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Frida Kabaso (Sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo SCZ Appeal No. 04/2012

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*Frida Kabaso (Sued as Country Director of Voluntary Services Overseas Zambia) v. Davies
Tembo SCZ Appeal No. 04/2012
Chanda Chungu⁸*

Facts

This action concerned an appeal from the Industrial Relations Court where an employee was employed on a permanent contract by Voluntary Services Overseas Zambia as an Administrative Officer on 11th July 1996. He was later promoted to the position of Officer Manager.

In 2001/2002, the employer changed its employment policy from employing staff on permanent terms to employing them on fixed-term contract. By 2008, the employer began restructuring and informed employees. The employee's position of Officer Manager was phased out and removed from the employer's organisational structure, with two positions created, including that of Finance Manager. The employee claimed a redundancy package as he considered himself redundant. The employer declined to give him the redundancy package but offered him the position of Finance Manager in the restructured entity.

The employee was initially reluctant to take up the position as he felt he was not qualified for the position, and he feared that the employer would use any poor performance on his part to dismiss him at a later stage. Despite his concerns, he accepted the new position.

He was subsequently subject to various disciplinary issues and resigned. He commenced an action claiming a redundancy package, calculated at three (3) months' pay for each year worked.

The Industrial Relations Court held that while there cannot be a redundancy where an employee is offered alternative employment, in this case the employee was not offered suitable alternative employment and only took up the position due to his employer's coercion. The court ordered the payment of a redundancy package but declined to award damages for mental distress and anguish.

Holding

The Supreme Court confirmed that the provisions on redundancy and the (now repealed) Employment Act situated in section 26B do not apply to employees on written contracts. The court guided that for those on written contracts, redundancy only applied if the contract provided, which it did in this case. The fact that the Industrial Relations Court did not consider the provision on redundancy in the contract was a misdirection, according to the Supreme Court.

As it related to the offer of Finance Manager following the phasing out of the role of Office Manager, the Supreme Court held that there was no evidence of coercion or that the new position had materially different duties and responsibilities to that of Office Manager.

Significance

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The Supreme Court issued a powerful statement as to when a redundancy situation. According to Malila JS (as he was then) on behalf of the Supreme Court, a redundancy takes place when an employer decides that the employee's position and/or services are no longer required and, therefore, the position must be abolished. In this case, the employee's services were still required as he was offered the alternative position of Finance Manager. As such, there wasn't a redundancy situation that arose.

The Supreme Court guided, per Malila JS that

On the totality of the evidence, we are of the considered view that a redundancy situation in respect of the respondent did not occur in this case. An alternative position of Finance Manager was available and was indeed offered to the respondent. We are not satisfied that the fears that the respondent was ill qualified for the position, or indeed that the offer of that new position was a ploy on the part of the appellant to manage perform the respondent out of the job were well founded.

The Supreme Court without referring to the provisions on redundancy in the Employment Act held that the refusal to accept the reasonable, alternative employment meant that he could not claim redundancy. This is important because the Supreme Court in essence developed a principle with regards to suitable alternative employment that is not tied to legislation but applies as a matter of law.

Therefore, where there is suitable, alternative employment offered to an employee, a redundancy cannot occur. This is important because it emphasised the point that an employee's services are still required. The only way an employee may claim a redundancy is if they prove that the alternative employment was unsuitable, or that they were ill-equipped or ill-qualified for the position. Evidence must be led to prove this. The Supreme Court emphasised that if an employee claims that the alternative job was not suitable, she bears the burden of proving that the position was not suitable or that she was not sufficiently qualified for the new position

As such, what is fundamental is to determine whether the employee who refused the alternative employment made a reasonable decision based on the facts that appeared before him. It is therefore, imperative that when making an offer for alternative employment, apart from the job being suitable, the employer should provide the employee with as much information as possible to enable the employee make an informed decision.

From this case, determining whether alternative employment will be suitable will depend upon issues such as the nature of the work, hours and pay, the employee's strength, qualifications, training, experience, and ability, but such matters as status in the premises of the employer.

If an employee accepts the alternative employment offered, the enquiry ends, and the situation can never be categorised as redundancy. However, if the employee refuses the offer of alternative employment, the court will have to determine whether the employee's refusal was reasonable. Just like the factors determining the suitability of alternative employment, the reasonableness of the refusal should relate to factors linked to the job and not personal factors of the employee that are extraneous to the job. It is for this reason that the Supreme Court was clear that issues such as the qualifications for. Job and the job description are determined by the employer and if they are reasonable but rejected by the employer, a redundancy cannot occur.

This case is also significant because it highlights that there is a difference between terms and conditions of employment. It should be noted that in Zambia it is common to refer to terms and conditions of employment as they form a part of every contract of employment. It should however be noted that there is a distinction between terms of employment and conditions of employment.

Terms of employment refer to those which are either bilateral in nature as they form part of the contract of employment based on the agreement between the employer and the employee. Conditions of employment on the other hand, are those which are unilaterally imposed by the employer on the employee and can be varied without the consent of employee based on the employer's right to make reasonable changes to work practices.

As it relates to qualifications for certain roles and job descriptions, the Supreme Court held that:

In our estimation, determining the qualifications and job description for particular job positions in the appellant's establishment, lay squarely with the appellant as employer. It does not lie in the mouth of the respondent, as a mere employee, to determine what the qualifications for particular positions were. In saying this, we take full cognizance of the fact that the qualifications for a Finance Manager in one organization need not be entirely identical with those of a Finance Manager in another organization.

What the statement from Malila JS clarifies is that there are certain aspects of the contract of employment which are solely within the preserve and discretion of the employer. These are unilateral instructions that are laid down by the employer, these are conditions, and an employee need not be consulted or consent when they are drafted or varied unilaterally. These include but are not limited to job descriptions, code of practice, company handbooks and disciplinary codes. On the other hand, terms of employment which are bilateral in nature, and form part of the agreement between the employer and employee and creatures of consent and can only be varied by both parties agreeing to the same.

The *Frida Kabaso* decision guides that there are certain obligations and duties that are solely for the preserve of the employer, that do not need the consent of the employee. The employer has the inherent right to regulate its affairs as it sees fit and it is for the employee to reasonably adapt, provided it is an aspect of employment that is not a term of the contract. This case thereby provides important information for employees who must be aware not all documents that form part of the employment relationship require their approval.

The significance of this case as it relates to redundancy and suitable, alternative employment is that if the employee's position or services are not abolished, or if the position is diminished but suitable employment is offered and/or unreasonably refused, a redundancy does not occur. This is important because it emphasised that a redundancy, and the ancillary redundancy payment can only be claimed where an employer no longer needs the services of a particular employee. These pronouncements are crucial to the development of Zambia's employment law jurisprudence as the Supreme Court laid down these general principles that are to be applied to all redundancy situations that will be faced by the courts going forward.

Curiously the new Employment Code Act does not include this important principle of redundancy law. This notwithstanding, the *Frida Kabaso* decision which was decided without reference to any legislative provision lays down a general principle that the offer of and/or rejection of suitable, alternative employment does not give rise to a redundancy situation. As such, notwithstanding the inclusion of such a provision from the Employment Code Act, the fact that an employee's services are still required by virtue of the offer of alternative employment means that a redundancy cannot arise.

Further, the approval of the employer's right to determine certain aspects of the employee-employer relationship. This highlights not only the employer's right to make regulate its own affairs and make reasonable changes to work practice, but also the distinction between conditions and terms of employment.