

REPORTABLE (Z.L.R.) (86)

Judgment No S.C. 87\2002  
Civil Appeal No 248\1001

ZIMBABWE UNITED PASSENGER COMPANY v RICHARD  
CHRISTOPHER DAISON

SUPREME COURT OF ZIMBABWE  
SANDURA JA, ZIYAMBI JA & MALABA JA  
HARARE SEPTEMBER 16 & NOVEMBER 13, 2002

*H. Zhou*, for the appellant

*Respondent in person*

SANDURA JA: This is an appeal against the quantum of damages in lieu of reinstatement awarded to the respondent (“Daison”) by the Labour Relations Tribunal (“the Tribunal”).

The salient facts are as follows. Daison was employed by the appellant (“Zupco”) as a motor mechanic. He was charged with an act of misconduct and was found guilty and dismissed in terms of Zupco’s Code of Conduct on 23 April 1997.

He appealed to the Tribunal in terms of s 101(7)(a) of the Labour Relations Act [Chapter 28:01] (“the Act”) and was successful. On 9 April 2001 the Tribunal ordered as follows:-

- “1. that the appeal be and is hereby allowed with costs.
2. that the respondent (Zupco) be and is hereby ordered to reinstate the appellant (Daison) with no loss of salary or benefits.
3. (that) in the event that reinstatement is no longer an option, the respondent be and is hereby ordered to pay the appellant damages in lieu of reinstatement, the quantum of which the parties may agree upon, failure of which either party may approach the Tribunal for quantification.”

When the parties subsequently failed to agree on the quantum of the damages, Daison approached the Tribunal and, on 10 July 2001, the parties appeared before the Tribunal for the quantification of the damages. Thereafter, on 1 August 2001, the Tribunal ordered Zupco to pay to Daison, *inter alia*, his salary and benefits for a period of forty eight months. Aggrieved by that decision, Zupco appealed to this Court.

The first issue which I must deal with is whether this appeal raises any question of law. The issue is important because in terms of s 92(2) of the Act an appeal from the Tribunal lies to this Court only on a question of law.

Since this is an appeal against the quantum of damages awarded by the Tribunal, the issue is whether a ruling by the Tribunal on such a matter involves a question of law. That issue was considered by this Court in *Leopard Rock Hotel*

*Company (Pvt) Ltd v Van Beek* 2000 (1) ZLR 251 (S). At 256B-C, McNALLY JA said the following:-

“A ruling by the Tribunal on damages is a ruling on fact and thus not appealable unless it can be categorised as wholly unreasonable. This may (but not must) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing damages.”

See also *Oliver Chiriseri & Anor v Plan International* S-56-2002 (not yet reported); and *Kuda Madyara v Globe & Phoenix Industries (Pvt) Ltd t/a Ran Mine* S-63-2002 (not yet reported).

I must now consider whether the Tribunal’s decision in this case can be categorised as wholly unreasonable. One of the grounds of appeal set out by Zupco in its notice of appeal reads as follows:-

“There were no facts upon which the Tribunal’s assessment of a period of 48 months could reasonably be based.”

That, in my view, amounts to alleging that the Tribunal’s decision is wholly unreasonable. That allegation was based upon the fact that in its judgment the Tribunal did not say why it chose the period of forty-eight months as opposed to any other period. As stated in *Nyaguse v Mkwesine Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S) at 575D, “if the Tribunal is forced to make an estimate, it must use the information to hand, and not simply pluck a figure from nowhere.”

In the circumstances, I am satisfied that the Tribunal's decision can be categorised as wholly unreasonable. The matter is, therefore, properly before this Court.

I now wish to deal with the main issue in this appeal, which is whether the Tribunal's order should stand.

When Daison appeared before the Tribunal for the quantification of the damages on 10 July 2001 he was not legally represented. He was asked what his claim was and he said the following through an interpreter:-

“I pray that the court direct that the Company pays (me) from the date of dismissal up to today (i.e. 10 July 2001).”

Upon further questioning, he stated that what he wanted paid were his salary and benefits. He then enumerated the benefits which he thought he was entitled to, most of which were correctly rejected by the Tribunal.

After the hearing the Tribunal issued the following order:-

“The employer is therefore ordered to pay damages for loss of employment as follows:

Pay the employee his salary and benefits in terms of the contract of employment for a period of 48 months. This should include his salary which was agreed to be \$4 112.68 per month, his employer's pension contribution to a pension scheme which was \$189.90 per month, his leave days, 13<sup>th</sup> cheque if it was due to him in terms of his contract of employment and any other benefits he was entitled to.

The employer should also pay interest on each sum as it fell due at the prescribed rate.

The sum of \$2 500 earned at Kamunhu Service Station should be deducted. An amount of \$62,50 multiplied by 365 days (12 months that he should have vended (sic) to mitigate his losses) should also be deducted together with his tax contributions and contributions to NASSA and any other lawful deductions in terms of his contract of employment.”

With respect, the Tribunal’s order was inappropriately worded, and is not in the usual form.

As already indicated, when Daison appeared before the Tribunal, he claimed payment of his salary and benefits from the date of his dismissal, which was 23 April 1997, to 10 July 2001, the date when the Tribunal heard evidence on the quantum of damages in lieu of reinstatement, i.e. a period of fifty months and seventeen days.

It is clear from that claim that Daison sought payment of a little more than his back-pay and benefits. The real issue, therefore, is whether he was entitled to his back-pay and benefits. I think he was.

I say so because on 9 April 2001 the Tribunal ordered Zupco to reinstate him “with no loss of salary or benefits”, or pay him damages in lieu of reinstatement.

In my view, where an employee is reinstated “with no loss of salary or benefits” his reinstatement is retrospective. If he is not reinstated, but is paid damages in lieu of reinstatement, those damages must include his back-pay and benefits.

As this Court stated in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 268A-B:-

“... the word ‘reinstate’ or ‘reinstatement’ carries no automatic retrospective connotation, either in ordinary language or in our legislation. Normally it means simply that the person concerned will be placed again in his/her former job. If retrospectivity is intended, one would normally look for additional words such as ‘with effect from the date of dismissal’ or ‘with effect from (a particular date in the past)’ or ‘with back-pay and all benefits from ... (date)’”.

If one applies that test to the order of reinstatement issued by the Tribunal in this case, it is clear beyond doubt that retrospectivity was intended. A contrary interpretation of the Tribunal’s order would mean that if reinstated Daison would lose the salary and benefits he had already earned, which would be contrary to the specific provisions of the order.

That being the case, it follows that the damages payable in lieu of reinstatement must include back-pay and benefits. As I stated in *Kudya Madyara v Globe & Phoenix Industries (Pvt) Ltd t/a Ran Mine, supra*, at p 5 of the cyclostyled judgment:-

“As far as back-pay and benefits are concerned, there is no cogent reason for distinguishing between an employee who is reinstated and one who is not, where the order of reinstatement has a retrospective effect. In my view, both of them are entitled to back-pay and benefits. The only difference between them is that one gets his job back whilst the other is paid damages for the premature termination of his employment contract.”

In the circumstances, Daison is entitled to net back-pay and benefits from the date of his dismissal, being 23 April 1997, to 9 April 2001, the date when the

Tribunal ordered that he be reinstated or paid damages in lieu of reinstatement. The claim in respect of the period between 9 April 2001 and 10 July 2001, when the Tribunal heard evidence on the quantum of damages, cannot be granted as Daison laid no basis for it. In addition, it is pertinent to note that Daison made no claim in respect of the premature termination of his employment contract.

Having said that, I would like to consider the three benefits which the Tribunal thought Daison was entitled to. The first benefit mentioned in the Tribunal's order is Zupco's contribution to a pension scheme in the sum of \$189.90. This benefit does not appear in Daison's employment contract, and there is no indication of where that figure came from. In my view, the Tribunal must have mistaken it for the sum of \$189.90 which appears on the Time and Wage Register as a deduction from Daison's salary in respect of his medical aid contribution. The benefit was, therefore, not proved.

The second benefit mentioned in the order is annual bonus. This benefit appears in Daison's employment contract but was payable at Zupco's discretion. It was not an entitlement.

The third benefit which the Tribunal found established was annual leave. This appears in the contract of employment, which indicates that Daison was entitled to twenty-four days' leave annually. He is, therefore, entitled to cash in lieu of leave in respect of the period from 23 April 1997 to 9 April 2001.

I now wish to deal with the mitigation of damages. It is well established that an employee who considers, whether rightly or wrongly, that he has been unlawfully dismissed, is not entitled to sit around and do nothing. He must mitigate his damages by looking for and taking temporary employment when available. See, for example, *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S) at 586D-E; and *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) at 419A-B.

However, the burden of proof rests on the employer to show that the employee has, or should have, earned an income from some other source. See *Nyaguse v Mkwesine Estates (Pvt) Ltd, supra*, at 575C. In my view, apart from the sum of \$2 500.00 which Daison said he earned whilst temporarily employed by Kamunhu Bus Service, Zupco failed to prove that Daison earned or ought to have earned an income from some other source and the amount thereof. Daison's evidence was that he looked for alternative employment but was unsuccessful. There was no evidence to the contrary.

In the circumstances, Daison is entitled to his net salary and cash in lieu of leave from 23 April 1997 to 9 April 2001, minus the sum of \$2 500. In addition, he is entitled to interest at the prescribed rate on the sum payable to him from 9 April 2001 to the date of payment in full. The net salary will be his gross salary minus the income tax payable by him, his contribution to the National Social Security Fund and any government levy payable by him during the relevant period.

Regrettably, this Court is not in a position to calculate the sum payable by Zupco because the record does not have the necessary evidence. For example, whilst the record shows that in April 1997 Daison's gross salary was \$4 112.68, there is no evidence indicating what it was during the rest of the period in question. It is, therefore, necessary to remit the matter to the Tribunal to enable it to calculate the sum to be paid by Zupco, after any evidence relating to Daison's salary, income tax, contribution to the National Social Security Fund and any government levy payable by him during the relevant period is led.

In the circumstances, the following order is made:

1. The appeal is allowed with no order as to costs.
2. The order issued by the Tribunal is set aside.
3. The matter is remitted to the Tribunal to enable it to calculate the sum payable to Daison in accordance with the principles set out in this judgment after the relevant evidence is led by the parties.

ZIYAMBI JA: I agree

MALABA JA: I agree

*Wintertons*, appellant's legal practitioners