education	-	Respondent

DETERMINATION

1. THE INQUIRY

The complainant lodged his claim with our office through a letter dated 23rd February 2009 alleging that his employer Ministry of Lands and Natural Resource had unfairly dismissed him. The office referred the matter to the Respondents for their comments and in their response they denied liability stating that the Complainant was simply a temporary employee and thus was not entitled to study leave or education advance and other privileges which formed the basis of their dismissing him. The Complainant expressed dissatisfaction with the Respondent position and the matter was recommended for a public inquiry which took place on 17th May 2016.

2. THE EVIDENCE

During the Inquiry complainant testified in person whilst the Respondents were represented Mr Alfred Butao. In his evidence the Complainant stated that he was employed by the Respondents on 19th December 1994 as a Library Assistant. In 1995 a Government circular abolished temporary employment. However the evidence shows that the Respondents decided to hang on to the Complainant and his colleagues as apparently there were so many vacancies in their organisation. According to the Complainant this message was relayed to them by the Surveyor General himself and so they continued to work in their temporary positions and receiving a salary. In 1997 vacancies were announced for Surveyor Assistants and the Complainant did apply. However a week later one of the senior officers Mr Botomani told him to apply for Photographic Assistant post as there were so many people on the position of the Surveyor Assistants to which he obliged. Later he received a letter inviting him for interviews which he attended but he was later told that this was erroneous as there were no vacant positions for that post. Most of his friends who had applied for Surveyor Assistant were however made permanent.

He continued working and in the course of working he decided to privately pursue an Accounting course which he actually did such that by 2005 he was a holder of Diploma in Accounting. By 2008 he had secured a place at the Polytechnic to pursue Bachelor's Degree in Accounting. He thus applied for a study leave and education advance. Before receiving response he proceeded on his 24 annual leave days and used this time to start his course. In the meantime he got communication that his application for Education Advance had been turned down. At the end of the semester he followed up on his request for study leave and later on in December 2008 he received a dismissal letter backdated to June 2008. It is this dismissal that he is now challenging through this office.

In response the Respondent representative state that the Complainant was not eligible for any benefits except for an emergency leave. And thus he could not be entitled to study leave or education advance. He further stated that it was simply out of goodwill that the Complainant was allowed to continue working after the circular abolishing temporary employment came out and also that he was allowed to accumulate the leave days. According to him there was no need to provide the Complainant a hearing after they were notified that he had proceeded on unpaid leave.

3. THE ISSUES FOR DETERMINATION

- a. Whether the dismissal by the Respondents amounted to maladministration
- b. Whether the Complainant has suffered an injustice
- c. If the answer in 2 above is in the affirmative whether the Complainant is entitled to a remedy.

4. THE LAW AND ITS APPLICATION TO THE ISSUES.

As it has been stated elsewhere maladministration covers a lot of administrative sins. Unfair treatment, acting in a high handed manner and failure to act are all examples of maladministration. Moreover failure to apply the law or wrongful application of the law amounts to maladministration. It is important to note at the outset that the claim herein arises out of an employment relationship. Since the Complainant was employed in 1994 guidance ought to be sought from the Malawi Public Service Regulations since the Employment Act only came into force in 2000.

From the evidence it appears to me that to determine whether there was maladministration on the part of the Respondents we need first to determine whether they handled his request for study leave and education advance and also the consequent dismissal in accordance with the MPSR. The provision relating to temporary employees are contained in Book Two and according to chapter 2 Part 2 I would agree with the assertion by the Respondents that the only allowance that a temporary employee like the Complainant is entitled in addition to the salary is the bicycle allowance. Regulation 2: 206 (3) which reads;

'Save in the most exceptional circumstances and then only with prior written approval of the Secretary to Treasury in addition to any other approval required under Book One, Chapter VII, no advance of salary , other than an advance for the purchase of bicycle under rule 2:205 may be granted to temporary employees'.

On the issue of study leave it is clear from Rule 2:316 that a Responsible Officer can use his discretion to grant a temporary employee unpaid leave for days not exceeding 12 days in any year.

However the MPSR is silent on entitlement for study leave by a temporary employee and looking at the MPSR restrictive regime my conclusion would be that the same was not available to temporary employees. The evidence suggest that during the first time of his degree studies the Complainant used his accumulated leave days. However he went for his second semester on the strength of the application for study leave which had not yet been approved and also which as stated above strictly speaking he was not entitled to. It is based on this that I find that the Respondents correctly applied the MPSR to the Complainant's situation and that they were entitled to dismiss him for proceeding on study leave.

I note however that he was not given a chance for a hearing. Fair labour practices provided for in the 1994 constitution would demand that an employee be granted an opportunity to defend him or herself against the allegations levelled by the employer. This failure to follow the procedure amounts to maladministration.

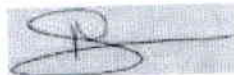
On the issue of whether the Complainant has suffered an injustice I would like to qualify that indeed he has but only to the extent that the Respondents broke a cardinal administrative law rule and never granted him a chance for a hearing. He was not given a chance to express his side of the story. As to whether the Complainant is entitled to any remedy my strongest view is that this should be answered in the negative. Whilst appreciating that the Respondents failed to conduct a hearing, such a hearing would not have changed the substantive finding that the Respondents correctly applied the MPSR and were entitled to dismiss the Complainant.

The Complainant's claim is thus dismissed.

5. RIGHT OF REVIEW.

Any dissatisfied party may apply for review of this Determination by the High Court pursuant to section 123 (2) of the Constitution within 3 months from the date hereof.

Dated this 22nd Day of March 2017



Martha Chizuma- Mwangonde

OMBUDSMAN