



REPUBLIC OF MALAWI
INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

CHAKUDZA D.K. MHONE.....COMPLAINANT

AND

MINISTRY OF TRANSPORT AND PUBLIC WORKS.....RESPONDENT

INQUIRY NO: 86/2019

FILE NUMBER - OMB/BT/C/083/2010

DETERMINATION

CORAM

Hon. Martha Chizuma - Ombudsman

Chakudza Mhone - Complainant

Mr. Chawinga - Respondent's representative

DETERMINATION

1. The Complainant lodged this claim against the Respondent in a letter dated 8th June, 2010.
2. Investigations failed to resolve the matter and it was recommended for Public Inquiry which took place on 29th January, 2019. The Complainant represented himself and the Respondent was represented by Mr. Chawinga.
3. In his sworn evidence the Complainant stated that he was employed as a fireman in September 1999. In 2006 he sat for his M.S.C.E and in 2010 he was selected to study at Domasi College of Education. He applied for a study leave and he gave the letter to a Mr. Kajombo who returned it to him after a week saying the immediate boss had refused to sign. He however proceeded and went to school. He wrote another letter to the Respondent but he did not get any response.
4. He further stated that he stopped receiving his salary in April 2010 and on 10th June, 2010 he received a letter of abscondment and he responded to the letter, explaining the reasons for his absence.
5. On 20th September he was invited for promotion interviews and he attended the interview in October 2013. On 27th January, 2014 he was called to the airport where he was given a dismissal letter. He claims that his dismissal was unfair as there were some other people at the same workplace that went for further studies but they were not dismissed from employment.
6. In cross-examination by the Respondent, he stated that he went to pursue a Diploma course in Education and that he wrote the Respondent for authority but he did not get any response.
7. He further stated that he was never called for any hearing after he was told that his absence from work was regarded as abscondment.
8. In response the Respondent stated that they received a complaint from Department of Civil Aviation on a number of employees pursuing education without authority. The matter went to the Appointments and Disciplinary Committee (ADC) and the Complainant was dismissed on the grounds of abscondment. He further stated that the other people that the Complainant was referring to were not dismissed because they did courses which were relevant to their work. On the issue of the Complainant being called for

interviews, the Respondent said that he was probably called to attend the interviews by mistake.

9. In cross-examination by the Complainant, the Respondent stated that indeed the Complainant's salary was frozen and later the abscondment letter was sent to him. He further said that the Complainant cannot say that he was dismissed twice because the stoppage of salary did not mean that he was dismissed. The Respondent also stated that there is no information that the Complainant was called for a disciplinary hearing.
10. According to the Respondent, the Ministry operated within its regulations and laws to dismiss the Complainant.

ANALYSIS OF THE LAW AND FACTS

11. The main mandate of the Ombudsman is to investigate instances of maladministration. For maladministration to be proved, according to section 123 of the Constitution and section 5 of the Ombudsman Act 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.
12. Regulation 1:550 of the Malawi Public Service Regulations provides as follows;
Responsible officers must deduct equivalent salary from wages due and payable to a civil servant in respect of any period of absence from duty, not authorized. In addition, such unauthorized absence shall subject the civil servant concerned to a disciplinary action.
13. The facts and the sworn statements of both parties reveal that there is no dispute that the Complainant went for further studies without authority from his employer. I find no fault in the Respondent's decision to treat his absence as abscondment since he left without permission. The stoppage of his salary on grounds of abscondment was not unfair in any way because he was studying

for an unauthorized course contrary to his work. If the Respondents had not deleted his name from the payroll it would have meant him receiving public funds without providing a service which is an undesirable situation. The conduct of the Respondent in this aspect was both fair and lawful.

14. On the other hand, I find that the Respondent has not properly followed procedural requirements in as far as dealing with the Complainant's issue is concerned. Firstly, the Complainant was not accorded a chance to explain his side of the story after his name was already deleted from the pay roll. Secondly, they did not give the Complainant a chance to be heard before dismissing him thereby breaching section 57 of the Employment Act. This in my view constitutes unfair and unjust omission on the part of the Respondent and it is greatly condemned.
15. The other issue that has to be looked at is the contents of the stated dismissal letter. The dismissal letter although written on 10th January, 2014 made the dismissal effective from 1st May, 2010. Thus the dismissal is made to work retrospectively which is not lawful. In Herbert Phalamba v ADMARC, HC, Civil Cause No. 1601 of 1996, Justice Mkandawire made the following remarks in relation to backdating the effect of dismissal:

"I am inclined to agree with the defendant that the plaintiff was guilty of misconduct as laid down under paragraph 16 sub-paragraph II of the conditions of service. The defendant was therefore entitled to dismiss him. The only fault I find is that the dismissal was backdated to 25th January, 1996. Dismissals cannot be backdated. The plaintiff was therefore dismissed on 4th may, 1996 on the date the letter of dismissal was written."

16. Failure to take into account relevant factors in making a decision or in discharging public duties is maladministration. In the instant case the Respondent failed to take into consideration the established legal principles which prohibit retrospective termination of employment. I therefore find that the Complainant was dismissed on 10th January, 2014 which is the date that the dismissal letter was written and not 1st May, 2010.
17. Where an allegation complained of has been proved Section 126 of the Constitution gives the Ombudsman powers to direct an appropriate administrative action to be taken to redress the grievance complained of and section 8(1) (b) gives the Ombudsman powers to take appropriate action or

steps to call for or require the remedying or reversal of matters or instances complained of.

18. In the instant case I have faulted the failure to conduct a hearing before affecting the dismissal and also backdating the said dismissal. However, I am of the view that even if the hearing was done it would not have affected the final outcome of the dismissal. So whilst not condoning such procedural failure I would rather this issue is put to rest.

19. As for backdating the dismissal ordinarily what I am supposed to do is to direct that the Complainant be paid all the salary up to the time that the dismissal letter was actually written. In this case this would be from the time of his suspension to the date when the Respondents actually dismissed him in writing. However, I am also mindful that the Complainant herein absconded from work. Legally he was not supposed to get any salary. In other words, I cannot direct that he be paid that which he was not legally entitled to in the first place by virtue of his own abscondment.

20. In view of this I make no directives on this matter.

21. 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 hereof.

FILE NUMBER: JMB/ST/COM/1010
DATED THIS 19th DAY OF JUNE, 2019



Martha Chizuma

OMBUDSMAN