

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

DARLINGTON MAPEMBA.....COMPLAINANT

AND

LILONGWE CITY ASSEMBLY.....RESPONDENT

INQUIRY NO: 74/2019

FILE NUMBER - OMB/BT/C/109/2012

DETERMINATION

CORAM

MARTHA CHIZUMA

- OMBUDSMAN

Darlington Mapemba

- Complainant

Msukwa

- Representing Respondent

DETERMINATION

1. The Complainant lodged a complaint with our Blantyre office through a letter dated 8th October, 2012. The complaint is against Lilongwe City Assembly alleging unfair dismissal.
2. The evidence on the file suggests that the Respondents were not forthcoming in providing feedback. Thus when the matter was recommended for public inquiry which took place on 31st January, 2019. For the Respondents was Mr Msukwa in attendance.
3. During inquiry the Complainant stated that he was employed by the Respondents in September 1973 as a workshop supervisor until November, 1983 when he was dismissed.
4. On 3rd November, 1983 the Complainant was invited suddenly to go to the Boardroom where he found many Counsellors, Town Clerk, Depots Supervisor and a mechanic. When he was in the Boardroom the Complainant was told that a jerk, wheel spanner and tyres for the mayor's car had gone missing whilst under his care. He was further told that he was purchasing tyres using the Respondents' LPO which he fixed on his car.
5. The Complainant denied all the allegations and stated that his car was different from that of the Mayor and he was not in-charge of LPO rather the Stores Keeper used to keep them. On wheel spanner and jerks he stated that he did not steal as he had his own. The Complainant also told the Respondents to ask one in transport section.
6. The Complainant's expectation after he narrated his side of the story was that he will be invited to be advised of the outcome of the meeting but he was served with a letter of suspension on the same day. The Complainant was later dismissed on 15th November.
7. After the dismissal the Complainant went to the Town Clerk who told him that after the impromptu hearing inquiries were made that did not reveal anything. Reports were made to the Council but they still went ahead to dismiss the Complainant. However the Complainant stated that he lost both letters of dismissal and interdiction.
8. The Complainant wants compensation for unfair dismissal.
9. During cross examination the Complainant stated that he cannot remember the officer who signed his dismissal letter and that he had never been warned throughout his work life.
10. He further explained that after the dismissal he went to Legal Aid to seek for redress but was told that since councillors were politicians Legal Aid did not want to fight with them. He gave up until he listened on Zodiak radio station about our office thus when he lodged this complaint.
11. The Respondents' representative indicated that he does not have any information regarding this matter. As such I directed that they should search for information at National Archives in Zomba and make submissions within 21 days from the date

- of the inquiry. To date we have not received the Respondents' position on the matter.
12. Before going into the analysis I need to state that the cause of action herein arose in 1983 thus before the present Constitution and the Ombudsman Act came into force. These laws do not operate retrospectively.
 13. In one of my determination in the case of **Dinness Siliya -vs- ADMARC** Inquiry No. 02 of 2016 and a very recent one of **Simplex Tebulo -vs- Malawi Defence Force** Inquiry No. 6 of 2017 I noted that the Office of the Ombudsman should as far as possible desist from entertaining complaints whose causes of action arose before the office of the Ombudsman was created. The reason behind this is that the office should not be used to punish public officers and offices for offences that were not subject to punishment during the time they were allegedly committed. I went further to state that the office should however not be too clinical in coming to the said decision but should look at peculiar facts of each complaint.
 14. I put up two considerations to be kept in mind when exercising such discretion. The first one is whether there were available forums for accessing a remedy at the time that the cause of action arose and if so, whether the complainant could have reasonably been able to access such a remedy. Secondly is whether and if the complainant tried within his means and capacity to get redress from the Respondent or any affordable forum soon after the incident occurred and before reporting to the Office of the Ombudsman.
 15. I will deal with the two consideration stated above one by one starting with the first one. By virtue of Article 23 of the Universal Declaration of Human Rights (UDHR) and as was stated in the case of **Chakufwa Chihana -vs- Republic MSCA** Crim. App. No. 9 of 1992, UDHR forms part of the laws of Malawi and freedoms. Article 23 gives every person right of work and protection against unilateral deprivation of work. The present matter is about employment. It can therefore be argued that there were forums that the complainant could have used to address his complaint and get a remedy. The question to follow now is could it have been reasonably possible for the complainant to access such a remedy in court?
 16. On this issue the complainant has clearly stated in the facts that he tried to approach Legal Aid who could handle his matter but Legal Aid could not do that for fear of losing their licenses considering that the case involved councillors who most of them were politicians and all the set up was political in nature. When we consider the political climate at that time then I have doubts whether the complainant could have succeeded to challenge the Respondents in courts either by himself or by appointing a lawyer.
 17. On the second consideration as to whether the complainant tried within his means to get redress either from the Respondent or any affordable forum soon after the incident occurred or before reporting the same to this office. It is indicated in the file that the Complainant wrote the Respondents a letter dated 13th December, 1983 to at least be considered but there was no response from the Respondent.

18. Where the Ombudsman finds the above two questions in favour of the Complainant then this becomes a reasonable basis for considering if the Respondents can be held liable for maladministration. However the maladministration in question should only be that which the Respondents committed after the lodging of the Complaint with my office. In the present case did any of the conduct of the Respondents during the period the complaint was in the office amount to maladministration under the law?
19. The complaint was lodged in October 2012. Since investigations were commenced the Respondents had never responded to any of our letters until the matter was set down for an inquiry. During inquiry the Respondents' representative stated that they do not have any information regarding the complaint and thus could not comment anything. Even after they went to National Archives they still could not find any information regarding this complaint.
20. The Respondents ordinarily took long time to respond to this complaint and the fact that they could not find the Complainant's record is simply due to their own poor record keeping which in itself is maladministration. I also bear in mind that the Complainant does not have either the dismissal letter or interdiction letter. The only documents he has are the reference letter which was written by the Respondents testifying to the good conduct of the Complainant and the letter which he wrote the Respondent demanding compensation for his dismissal.
21. Where an allegation has been proved Section 126 of the Constitution gives me powers to direct an appropriate administrative action to be taken to redress the grievance complained of and section 8(1) (b) gives me powers to take appropriate action or steps to call for or require the remedying or reversal of matters or instances complained of.
22. The finding of maladministration above is in the context of poor record keeping and non-responsiveness. Legally it is the Employer and in this case the Respondents who are obliged to provide reasons for dismissal. They have failed to do this leaving the Complainant's complaint of unfair dismissal unchallenged. The appropriate fair and administrative remedy in my view should be compensation to be restricted to the period when the complaint was in my office thus from 2012 to 2019.
23. The Complaint herein was in my office for about 7 years. Considering all the relevant factors of the case I am of the view that 7 years' salary would be a fair and equitable compensation. I have also taken note of the fact that in his complaint letter, the Complainant made further claims of three months' notice pay, twelve days' suspension pay and Council's provident fund contribution for 10 years. It is my considered view that the 7 years' salary pay would effectively cater for the claims of notice pay and suspension pay. Anything otherwise would amount to over compensating. However, the Provident Fund contributions should only be paid upon the Complainant producing supporting documentation for the same.
24. By powers vested in me by section 126 of the Constitution and section 8 of the Ombudsman Act I hereby direct that;

- a. The Respondent should pay the Complainant 7 years' salary as compensation for unfair dismissal. The calculation for this should be based on the salary of a Senior Mechanical Supervisor or any equivalent position within the Respondent's organisation as of the date of this determination.
- b. The Respondent should pay the Complainant's contribution to the Provident Fund. This payment should only be done upon the Complainant producing evidence for the claim.
- c. The payments stated above should be made by 30th September 2019.

25. 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 18TH DAY OF JUNE, 2019



Martha Chizuma

OMBUDSMAN

DETERMINATION