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Judgment No. SC 82/05
Civil Appeal No. 376/03

A H HWARA v NATIONAL RAILWAYS OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, JULY 5 2005 & FEBRUARY 6, 2006

R Munhuweyi, for the appellant

F Fitches, for the respondent

GWAUNZA JA: In the Labour Court the appellant appealed against a determination made by a Senior Labour Relations Officer, to uphold his dismissal from his employment as administrator of the Health and Safety Branch of the respondent. The Labour Court having dismissed his appeal, he now appeals to this Court.

The dispute between the parties goes back to April 1989, when the respondent's General Manager addressed a letter to appellant informing him that:

(a) in view of the disharmony that existed in the Health and Safety Branch, the General Manager had decided to institute a "Fact Finding Inquiry" into the branch's operations;

(b) the appellant was suspended from duty with immediate effect on full pay, in order to "facilitate a conducive atmosphere" for the inquiry, and;

(c) the suspension would continue until such time as the fact finding committee completed its task.

The fact finding inquiry was duly conducted and was completed on 31 July 1989. It made certain adverse findings about the appellant's method of administration as well as his relationship with other employees. The respondent's General Manager on 31 July 1989 communicated the findings of the fact finding inquiry to the appellant and invited him to respond to them in writing.

After considering the appellant's response to the findings of the fact finding mission, the General Manager on 31 August 1989 again wrote to the appellant, formally charging him with "serious" misconduct summarised as follows:

1. misuse of railway staff (*sic*), railway property and railway vehicles;
2. unprofessional conduct in the selection of medical staff;
3. unwarranted interference in medical matters;
4. failure to timeously produce a Health and Safety manual;
5. sexual harassment of female employees;
6. poor managerial attitude and unprofessional conduct;
7. creating disharmony within the branch, and
8. disrespectful attitude towards his superiors.

As requested by the General Manager, the appellant responded to the charges, in writing. He denied the allegations against him and proffered lengthy explanations for happenings within the Branch, that had led to the charges in question being preferred against him.

On 12 September, 1989 the General Manager wrote to the appellant, rejecting his explanations and terminating his employment with effect from 13 September 1989.

The only information concerning what thereafter happened is contained in the determination of the Senior Labour Relations Officer who heard the matter initially from 19 August to 10 October 1996 and finally on 14 September 1998, which read as follows:

> "The matter came before me by way of a draft consent order from the Labour Relations Tribunal on 1 November 1995. The background of this case is that respondent was employed as a branch head of the Health and Safety branch. He was dismissed from employment on 12 September 1989. He appealed against dismissal and his case went through the following channels:-
>
> - N.R.Z General Manager
> - N.R.Z Board
> - Parastatal Commission
> - Labour Relations Board
> - Labour Relations Tribunal
>
> Through all the above Boards it took 4 years and there was no decision made but at the Labour Relations Tribunal a consent judgment was made and the matter was remitted back to Senior Labour Relations Officer. The parties agreed to have the matter treated as a fresh case, with the N.R.Z being the applicant and A.H. Hwara being respondent." (my emphasis)

The Senior Labour Relations Officer attributed the delay in finalising the matter, to the appellant. She asserted and this has not been disputed, that on 10 October 1996, the hearing had been postponed to allow the appellant to produce his M. Phil papers inorder for the Senior Labour Relations Officer to establish the nature of origin of the typewriting machine that had been used to type them. The appellant had later advised, through his legal practitioner, that the documents were with him in Botswana, where he was now working. These documents were never produced and the matter was ultimately determined on 12 September 1998, without them.

As already indicated the Senior Labour Relations Officer upheld the appellant's dismissal.

The appellant's main ground of appeal is that the court *a quo* "grossly erred" by treating the reference of the matter to a Senior Labour Relations Officer, as a consent or 'condonment' of the respondent's failure to comply with its own disciplinary regulations.

The appellant also takes issue with the court *a quo*'s disregard of what he termed evidence of defiance, by the respondent, of its own disciplinary regulations. In particular the appellant charged that the court *a quo* had ignored the fact that a disciplinary inquiry as opposed to a fact finding inquiry was never held, when it was the former rather than the latter, which was a pre-condition to a determination.

The appellant also charges that the respondent's General Manager, Mr Singh, was biased against him since he had acted as investigator, prosecutor and judge in his own cause.

It appears to me that a determination as to whether the Senior Labour Relations Officer to whom the Labour Relations Tribunal remitted the case, considered the matter as a fresh case or as an appeal, would be decisive of this appeal.

It is not in dispute that the appellant tried unsuccessfully to prosecute appeals against his dismissal through various channels. In acknowledgment of the technical difficulties he experienced in this respect, and in an endeavour to have the matter finally resolved, the parties consented to the matter being heard afresh before the Senior Labour Relations Officer in Bulawayo.

As indicated in her determination, on the date the matter was first heard before the Senior Labour Relations Officer, the parties confirmed their agreement to have the matter treated as a fresh case. They also agreed that the NRZ would be the applicant and the present appellant, the respondent.

I find this latter part of the parties' agreement to be significant. It shows that the parties themselves determined the character and conduct of the proceedings before the Senior Labour Relations Officer. The charges against the present appellant were therefore laid out afresh, and a full scale inquiry spanning a number of days between August and October 1996 and involving the leading of evidence from a total of nine witnesses, was conducted. The present appellant, as the

respondent, was given an opportunity to lead evidence in his defence. He was, at that stage, not prosecuting an appeal against any earlier determination against him.

That the respondent was clearly put to his defence, is evidenced by the following comments by the Senior Labour Relations Officer in her determination:

> "In most of his responses to the allegations, Hwara appeared very emotional and evasive and he made a lot of funny movements with his chair. He looked very uncomfortable whenever he had to respond or make comments, especially on sexual harassment. He sweated a lot such that his legal counsel had to request that Hwara's wife be excused from the next session of the hearing."

At the end of it all the Senior Labour Relations Officer was satisfied that the grounds for dismissing the (then) respondent had been proved to her satisfaction. She found that the evidence against him given by several witnesses from varied backgrounds was overwhelming.

The appellant at no time during the proceedings before the Senior Labour Relations Officer, objected to the procedure being followed (he in fact agreed to it), nor did he raise any of the grounds he belatedly raised in the court *a quo*, and persisted with in the appeal before us.

The conclusion is inescapable that the appellant had consented to have the whole dispute and not an appeal, heard afresh by the Senior Labour Relations Officer. By not objecting to the procedure adopted, he effectively abandoned any objections he might have had concerning the propriety or otherwise of the disciplinary proceedings earlier followed by the NRZ in dismissing him. The court *a quo* was

therefore correct in its finding that the proceedings before the Senior Labour Relations Officer were in effect a hearing *de novo*, of the entire dispute between the parties. The appellant could not then, nor can he now, be heard to say that the character of the proceedings was different from what the parties themselves had agreed it should be.

There being no merit in the appellant's main ground of appeal the other two grounds of appeal accordingly fall away.

In the result, I find the appeal has no merit and must fail.

It is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Honey and Blanckenberg, appellant's legal practitioners

Webb, Low & Barry, respondent's legal practitioners