



REPUBLIC OF MALAWI

# INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

**EMMANUEL SILUNGWE**.....**COMPLAINANT**

AND

**MINISTRY OF LABOUR, YOUTH  
SPORTS AND MANPOWER DEVELOPMENT** ..... **RESPONDENT**

INQUIRY NO: 85/2019

FILE NUMBER - MZ-2010-OMB-146

## DETERMINATION

### CORAM

- Hon. Martha Chizuma - Ombudsman
- Emmanuel Silungwe - Complainant
- Raphael Mhango - Chief HRMO Ministry of Labour
- Tuneka Nyirenda - HRMO Accountant General

## DETERMINATION

1. The Complainant lodged his complaint with our office through a letter dated 10<sup>th</sup> May, 2010 claiming unfair dismissal. He alleged that he was dismissed from employment on charges that he was acquitted on.
2. Investigations failed to resolve the matter and it was recommended for Public Inquiry which first took place on 14<sup>th</sup> December, 2017. The Complainant represented himself and the Respondent was represented by the Accountant General.
3. In his sworn evidence the Complainant stated that he was employed in 1997 as accounts assistant. In August 1998 he was arrested on suspicion that he was involved in a robbery at his work place. He was later on acquitted and cleared of all his charges at Lingadzi Police Station. When he went back to work he was asked to write a report about the incident and then he was told to resume work but he was transferred to a different department.
4. He alleged that after some time, he applied for annual leave and when he came back, he found that his office was sealed. He was then informed by the Human Resource Management Officer (HRMO) that his personal file was being reviewed and that he should go back and wait at home until communicated to by the HRMO. After some time the HRMO informed him that he had been dismissed and that a letter had been sent to his next of kin. He indicated that his next of kin did not receive any letter on his behalf and that when he asked the HRMO for a copy of the said letter, he was not given.
5. The Respondent in response stated that the Complainant absconded from duties. He went on leave for one month but stayed well beyond the one month. Efforts were made to contact him and his next of kin but both could not be found. He further stated that during this period things were being done at departmental level and not generally. The matter was then adjourned as it showed that it could not be completed without the presence of Ministry of Sports and Culture.
6. The Public Inquiry resumed on 21<sup>st</sup> August, 2018 where the Complainant represented himself and the Respondent was represented by Mr. Raphael Mhango, the Chief Human Resource Management officer of Ministry of labour and Mr. Tuneka Nyirenda the Human Resource Management officer of the Accountant General. The Respondents clarified the fact that the issue of the robbery was not in any way related to the dismissal but that he was dismissed due to abscondment. They further stated that they tried so hard to find the Complainant so they could accord him the right to be heard but he was never found. The Respondents further stated that according to MPSR, a person

- whose employment is terminated on the grounds of abscondment has a chance to reapply but the Complainant chose not to take that opportunity.
7. In cross examination by the Complainant, the Respondent stated that efforts were made to find the Complainant or his next of kin but he could not be found and that for more than ten years he did not go to his workplace to inquire about anything. When the Complainant was asked as to why he did not report to work he said that soon after his leave was over, he reported to work on 13<sup>th</sup> August 1999 but he was told to stay away by the HRMO Mrs. Kamoto.

#### ANALYSIS OF THE LAW AND FACTS

8. The primary function of an Ombudsman is to investigate complaints of maladministration. Maladministration has many facets but for us in Malawi, the first port of call to establish maladministration is section 123 of the Constitution and section 5 of the Ombudsman Act. Under these provisions, for maladministration to be proved, the complaint lodged 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; and the exercise or performance of powers, duties and functions in an unreasonable, unjust or unfair way. As per section 5 (2) of the Ombudsman Act, this further includes decisions or recommendations 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.
9. The complaint herein is that of unfair dismissal. My task in this case is to determine if the Respondent is guilty of this. Absenteeism is indeed a very serious offence. It actually warrants a summary dismissal under the Employment Act Section 59.
10. In order for a dismissal to be fair, the Respondent has to show that they had a valid reason to dismiss the Complainant and this has to be coupled with an opportunity for the Complainant to defend himself against the said allegation. The right to be heard emanates from section 57(2) of the Employment Act. The effect of section 57(2) is that even where the employee is guilty of any misconduct, before his employment can be terminated, he must be accorded an opportunity to defend himself.

11. The respondent managed to bring enough evidence to show that indeed the Respondent absented himself from work when his leave was over. The Complainant himself conceded to this but his argument was that he was not reporting for duties because he was told so by the HRMO. This could have been a valid reason had it been that there was evidence that after some time he went to the office to inquire about his situation. I do not think that a reasonable person who loves his job can be told orally to stay away by one single person and the person indeed stays away for years without making inquiries or complaints to other senior officers. I therefore find that the reason given by the Complaint is not strong enough to convince me that he had a good reason for his actions.
12. The Complainant had the right to be heard by an impartial tribunal before implementing the decision of dismissing him from his charges. However, evidence was also produced to show that the Respondent tried to find the Complainant up to the point of following up with his father but their efforts were fruitless. One may therefore argue that it was very difficult for the Respondents to grant him the right to be heard when he was nowhere to be found.
13. The only thing that needs to be analysed is the issue of the actual dismissal. From the evidence that was brought before me and from what was said at the Public Inquiry, it is clear that the Respondent never implemented the decision of dismissing the Complainant. There was no dismissal letter given to the Complainant and none in the Respondent's files. The Complainant's contract was not properly terminated and this was a serious flop on the part of the respondent and I condemn such reckless omissions.
14. I am nevertheless mindful of the fact that this anomaly is likely to have happened because the Complainant was not in the picture when all these decisions were being made. Regardless of this fact, good practise would demand that the dismissal letter be drafted and kept in the file of the Complainant as was the case with the other documents that they brought before me as evidence.
15. The question that I need to ask myself is whether the Complainant suffered any injustice because of this anomaly. The answer to that question is in the negative. The Claimant did not suffer any injustice by the fact that the

dismissal letter was not given to him because the letter could not have changed his predicament.

16. The totality of the evidence before me reveals that the Complainant was an irresponsible employee who abandoned his duties. It was therefore fair to dismiss him under the circumstances.
17. The Respondent should formally give the Complainant a dismissal letter, the letter should reflect the present day as it cannot be backdated.

RIGHT OF REVIEW

18. 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<sup>th</sup> Day of June, 2019



Martha Chizuma  
OMBUDSMAN