

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

MR. J. P. CHIGONA.....COMPLAINANT

AND

ESCOM.....RESPONDENT

INQUIRY NO: 10/2016

FILE NUMBER - OMB-BT-C-723-2001

DETERMINATION

CORAM

Hon. Martha Chizuma-Mwangonde	-	Ombudsman
Complainant	-	Present
Respondent	-	Absent

1. THE INQUIRY

The complainant lodged a complaint with our Blantyre office by a letter dated 20th February 2001 alleging unfair treatment by the Respondents in the manner that they terminated his employment. Upon receipt of the complaint the Office of the Ombudsman referred it to the respondents for their comments. The respondents responded to the claim by denying to have unfairly terminated the Complainant. After that a number of correspondence passed between the complainant and the respondents through our office with both parties sticking to their positions. Thus when this matter was set down for Public Inquiry on 23rd February 2016. The Respondents did not attend despite having been duly given notice of hearing. We proceeded with the Inquiry and below is our determination on the same.

2. THE EVIDENCE

It was the complainant's undisputed evidence that he was employed by the respondents as a Building Foreman in 1991 and working in Maintenance Section. He had his services terminated in 2000. In 1997 he was part of the team that was sent to construct a control room at Kasinthula Substation. At this time the complainant was working under supervision of an Electrical Engineer. However there was a Project Coordinator, Mr Sichinga, based in Blantyre who used to come to supervise the works. On one occasion Mr Sichinga came and inquired from the Engineer on the number of cement bags required for the building to which the answer was 60. Then an LPO was issued and given to the complainant to go and procure the 60 bags. However the Indian Supplier who was approached refused to release all the 60 bags of cement with cheque payment. He only released 50 bags. The complainant told the inquiry that he reported this to the Engineer who allowed him to pick the 50 bags. When the Supervisor came and was informed about the 50 bags he was not happy and started asking questions to the complainant but the latter told him to inquire on the same from the Engineer since he was the boss. The next thing he received was a suspension letter in November 1999 followed by a hearing which took place in January 2000. However during the waiting period he heard from his juniors that the auditor sent by the respondents to investigate the matter, Mr Thauzeni was coaxing them with beer so that they implicate him.

He further stated that during the hearing he was surprised that Mr Thauzeni, the auditor was also sitting on the hearing panel. He was further surprised that despite that he had specifically asked for his boss the Electrical Engineer and his juniors at the hearing they never came. After he received the dismissal letter he asked for an appeal which the respondents granted. However he could not manage to attend because he received letter of invitation late. It later turned out that the appeal hearing was scheduled on the same day that the notice was sent to him. When he approached the HR Manager Mrs Takomana for a reconsideration of the date of appeal she shouted at him and told him to stop bothering them as they were done dealing with his issue. He thus alleges that he was unfairly treated by the respondents and that this resulted in his loss of employment. He

would like this office to help him with compensation for unfair dismissal, severance allowance and his pension.

To have a full appreciation of the facts herein I also looked at the documentation on file more especially that from the respondents since I did not benefit from their evidence during the inquiry. The first one worth referring to is the letter dated 29th October 2001 from the Respondents to us in response to our referring the complaint to them on behalf of the complainant. In the said letter the respondents explain that it was whilst the Complainant was doing the building project that that the Building Services Manager advised him to purchase 60 bags of cement. They say that the Complainant was advised to use only 30bags and then call the Building Services Manager to supervise the work before proceeding to using the rest of the 30 bags. However the Complainant disobeyed the instruction and further cheated that he had used 60 bags when in fact he had only used 50 bags. This to them showed that the complainant lacked in both integrity and honesty and resulted in the respondents losing confidence in him. The letter further stated that the Complainant failed to appear for his appeal hearing despite being notified of the same. The second letter worth mentioning is one dated 26th January 2006 in which the Respondents were responding to the Complainant's letter of appeal to the Executive Management. In this letter they are advising him of their decision not to proceed with Executive Management appeal on the ground it was their view that the case was properly handled and closed.

2. THE ISSUES

- a. Whether the respondents are guilty of maladministration
- b. Whether the complainant suffered injustice
- c. Whether the complainant is entitled to any remedy.

3. THE LAW AND ITS APPLICATION TO THE EVIDENCE

Under section 123 of the constitution, the Ombudsman has got powers to investigate any allegation of an injustice. However the injustice to be investigated should be as a result of maladministration. As to what amounts to maladministration, Section 5(1) of the Ombudsman Act gives some examples as unfair treatment or abuse of power by public officials. However this list is not exhaustive at all. There are so many administrative sins which once you see them you know is maladministration. Maladministration is any form of bad administration and can also include failure to take into account the law when making decisions or indeed failure to follow lawful procedures when coming up with a decision.

The question in the instant case is whether the respondents committed maladministration. To answer this we need to find out if in dismissing the complainant herein the Respondents followed the law. But before going into the substantive analysis of this issue I have

observed that the cause of action herein arose in February 2000. This was before the present Employment Act which only came into force a few months later in July 2000. However by this time the 1994 constitution was in force. Section 31 of the constitution provides for a right to fair labour practices. Again section 43 of the same constitution provides for a right to lawful and procedurally fair administrative action. A wholesome reading of these two sections leaves no one in any doubt that before any termination of employment there has to be some justifiable reason for such action which need to be proved by evidence and that it is also expected that the employee would be given a chance to state his side of the story against the stated reasons before a termination takes effect. Without this the justification of the reasons would be questionable and any termination flowing from that would tantamount to unfair labour practices.

According to the evidence the respondent's reasons for dismissing the complainant were threesome; failure to account for 25 bags of cement, lack of integrity and insubordination to the superiors. These were the reasons that they proffered which had to be justified by evidence during this inquiry. They chose not to come despite being notified thereby leaving the complainant's evidence to the effect that the reasons were not true unchallenged. Thus it is my finding that the Respondents did not have any justified reasons to dismiss the Complainants.

Again looking at the manner in which the hearing process itself took place leaves a lot to be desired. It was more of a smokescreen. The undisputed evidence by the complainant is that the auditor who had come to investigate the issue of cement in Chikwawa also sat on the disciplinary hearing panel thus he held position of both the judge and prosecutor which is total affront to the rules of natural justice. Further when he appealed against the dismissal the clear evidence on file is that it was on the same day that the respondents sent him a letter of notification of the date of appeal hearing that the appeal hearing was scheduled to take place. Thus he missed the date. When he further asked for another appeal hearing the Respondents simply told him that they do not want to hear from him again. Putting all this together leaves me with no any other option but to find that the termination was also procedurally unfair.

From the foregoing it is therefore my finding that the respondents failed to follow the law by their failure to dismiss the complainant on justified reasons as is required by sections 31 and 43 of the Constitution. They further carried out the hearing in total disregard of the rules of natural justice. In addition they displayed a lot of highhandedness by the manner in which they treated the complainant when he insisted on the appeal. In short I find that the respondents are guilty of maladministration.

Coming to second point of whether the complainant suffered injustice again it should be noted that the law again does not define what injustice is. What really amounts to injustice depends on what respective Ombudsman considers injustice based on the facts of each complaint that he or she is faced with. Suffice to say that every injustice suffered would

have to flow from the maladministration committed. In the instant case due to the failure to follow the law on unfair dismissal the complainant lost his job and therefore his salary and other related benefits. Thus the injustice suffered by the complainant herein.

Coming down to the remedy section 123 of the constitution gives the Ombudsman powers to direct an appropriate administrative action to redress any grievance. In employment cases as this one what comes to mind is reinstatement or compensation. However 16 years have passed between the date the complainant herein had his services terminated to this date. It would be impossible for the respondents to take him back and quite unfair to expect him to fully blend in the respondent's business after such a long period. Accordingly the appropriate remedy herein is compensation. The evidence shows that the complainant worked for the respondents for a total period of 8 years and a few months. It is not clear what the retirement age for the respondents was at this time although we can take judicial notice of the fact that it should have been between 55 and 60 at this time nor is there evidence of the complainant's age at the time of the cause of action. Suffice to say that we can safely assume that all things being equal the complainant was going to work till the retirement. On the other hand I am fully aware that an employment contract is not for life and that it could probably have come to an end without any fault on the part of the respondents herein. Considering all this it is my considered view that a 5 year salary plus benefits that the applicant was entitled to at the time would be an appropriate remedy in this matter.

I note that the complainant further claims severance allowance and pension. As stated above this cause of action arose before the present Employment Act which provides for severance allowance. Accordingly this claim fails. As for pension without any proof that he was on pension scheme it is very difficult for me to make any definite directive on the same.

4. FINDING

From the foregoing it is my finding that the respondents failed to follow the constitutional provisions when terminating the employment of the complainant herein and thus are guilty of maladministration. This maladministration resulted in the complainant suffering an injustice of losing his job and therefore his salary.

5. DIRECTIVE

By powers vested in me by section 126 of section I hereby direct that the respondents pay the complainant an equivalent total sum of 5 years' salary which he would have received from 7th February 2000 to 7th February 2005. The payment should take into consideration devaluation of the kwacha as at the date of payment. This payment should be made within 21 days from the date of this determination.

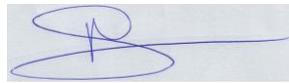
I further direct that the complainant proves to the respondent by way of evidence that he was on the respondent pension scheme. If indeed there is such proof then the evidence

should also be produced within 21 days of this determination and the respondents should pay the same according to the terms of that scheme within 15 days from date when the said proof of pension claim is produced to them.

6. RIGHT OF REVIEW

Any Party dissatisfied by this determination and with sufficient interest in the matter has a right to apply for review to the High Court in accordance with section 123 (2) of the Constitution within 90 days from the date of this determination.

DATED THIS 10th DAY OF MAY 2016



Martha Chizuma-Mwangonde

OMBUDSMAN