



REPUBLIC OF MALAWI

# INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

JANUARY BANDA.....COMPLAINANT

AND

MINISTRY OF HEALTH.....RESPONDENT

INQUIRY NO: 63/2018

FILE NUMBER - LL-2010-OMB-0016

## DETERMINATION

CORAM

Hon. Martha Chizuma

Mr. January Banda

Mr. Kenneth Matola

- Ombudsman

- Complainant

- Respondent

### DETERMINATION

1. The Complainant lodged his claim with our office through a letter dated 4<sup>th</sup> September, 2000 alleging the Respondent unfairly dismissed him.
2. Investigations failed to resolve this matter and it was eventually recommended for Public Inquiry which took place on 21<sup>st</sup> November, 2017. The Complainant represented himself and the Respondent was represented by Mr. Kenneth Matola.
3. The evidence shows that the Complainant was employed by the Respondent on 20<sup>th</sup> November, 1986 as a ground labourer and was dismissed on 21<sup>st</sup> August, 1991. He stated that on that particular day, he reported to work late from his lunch break as he was escorting a relative to the bus depot. He stated that he had assigned his duties to someone else before he left for lunch as he knew that he would return to work late. Upon his return, he was informed that his supervisors were looking for him and that they assumed that he had gone out drinking. He went in to see his supervisor and explained his side of the story to him. He was then asked to leave his supervisors office and wait outside. He was then called back in and was given what turned out to be a reference letter. He stated that he has not received benefits from the Respondent. He went to the Respondents Headquarters and was advised to put his complaint in writing which he did but has not been assisted to date. His claim is for unfair dismissal and he would like to be reinstated if possible.
4. In response, the Respondent representatives informed the inquiry that they were finding it difficult to trace documentation to present to the inquiry as it happened over 25 years ago and they asked for two weeks for them to submit their position on the matter. However, up to the date of this determination I have not received any communication from them.
5. 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.

6. The complaint herein is on unfair dismissal. It is important to note at the outset that this claim arises out of an employment relationship. To determine whether or not maladministration took place, we need to look at dismissal from employment in the Malawi Public Service Regulations, specifically book 3 as the Complainant was an industrial class employee. This is because more so because the cause of action arose way before the Employment Act was in force.
7. **Regulation 3:110 of the Malawi Public Service Regulations** states the following acts as "*acts of misconduct*":
  1. *He is guilty of misconduct, whether in the course of his duties or not, which is inconsistent with the fulfilment of the express or implied conditions of his employment;*
  2. *He wilfully disobeys a lawful order given by the employer;*
  3. *He fails to hold the level of skill which he expressly or by implication holds himself to possess;*
  4. *He habitually or substantially neglects his duties; or*
  5. *He is absent from work without the permission of the employer or without other reasonable excuse."*
8. If the Respondent found any one of these misconducts, they were well within their rights to dismiss him based on Regulation 3:112(1) (c). Based on the facts, the Complainant admitted that he was absent from work for around two and a half hours without the permission of the Respondent. Whether that amounts to dismissible absence is something worth more debate but one thing for sure is that it reflected some levels of negligence on the part of the Complainant as the one whom he left the ward which he was looking after was not even an employee of the clinic.
9. Moreover I cannot ignore the fact that the passage of time on this claim is immense. He was dismissed in 1991 and he only lodged his claim with us in 2009. As it is and as the Respondents have also put it is very difficult to

get any documentation on this claim. Thus even if I am wrong in my determination in par 8 above and that the Complainant was actually unfairly dismissed and entitled to some sort of compensation it would be totally impossible to process that in the absence of any reliable documentation to support the claim. The Complainant did not help himself by sitting on his rights for too long and not providing any kind of supporting documentation.

10. It is based on this that I am of the considered view that either way this claim is really unsustainable or I direct that it should be dismissed and the file closed.

#### 11. 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 4<sup>TH</sup> DAY OF OCTOBER 2018



Martha Chizuma

OMBUDSMAN

DETERMINATION

10/04/18

Martha Chizuma

301, Victoria Street

Harare, Zimbabwe

Ombudsman

Complainant

Respondent