



REPUBLIC OF MALAWI

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

SIMON PASCAL MBEWE.....*COMPLAINANT*

AND

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

INQUIRY NO: 15/2020

FILE NUMBER - LL-18-OMB-0047

CORAM

- MARTHA CHIZUMA** - **OMBUDSMAN**
- Simon Pascal Mbewe - Complainant
- Leonard Kayaye - Principal Human Resource Management Officer
- Sorex Wkhaluwe - District Education Manager
- Alex Makandanje - Principal Human Resource Management Officer
- Prince Tchukambiri - Assistant Human Resource Management Officer

DETERMINATION

1. We received a complaint from the Complainant alleging that the Respondent, Ministry of Education Science and Technology unfairly treated him during his employment by putting him on prolonged interdiction. We sought comments from the Respondent who informed us that they had dismissed him due to his perpetual absenteeism. Upon seeing that we had had reached a deadlock in the matter we scheduled it for inquiry which took place on 25th November, 2019. The inquiry was attended by both the Complainant and the Respondent.
2. In the inquiry the Complainant stated that he started working as a Primary School Teacher in 1995 at grade (L) T2 at Namitambo Local Education Authority (LEA) School in Mulanje and was dismissed on 2nd February, 2001.
3. He stated that between 1995 and 1996 his sister died in Chiradzulu so he was asked to take care of her 3 children. That, in 2000 he was transferred to Chiradzulu and at Chiradzulu District Education Manager's (DEM) office he was told that he should swap with another teacher from Namitambo who wanted to go to Mulanje. He agreed to the arrangement of being transferred to Namitambo LEA School, but however he requested that he should be posted to St Michael Zone because it was near his home village. The Respondents at the DEM's office advised the Complainant to wait as they are looking for a Teacher who can be sent to Namitambo.
4. After a year the Complainant followed up about the transfer issue, but the Primary Education Advisor (PEA) kept saying that the letter was with the DEM. Then the Complainant decided to follow up with the DEM on 31st January, 2001. However he did not find the transfer request letter. The Complainant was advised to write another letter and bring it in person to the DEM's Office. Before writing the letter, he reported to the PEA what had happened who in turn shouted at him for going to the DEM. The Complainant apologized instantly, then the PEA told him that before writing the DEM he should follow up his letter with Mr. Kelekesa who is the PEA for St Michael Zone.
5. Subsequently on 1st February, 2001 the Complainant averred that he went to Mr. Kelekesa but did not find the letter so he was asked to write another letter again. The Complainant went back to Namitambo where he found the PEA and the Deputy Head Teacher at a Football Ground. The Complainant reported to the Deputy Head Teacher what transpired as the PEA left when he was approaching. The Complainant then wrote the letter and requested the Deputy Head Teacher to sign the letter but the Deputy Head teacher refused for the reason that it was the PEA who was supposed to sign first.
6. When the Complainant went to the PEA so that he should sign the said letter, the PEA refused and referred him back to the Deputy Head Teacher. Further the PEA

told the Complainant that he was advised by the Deputy Head Teacher not to entertain the Complainant in any way. The Complainant reverted to the Head teacher who signed the letter and thereafter he took it to the PEA who however still refused to sign the letter. The Complainant then decided to take the letter to the DEM who told him to go Mr. Khungwa's office for assistance.

7. When he was on his way to the Mr. Khungwa's office the Complainant states that he saw the PEA shout something to the DEM whilst pointing at him. Then the DEM turned back and called the complainant and told him to now go to Mr. Ndazipha's office instead of Mr. Khunga's office.
8. Consequently he went to Mr. Ndazipha's office who explained to him that he was interdicted and gave him a letter to present to the Head Teacher at Namitambo. Thereafter the Head Teacher advised the Complainant to vacate the house belonging to the Respondent.
9. The Complainant states that from thereon he kept on following on his interdiction letter for almost a month.
10. He contends that after some time, the Respondents gave him a letter and told him that he should go and wait. He waited for one year until he decided to get a temporary job at a private school for survival. He concluded by saying that he is still on interdiction and seeks justice.
11. In cross examination by the Respondents, the Complainant stated that he never received a dismissal letter from the Respondents. The Complainant alleged that he was only absent from work for 3 days at the time when he was processing the transfer.
12. On behalf of the Respondents Leonard Kayaye alleged that the Complainant was absconding from work for 2 months and that was the reason why he was dismissed. They added that the dismissal letter came through Education Division Manager and the interdiction letter was written on 27th March, 2001.
13. However the Complainant rebutted that he never received the dismissal letter.
14. After hearing the evidence I instructed the Respondents to furnish me with the report which the head teacher wrote and sent to the Ministry Headquarters, which I would use together with the evidence on file to draft a determination.
15. Subsequently the Respondents in a letter dated 4th December, 2019 reported that the complainant had indeed been employed by them but was dismissed on the grounds of absenteeism. They stated they never granted him his transfer.
16. As an Ombudsman under section 123 of the Constitution I have the power to investigate complaints about maladministration occasioned by public bodies. Maladministration includes multitude of administrative sins: *bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness*

17. The complainant alleges unfair treatment and the applicable law in section 57 of the Employment Act provides that for such to occur they should be wrongness in the procedure and the grounds for dismissal.
18. It is undisputed that the Complainant was employed by the Respondent. What is in contention is the status of his employment. The complainant states that he is on interdiction whilst the Respondent avers that they dismissed him on grounds of abscondment and have submitted a dismissal letter explaining the same.
19. They have also stated that the dismissal letter was forwarded to all the necessary parties including the complainant. Now the complainant states that for the past 16 years he did not know that he was dismissed. I find it highly unlikely that a dismissal letter that has gone through the Teaching service commission and forwarded to some officers would not reach the Complainant in over 16 years.
20. But if indeed the letter did not reach him then at least it would have been easily discover-able if he attempted to follow up the matter. From his testimony it appears that he only followed up once after one year of being on interdiction but from then on he did nothing. This for me makes me suspicious and weakens his assertion for I would have expected that in the space of 15 years, the Complainant considering the disadvantaged employment position that he was in, would have made tangible efforts to follow up on the current status of his employ up until the moment he brought his claim to our office.
21. His testimony shows that he was in contact with the PEA and even the DEM who was forwarded the dismissal letter, I find it unbelievable that none of these people would not have informed him of his dismissal. Further to that, he brought the matter to our office after most of the Respondents' witnesses died, which again does not help his case. With the evidence on file, the Complainant needed to bring a lot more to the table to prove that the Respondents made no effort to inform him of his dismissal. His claim that he was not aware of his dismissal therefore fails.
22. Having now determined that the dismissal took place and was communicated to the Complainant, I will proceed to assess its justification. The Respondent dismissed him due to absenteeism for two months and the Complainant refutes this by saying that he was only absent for three days. He has not provided any reason for his three day absenteeism or even proof that he was present for the alleged two months.
23. Legally the burden of proof lies on the employer to prove the reasons for the dismissal. Apart from the interdiction letter of 2001 and subsequent dismissal by the Teaching Service Commission there seems to be no other evidence to prove the allegation. Ordinarily in instances like this where the facts are in dispute a hearing report would prove that there was some due process. But in this case nothing of that sort happened.

24. On the other hand I have observed that there was something quite suspicious in the manner in which the Complainant simply sat on his rights for close to 15 years before lodging his complaint to this office. By the time he did all the people with personal knowledge over the issue had died. However based on the documentary evidence that is on file I have no doubt on my mind that this could have been done. In other words I do not have much basis based on the totality of evidence for me to conclude that there was any unfairness in the manner that the Complainant was handled. The dismissal was quite justified in the circumstances and even though there was no hearing conducted such would not have affected the substantive finding.
25. Nevertheless there is the issue that he was on interdiction without pay. Withholding pay during interdiction is prohibited under section 56(3) of the Employment Act unless it is for restitution for properties damaged by the employee. This interdiction did not involve anything to do with restitution therefore the Complainant was meant to be paid during that period. The Respondents therefore had no right to withhold the Complainant's salary during the time of interdiction. In this regard the Respondent is guilty of maladministration as they failed to take into consideration the established legal principles which prohibit withholding of salary during suspension pending investigations.
26. Further to to this, it is noted that his interdiction was prolonged as it occurred for well over 4 years and that delay also amounts to maladministration. And since it has already been established that the Respondents had no right to withhold the salaries in this first place, it thus means that Complainant is entitled to be recompensed all the salaries withheld during this long period of interdiction. On this point I will take the opportunity to caution the Respondent that they should ensure that they desist from such practices as it results in Government paying employees for services they have not rendered putting an unnecessary strain on the wage bill.
27. Finally I also note that his dismissal was backdated which is another unfair labour practice that was condemned in the case of *Kalitera and Others v INTER-AIDE Malawi Matter No. IRC 120 of 2003*. In the aforesaid case it was held that an employer cannot backdate the termination as doing so is against the law. Courts have now rectified such a malpractice by declaring the date of the dismissal letter as the date of dismissal. In view of that, I find the Respondent unfairly removed time and money from the Complainant that he was legitimately entitled to when they backdated his dismissal, and this amounts to maladministration. His date of dismissal should thus be changed accordingly and any lost dues be recompensed.
28. Accordingly from the foregoing my findings are:
- a. That the complainant was dismissed fairly from his employment.
 - b. The respondent is guilty of maladministration for prolonging his interdiction and withholding pay during that period.

c. The date of dismissal of the Complainant is 19th September, 2006.

29. Having thus so found, I direct by powers vested in me under section 126 of the Constitution and section 8 of the Ombudsman Act that he be reimbursed all the salary withheld from him during his interdiction on 27th March, 2001 to 19th September, 2006 when he was dismissed. This should be calculated at the rate of salary of teacher of his grade as of the date of this determination.

30. **RIGHT OF REVIEW**

Any Party dissatisfied by this determination and with sufficient interest in the matter has a right 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 13th Day of March, 2020.



Martha Chizuma

OMBUDSMAN