

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

AUBREY DIWA..... COMPLAINANT

AND

MIN OF HEALTH.....RESPONDENT

INQUIRY NUMBER: 90/2019

FILE NUMBER- OMB-18-BLK-13

CORAM

- Martha Chizuma - Ombudsman
- Aubrey Diwa - Complainant
- Mercy Gondwe - (AHRMO) for the Respondent

DETERMINATION

1. The Complainant states that he was employed on 23rd May, 1996 as a Hospital Attendant at Machinga District Health Office (DHO).
2. In March 2005, he was bereaved and he asked for permission from Mrs. Msonthi, the sister-in-charge to go and attend the burial. Mrs. Msonthi allowed him to go and gave him 7 days leave.
3. He did not go with his wife due to transport problems.
4. After the lapse of the 7 days, the Complainant did not go back to his workplace as he had fallen sick. A message of his sickness was sent by his brother who called on the switchboard of his workplace and talked to Mr Malindi who was requested to pass it to Mr Kaulanda, the auxiliary nurse.
5. Later his uncle took him to a Traditional Doctor in Mulanje. He came back to his work after a month where he was told that he had been stopped from working at the Hospital. He tried to get assistance from the DHO who was on transfer then and he told the Complainant that his matter would be dealt with by the Human Resource. Thereafter the Complainant went to the Ministry's Headquarters to be assisted but they sent him back to the DHO as they did not have any documentation for him from the DHO.
6. Further, the Complainant states that between 2005 and 2018, he had been asking for assistance from the Respondent but never got a response. That is when he decided to come to my Office.
7. In their defence, the Respondent affirmed that the Complainant had worked for them. As an office they did not know that the Complainant had gone to attend a funeral. All that was in his file are notes about his absenteeism as he was away for about a month. Rumours were circulating that he had secured another job and also that he had found another wife. His wife had come to the office to seek help as she was not aware of her husband's whereabouts.
8. The Complainant was invited by the Appointments and Disciplinary Committee (ADC) but he did not come as the invitation was sent to his known address but he was not there. After the ADC meeting which was held in absence, it was resolved that he should be dismissed. A report was made to the Ministry and the DHO wrote him a dismissal letter. The Ministry delayed to respond to the DHO's letter by 5 years.

9. The Respondent further stated that the Complainant was aware of his dismissal earlier than he admitted at the Inquiry because there is a letter that was written then by him expressing wonder on why he was being invited to the Office when he had already been dismissed. According to the Respondent, the dismissal letter was given to the Complainant in 2005.
10. The Respondent also asserted at the Inquiry that the Complainant stated he sought his leave from the sister in charge and yet it was the same sister who reported his absenteeism. Moreover, in one of his letters, the Complainant stated that he was with a new wife who he suspects had given him a love concoction that made him loose his mind and not to come to work.
11. Again, the Respondent stated that the Complainant had been called to a disciplinary hearing and a letter had been sent to the address he indicated in his records, but he was not at the address he had given. This explains why he did not attend the disciplinary hearing.
12. The main mandate of my office is to investigate instances of maladministration. Maladministration basically means bad administrative decisions or actions made or taken by public officials or offices. Both our Constitution and Ombudsman Act list out a number of instances that constitute maladministration. According to section 123 of the Constitution and section 5 of the Ombudsman Act, for maladministration to be proved the complaint against the public authority has to allege either or several of the following instances; injustice; abuse of power; unfair treatment; manifest injustice or conduct qualifying as oppressive or unfair in an open and democratic society; the exercise or performance of Powers, duties and functions in an unreasonable, unjust or unfair way. As per section 5 (2) this further includes decision or recommendation made by or under the authority of any organ of Government or any act or omission of such organ that is unreasonable, unjust or unfair or based on any practice deemed as such and also that the powers, duties and functions which vest in any organ of Government are exercised in a manner which is unreasonable' unjust or unfair.
13. Looking at the mandate of my office which is to investigate cases of maladministration, I note that the Complainant is somehow being economical with the truth. For instance, he did not respond to the allegation that his wife had come to the office inquiring as to his whereabouts. Surely if he had fallen sick after the funeral, his wife should have been the first to know his whereabouts and perhaps

even be the one to inform the Office of his illness. Again with respect to the invitation of the disciplinary letter which was sent to his known address and his absence at the hearing speak volumes as to his innocence.

14. With respect to his dismissal, indeed I note termination of employment letter written on 26th May, 2005 to the Complainant signed by Dr. J.U.A. Mpunga and another one to the Secretary for Health reporting of the termination of services. The Ministry only responded in 2011 with instructions that the Complainant should be dismissed from the service and not terminated on grounds of misconduct. The letter went on to advise that the DHO was to write another letter superseding the first letter of dismissal. This unreasonable delay to respond to one of their own offices is an act of maladministration and should not be condoned at all.
15. Based on the letter from their Headquarters, Machinga DHO wrote a dismissal letter on 20th July, 2011 backdating the date of dismissal to 2005. Backdating the dismissal letter of 2011 to say dismissal was with effect from 26th May, 2005 was an unfair labour practice as it has been said in a number of court decisions and even in many of my determinations. In any case the dismissal was supposed to take effect on the day the letter was written which is 20th July, 2011. This means from 2005 to 20th July, 2011, the Complainant was still the Respondent's employee. The reasoning against backdating dismissal dates is to have efficient systems that do not keep their employees in a state of limbo as it happened in the present case.

DIRECTIVES

16. As per section 126 of the Constitution, where am satisfied that an injustice has been done, I am empowered to redress that grievance, therefore on that note I direct by virtue of powers vested in me by section 126 of Constitution and 8 of the Ombudsman Act I direct as follows:
 - a. The claim for unfair dismissal fails as the Complainant was accorded an opportunity to be heard but he was nowhere to be found.
 - b. The Respondent do pay the Complainant his monthly salary from 2005 to July 2011 as his date of dismissal is 20th July, 2011. Looking at the time gone by, when paying the Complainant, the payment should be made based on the present grade of the Hospital Attendant, the position held by the Complainant at the time of dismissal. The payment should be done by 30th October, 2019.

17. RIGHT OF REVIEW

Any party dissatisfied with this determination and with sufficient interest in the matter is at liberty 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 19 day of June, 2019


Martha Chizuma
OMBUDSMAN

INQUIRY NUMBER: 10/2019

FILE NUMBER: OMB-18-BUC-13

SEARCH

Martha Chizuma

Ombudsman

Audrey Chikwira

Complainant

Martha Chizuma

(ABSTRACT) for the Complainant