



REPUBLIC OF MALAWI

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

ROSE KAMCHACHA.....*COMPLAINANT*

AND

MINISTRY OF HOME AFFAIRS.....*RESPONDENT*

INQUIRY NO: /2017

FILE NUMBER - LL-16-OMB-120

DETERMINATION

CORAM

MARTHA CHIZUMA

- OMBUDSMAN

Rose Kamchacha

- Complainant

Uthon Mkandawire - AHRMO

- Representing Respondent

DETERMINATION

1. The Complainant lodged a claim with our Lilongwe office through a letter dated 12th October, 2016. In her letter, she alleged that she was unfairly treated by the Respondent allegedly because of their refusal to allow her go on leave and also their failure to communicate to her that her application to accumulate leave has been rejected.
2. The complaint letter was referred to the Respondent for their comments. Several communications were made between the Office, the Respondent and the Complainant but both parties did not agree as such the matter was recommended for a public inquiry which took place on 23rd November, 2017. The Respondent was represented by the Assistant Human Resource Officer Mr. Uthon Mkandawire.
3. The evidence indicates that the Complainant joined the civil service as an Accounts Clerk in 1978. In 2004, she was posted to the Department of Immigration from PVHO.
4. The evidence shows that during the last two years at PVHO she never took any leave and also that during her stay at Immigration from 2004 to 2008 she never went on leave. By 2009 she had a total of 139 outstanding leave days.
5. On 16th September 2009 she wrote to the Respondent to apply for authority on her behalf to DHRMD so that she can accumulate her leave days to be used at the time of her retirement. The evidence shows that the Secretary for Home Affairs wrote the Secretary for Human Resource on 16th November 2009 seeking authority to accumulate leave on behalf of the Complainant.
6. On 24th November 2009 the Secretary for Human Resources wrote Secretary for Internal Affairs on the application asking the later to revise the application based on Government circular No HRMD/A/CL/01/175 which put caps on the number of leave days one can accumulate. Based on this the Secretary for Home Affairs wrote another application dated 16th December 2009 applying for 63 days to accumulate on behalf of the Complainant.
7. Through a letter dated 7th April 2010 the Secretary for Human Resources informed the Secretary for Internal Affairs that the application to accumulate had been denied and that the later should advise the Complainant to take the outstanding leave days in phases.

8. Evidence suggest that this was never communicated to the Complainant on time or at all because she wrote a letter again on 30th April 2016 this time directly to Secretary for Human Resource Management still making reference to her application and asking for advice on the matter. The Secretary for Human Resources responded to the Secretary for Home Affairs with a copy to the Complainant through a letter dated 4th May 2016 making reference to their letter dated 7th April 2010 and asking the later to handle the matter based on that communication.
9. On 17th August 2016 the Respondents ie Secretary for Internal Affairs wrote the applicant informing her of Secretary for Human Resource refusal to her application to accumulate leave days. In the said letter they acknowledged that they were in the wrong for not communicating the position of the Secretary for Human Resource on the leave application in time.
10. Apparently it was upon being dissatisfied with the manner her issue was handled that she decided to come and complain at this office in October 2016 based on the above stated two complaints.
11. The main mandate of the Ombudsman is to investigate instances of maladministration. Maladministration basically means bad administrative decisions or actions made or taken by public officials or offices. Both our constitution and Ombudsman Act list out a number of instances that constitute maladministration. According to section 123 of the Constitution and section 5 of the Ombudsman Act, for maladministration to be proved 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.
12. The complaint by the Complainant herein is unfair treatment over the refusal by the Respondents to allow her accumulate her leave and also the delay or failure to communicate the refusal to her on time. The question to ask is whether this falls into any of the instances mentioned in par 11 above.
13. On the issue of refusal to approve accumulation of leave the question that needs to be answered is whether the Respondents were under an obligation

to approve the application for leave accumulation. In my view the answer to this is in the negative.

14. Through a memo Ref No HRMD/A/CL/01/175 dated 1st July 2005 from Secretary for Human Resource Management and Development to all Principal Secretaries and Heads of Departments, Government advised on the new measures put in place to ensure that there is less accumulation of leave days by civil servants. Thus through the memo the number of leave days that could be accumulated was shortened by providing for mandatory leave days one should take relative to one's annual leave entitlement. Further to this the memo provided that any accumulation of leave had to have prior approval from Department of Human Resource.
15. Accordingly approving of accumulated leave days was a matter of discretion other than mandatory. And moreover the approving authority was not the respective Ministry Agency or Department like the Respondents in this case. It was the Department of Human Resource. Thus since this was discretionary matter the refusal to approve the same by the Department of Human Resource cannot in my view be deemed unfair.
16. On failure to communicate on the refusal to commute the leave days the Respondent has admitted to being at fault for their omission of duty for not conveying their response to the Complainant's application on time which is, quintessentially, an act of maladministration leading to a significant injustice on the Complainant in that if she had been communicated she could have chosen to take her outstanding leave days in phases as was initially communicated by the Secretary of Human Resource.
17. Under section 126 of the Constitution and also section 8 of the Ombudsman Act after the complaint or allegation is proved I am mandated to direct an appropriate remedy to rectify the wrong complained off. In the instant case the only remedies available would be that the Complainant be allowed to proceed on leave or indeed that she has her leave days commuted to chash.
18. However in this case the Complainant has since retired and thus cannot go on any leave and again Government through the same Memo mentioned in 14 above stopped commutation of accumulated leave days to cash. Even if I was to direct that she be paid it will be administratively impossible to do that. In other words I cannot think of any remedy other than an apology which again going by the records was already given by the Respondents

through a letter dated 17th August 2016. I don't think there can be a better apology than that.

19. In view of all this I would thus direct that this matter be considered concluded and file closed immediately. However I direct that the Respondents should by 30th November 2018 write me on measures put in place to ensure that the mishap that happened herein does not happen again.

20. **RIGHT OF REVIEW**

Any person dissatisfied by this determination and with sufficient interest in the matter has a right to apply for judicial review to the High Court of Malawi in accordance with section 123(2) of the Constitution within 90 days from the date of this determination.

Dated this 4TH Day Of October 2018



Martha Chizuma

OMBUDSMAN

INQUIRY NO: 12017

FILE NUMBER - 12-16 OMB-137

DETERMINATION

CCP No

AMPTNA CHIZUMA

Role/Category

Letter of Appointment/Referral

OMBUDSMAN

Original

Representing Respondent