



REPUBLIC OF MALAWI

# INQUIRY BY THE OMBUDSMAN

IN THE MATTER

**BETWEEN**

GRESHAM HUNGA.....COMPLAINANT

**AND**

MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY.....RESPONDENT

**INQUIRY NO: 11/2018**

**FILE NUMBER - OMB/MZ/C/337/2007**

## DETERMINATION

CORAM

- MARTHA CHIZUMA - OMBUDSMAN
- Gresham Hunga - Complainant
- Mr Dzongololo and Mrs Kaliati - Representing Respondents

## DETERMINATION

1. The Complainant lodged his claim against the Respondents with our Mzuzu office by a letter dated 16<sup>th</sup> November, 2007 alleging that the Respondents unfairly dismissed him. The complaint letter was immediately sent to the Respondents for their comments who in response stated that the Complainant was convicted and sentenced by a court of law as such he could not be employed by Government as the said Government does not employ persons who were once convicted. In another letter the Respondents also stated that they had submitted the Complainant's disciplinary case to management for its decision.
2. Evidence on the file suggests that the Complainant was later dismissed on 6<sup>th</sup> June, 2008 but the dismissal was backdated to 7<sup>th</sup> December, 2006.
3. On receipt of notification of the dismissal the office asked the Respondents to regard the dismissal to have taken place on the date the dismissal letter was written and that they should pay the Complainant salaries for the period he was on interdiction up to the date of the dismissal. Thus when the matter was recommended for public inquiry which took place on 12<sup>th</sup> December, 2017. In attendance for the Respondents were Mr Dzongololo and Mrs Kaliati.
4. In his evidence the Complainant stated that he was employed by the Respondents in 1992 as a guard. On 7<sup>th</sup> December after a night shift as he got home his girlfriend called him to her house. On his way to his girlfriend's home a certain woman accused him of dating a married woman. He got angry and slapped the woman who reported him to the chief and police.
5. He was arrested and brought before court where he was convicted of attempted rape and later sentenced to 7 and half years. On appeal the sentence was reduced to 12 months. In 2007 he was released and he went to his workplace where he was told to go to the DEO to collect his arrears of which he did. The next morning he was told that he had been dismissed from employment. Thus when he lodged this complaint at our office. He was aggrieved with the dismissal as he was never given any documents as regards his dismissal.
6. In response the Respondents' Mrs Kaliati stated that she had partial knowledge of the case that the Complainant was sentenced for unlawful wounding. She then asked for time so as to gather more information about the case.
7. I gave the Respondents up to 22<sup>nd</sup> December, 2017 to provide me with information on their position. On 22<sup>nd</sup> January, 2018 I received the Respondent's position on the matter where they stated that the Complainant was indeed their employee as a security guard.
8. The Complainant was arrested on allegations of indecent assault where he was later convicted by the court of law and sentenced to 12 months imprisonment so he was dismissed on the ground of his conviction.
9. 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.

10. Instances of maladministration though are not limited to above and as stated by S De Smith and R Braze " *Constitutional and Administrative Law, 6th edition p 649*

*'maladministration covers a multitude of administrative sins; sins of commission and omission, corruption, bias, unfair discrimination, harshness misleading members of the public as to his right, failing to notify him properly of his rights or to explain the reason for decision, general highhandedness, using powers for wrong purpose, failing to consider relevant materials, taking irrelevant materials into account or failing to reply to correspondence.*

- 11 The complaint before me is unfair dismissal. Legally under section 57 unfair dismissal comes under two limbs; lack of reason to dismiss and failure to provide a hearing before dismissal. With this understanding what needs to be determined is whether the circumstances and processes surrounding the dismissal of the Complainant herein amounts to any of the circumstances mentioned in (8) and (9) above.
12. Without much ado the evidence before me clearly shows that the Complainant was tried and convicted of assault occasioning actual bodily harm. This has even been confirmed by the Complainant himself in his evidence in chief. He was at first verbally told that he had been dismissed. Later in 2008 when he had already lodged this complaint with our office is when he was served with a dismissal letter though backdated. Thus there was sufficient and valid reason to dismiss the Complainant.
13. Coming now to the issue of whether the Complainant was heard before the decision to dismiss the answer is obviously in the negative. It is clear that the Respondents simply based their decision on the evidence that was provided by their Education Division Manager (NED) that the Complainant was tried, convicted and later sentenced to 12 months imprisonment for assaulting someone. This in my view constitutes unfair and unjust omission and also failure to take into account relevant matters in this case section 57(2) of the Employment Act. It is maladministration.



14. The other issue as stated above has to do with the contents of the stated dismissal letter. The dismissal letter although written on 6<sup>th</sup> June, 2008 made the dismissal effective from 7<sup>th</sup> December, 2006 and forfeiture of the withheld salaries. Whilst this seems to be allowed under the MPSC regulations the fact of the matter is the Employment Act is superior to the MPSC regulations and under the Act, the only time when a suspension without pay is allowed is when the said suspension or interdiction is meted out as a disciplinary action after a full disciplinary process. The forfeiture of the salary is therefore illegal and thus maladministration.
15. Failure to take into account relevant factors in making a decision or in discharging public duties is maladministration. In the instant case the Respondents failed to take into consideration the established legal principles which prohibit retrospective termination and withholding of salary pending investigations. I find the Respondents to be guilty of maladministration.
16. These irregularities are in the circumstances of this case quite fatal and put serious holes on the legality, fairness and reasonableness of the alleged dismissal. They amount to serious maladministration.
17. Where an allegation complained of 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.
18. The finding of maladministration above is in the context of failure to conduct a hearing before a dismissal is affected, backdating of dismissal and forfeiture of withheld salaries. The appropriate administrative remedy therefore would be that I direct that the dismissal be reversed and for a hearing to be undertaken. The question to ask however is whether such a hearing would substantially affect the earlier decision of dismissal. Considering the overwhelming evidence of conviction and sentence against the Complainant it is my view that such a hearing would not affect the earlier dismissal.  
This is not however to endorse the practise of dismissal without a hearing. The evidence in this matter are simply peculiar. In view of this I will not make any directive regarding this.
19. In view of the above I make the following directives:
  - a. The Respondents reverses the effective date of dismissal from 7<sup>th</sup> December, 2006 to the date when the letter of dismissal was written on 8<sup>th</sup> June 2008. This should be done by 30<sup>th</sup> November, 2018.
  - b. The Respondents do pay to the Complainant all withheld salary during the period of interdiction to the date of dismissal. In order to obtain value for money the salary rate should be for a current guard at the Respondent's Ministry. The money should be paid by 1<sup>st</sup> December, 2018.

**20. 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 28<sup>TH</sup> DAY OF September, 2018**

  
Martha Chizuma  
**OMBUDSMAN**

INQUIRY NO: 11/2018  
FILE NUMBER: OMB/MZK/227/2017

**DETERMINATION**

COMRAH  
MARtha CHIZUMA  
OMBUDSMAN  
Representing Respondent