



REPUBLIC OF MALAWI

# INQUIRY BY THE OMBUDSMAN

IN THE MATTER

**BETWEEN**

*PASTER LUNGU*.....*COMPLAINANT*

**AND**

*LILONGWE CITY ASSEMBLY*.....*RESPONDENT*

**INQUIRY NO: 13/2019**

**FILE NUMBER - LL-08-OMB-0198**

## DETERMINATION

**CORAM:**

- MARTHA CHIZUMA - OMBUDSMAN
- J.L. Nyirongo - Complainant
- Masukwa - Assistant Legal Officer
- Jones Gondwe - Controller Officer
- Sargh Seleman - Legal Intern

## DETERMINATION

1. The Complainant lodged a complaint with our office claiming that the Respondent unfairly terminated his services. Upon receipt of the complaint we forwarded the same to the Respondent for their comments. They responded by explaining the events that led to his dismissal and how in their view the dismissal was fair due to his misconduct. The Complainant expressed dissatisfaction with Respondent's position and seeing that there was a deadlock in the matter it was called for a public inquiry for a fair decision to be made.
2. The inquiry took place on 21<sup>st</sup> November, 2017 and the Complainant testified that he was employed by the Respondent in 1989 and by the time his services were terminated he was an Assistant Director of Finance. His services were terminated on two allegations of misconduct.
3. The first allegation was that he delivered a cheque payable to Prestige Inc. Company amounting to K250, 000.00 to Mrs. Mwale instead of Mr. Mwechumu the rightful owner of the cheque.
4. He denied this allegation and his explanation on the same is that in 2002 to 2003 Councilor Mwechumu who was allowed to do business with the Respondent, reached an agreement with Mrs. Mwale of Zimbabwe to sell overalls to the Respondent using Mr. Mwechumu's business company. The overalls were worth K 240,000.00 and Mr. Mwechumu delivered them to Lilongwe City Assembly. When payment came out instead of cashing the cheque and paying Mrs. Mwale he states that Mr. Mwechumu decided to do the contrary and left for South Africa where he spent all the money.
5. He further stated that Mr. Mwechumu did not even bother to pay Mrs. Mwale when he came back and this left Mrs. Mwale worried that she asked the Complainant that she should be present when Mr. Mwechumu come to collect any other cheque as she was aware that Mr. Mwechumu was still doing business with the Respondent. Thus, the Complainant arranged that when the cheque was brought to his office both parties should be there so they could sort out their conflict amicably. However, when Mr. Mwechumu was called to collect the cheque he never showed up.
6. This prompted Mrs. Mwale to snatch the cheque from his table and she told him that she would give it to Mr. Mwechumu herself to force him to give back her money. The Complainant stated that it was difficult for him to control the situation and this is how the cheque ended up with Mrs. Mwale as she did not deliver the cheque to Mr. Mwechumu.
7. After two weeks he thought they had sorted out the issue but Mr. Mwechumu came to his office saying Mrs. Mwale had not delivered the cheque to him. The Complainant did not worry about this as he thought she was just busy and that she would avail herself to Mr. Mwechumu at an opportune time.

8. After another week he was queried by the Chief Executive Officer(CEO) about the encashment of the cheque and he told the CEO that he had no the knowledge of encashment of the cheque and to this day he still does not know who cashed the cheque.
9. A few days later he was called to meet the Ministry of Local Government on the matter. Whilst there, he was asked by top officials at the Ministry about the encashment of the cheque and in reply he told the officials of what he knew and denied any involvement in the encashment. However, they asked him to refund the money in four days because the cheque went missing whilst in his care.
10. The Complainant stated that he did not refund the money as he considered doing so an admission in the involvement of the cashing of the cheque. Next thing he saw was an interdiction letter from the CEO.
11. The second allegation concerned a cheque payable to JB Tech and Bolt Engineering Private Limited for K531, 000.00 for supply of a water pump. It was alleged that he authorized the supply of a water pump, which he denied as according to him all he knew about the transaction was that the procedure was followed up to the point of the requisition getting authorized by the CEO.
12. From that point an LPO was supposed to be issued to the company but that was overlooked and he did not know why because at that time CEO had started sidelining him on issues of finance management. He states that instead of raising an LPO to the company, a cheque was directly written to the company and that was against standing financial orders of issuing LPO first. He does not know who authorized that transaction but that is what resulted in cheque being issued before supply of the pump. The Assembly itself is to blame for this and he heard that the pump was delivered but a small one.
13. He was suspended indefinitely on 19<sup>th</sup> October, 2003 on an allegation of corruption and violation of conditions of service. This was followed by a letter of termination of service on 13<sup>th</sup> February, 2004 signed by Human Resource Manager. He, therefore, seeks to know whether proper procedures were followed in terminating his services; whether the Respondent was right in backdating the date of dismissal to date of suspension and whether he is entitled to severance pay.
14. His argument is that in accordance with Terms and Conditions of service for staff in the Assembly the disciplinary procedure stipulate that a verbal warning should be given to an employee who commits a misconduct and if he does not reform within a month a then a meeting is held with his departmental head and a warning letter is issued.
15. In addition, the Complainant avers that there was no disciplinary hearing, what came after the suspension was termination of his services, therefore, he concludes that he was denied procedural justice.

16. On issue of backdating the date of his dismissal he argued that he was not supposed to be suspended indefinitely. By virtue of section 35 of the Employment Act and section 9 of the Terms and Conditions of service of the Assembly he was entitled to severance pay. He therefore seeks to be reinstated; to be paid his withheld half pay salary during the period of suspension; severance pay and compensation for suffering he had endured.
17. In cross examination he stated that his suspension was dated 19<sup>th</sup> October, 2003 and the allegation in the letter was corruption. He clarified that Mr. Mwechumu met Mrs. Mwale in his office as she used to come to the Respondent looking for business orders and that in the meeting Mr. Mwechumu told her she needed a business licence.
18. The Complainant also stated that he made arrangements for the cheque to come to his office so that he gives to Mr. Mwechumu in the presence of Mrs. Mwale. It was the payment section that would ordinarily be the last section to handle the cheques and make payment. He had a dispatch book in his office ready for Mr. Mwechumu to sign after Mr. Mwale took the cheque. He further stated that he never reported this issue to any senior official as to him this was a very simple matter and he denied colluding with Mrs. Mwale. The cheque was closed and could not be cashed by a third party. He does not remember any officer coming to his office to inquire about the cheque. When Mr. Mwechumu came to him he told him what had happened and that he expected Mrs. Mwale to give him the cheque. He does not know up to now who cashed the cheque. He informed the inquiry that he was told to write a report but procedurally he was not given a chance for a hearing.
19. After hearing the evidence, the respondent sought an adjournment as the representative was given instructions late as such he was not conversant with the matter. I granted the request and the inquiry was adjourned to 24<sup>th</sup> November 2017.
20. On the said day the Respondent testified that the Complainant was employed by them and he was suspended in 2003 through a letter date 19<sup>th</sup> October, 2003. The first charge had to do with encashment of cheque no 00465 that was handed over to Mrs. Mwale and not the rightful owner.
21. The cheque was not registered to have been collected. The Director of Finance and Administration wrote the CEO and later the Complainant wrote a report on the same. Based on that information it was proved that he was involved in fraudulent activities.
22. The Respondent further alleged that the Complainant was also involved in the issuing of a cheque to Geotech and Boat Engineering before actual delivery of the goods. This was regarding the purchase of the water pump. It was alleged that the Complainant solicited quotations of the suppliers for the pumps and went further to facilitate the issuing of the payment cheque to the Supplier before the delivery of the pump contrary to standard operating procedures.

23. They inquired from him and looking at all these issues the Council felt that they could not continue working with the complainant and dismissed him. According to them they followed section 57 of the Employment Act. His suspension was without pay because he had stolen money. He is not entitled to severance pay because his services were fairly terminated.
24. In cross-examination the Respondent stated that the Prestige Inc. cheque was cashed by K.M. Building Contractors. They stated that the Bank made a mistake and the bank paid back the amount to them and that they did not establish the relationship between encashment of the cheque with Mrs. Mwale and the Councilor. They also added that Mrs. Bwanamdoko would be the best person to respond as whether the Complainant was the one who obtained the quotations.
25. The primary function of an Ombudsman is to investigate complaints of maladministration. Maladministration has many facets but for us in Malawi 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; 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.
26. My task is to determine if the complaint before me fits into any of the instances mentioned above. Secondly based on the evidence made available to me in this complaint, I need further to establish whether proper procedures were followed in terminating the Complainant's employment; whether the Respondent was correct in backdating his termination to the date of suspension and finally whether the Complainant is entitled to severance allowance.
27. Under section 57 of the Employment Act, for dismissal to be unfair, it has to contain elements of either or both substantive unfairness and procedural unfairness. With regards to the former, the Complainant denies any involvement in the encashment of the cheques but admits that the first cheque of K 250, 000.00 was taken by the wrong recipient under his watch.
28. Looking at the evidence firstly with the cheque of K250, 000.00 I deem the Complainant negligent and careless in orchestrating a scenario where a cheque was retrieved by a wrong party. Surely as a senior finance administrator he should not even

have involved himself in the personal issues involving the Councilor and Mrs. Mwale. She could have resorted to the courts to recover her money from the Councilor. Moreover, he should have known that it was unprofessional to let a financial transaction occur under such a personal and volatile situation.

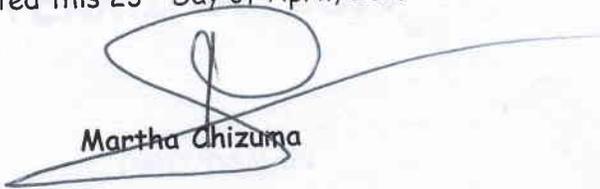
29. It does not matter that the Banks were also found to have been implicit in this transaction and that they made a repayment to the Assembly. This whole saga could have been avoided if the Complainant had not suspiciously involved himself in this as he did. In terms of the Assembly's own Terms and Conditions of Service (Art 7.3 (iii)) this amounted to objectionable and unbecoming conduct. I fault the Complainant in this regard.
30. On the other issue of a cheque for the water pump much as on the face of it the evidence suggests that there was some irregular conduct by the Complainant resulting in breach of Assembly's own operating procedure whereby a cheque payment was issued before delivery, it is my suspicion that there probably were so many players in this botched process other than the Complainant. The failure by the Respondent to produce evidence showing that it was actually the Complainant who was responsible for issuing of the LPO and also auditing the voucher leaves me with uncertainty as to the validity of the allegation against the Complainant herein. Legally they are the ones who are supposed to bring such evidence. Accordingly, on the evidence before me I have no basis to fault the Complainant herein.
31. In terms of the procedural side it is undisputed from the evidence that he was granted an opportunity to give his side of the story. It should be pointed out here that the right to be heard does not necessarily have to be through oral hearing. Where there are no dispute as on the facts as in this instant case, written reports suffice.
32. It is, therefore, my finding that the Complainant is guilty of gross misconduct for his unreasonable and suspicious conduct in the manner in which he handled the payment for Prestigious International Inc. accordingly, his dismissal was fair.
33. Coming now to the specific claims; on the issue of whether Lilongwe City Assembly was right to backdate the date of dismissal the answer is in the negative. The law does not allow this. The courts have ruled against this and I have in my numerous determinations also cautioned against this practice. The same goes to suspension without pay. It is illegal under both the Constitution and the Employment Act to suspend any employee without pay.
34. The argument herein that because the Complainant was not working during suspension and therefore, cannot and should not be paid is for lack of better word nonsensical because in the first place it is the Respondent themselves who put him on suspension and most importantly the argument is not supported by law.

35. The evidence shows that the Complainant was suspended on 19<sup>th</sup> October, 2003. His letter of dismissal is dated 13<sup>th</sup> February, 2004 but made effective from 19<sup>th</sup> October 2003. Based on the foregoing dispose, he is entitled to be paid for the 4 months he was on suspension.
36. On the claim for severance allowance it should be noted that under section 35 of the Employment Act the same is only payable in cases where there has been unfair dismissal and or a retrenchment or redundancy and in no any other situation. Under the Assembly's own Terms and Conditions of Service Art 9.4 severance allowance is not payable where a termination has occurred as a result of a gross misconduct.
37. My finding herein was that the termination was fair. The conduct committed is in the category of gross misconduct. Accordingly, from the perspective of both the Employment Act and Assembly's own Terms and Conditions of Service, Severance allowance is not payable to the Complainant.
38. Accordingly, the only dues payable to the Complainant is the four months' salary withheld during the time of suspension. To ensure maintenance of value for money, the rate to be used should be that of Assistant Director of Finance or any equivalent position as of the date of this determination. This money should be paid by 30<sup>th</sup> June, 2019.

### RIGHT OF REVIEW

Any dissatisfied party may apply for review of this Determination by the High Court pursuant to section 123(2) of the Constitution within 3 months from the date hereof.

Dated this 23<sup>rd</sup> Day of April, 2019

  
Martha Chizuma

OMBUDSMAN