

EUBYNECIL MOYANA
versus
TRIANGLE LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 November 2016 & 21 March 2018

Opposed Application

T. Marume, for the applicant
E.T Moyo, for the respondent

ZHOU J: This is an application for the setting aside of the dismissal of the applicant from his employment with the respondent. Although the application on the face of it is clearly one for review the draft order seeks declaratory relief. The applicant's draft order invites the court to declare his dismissal from employment to be irregular and therefore null and void. The applicant also asks the court to order his reinstatement without loss of benefits. The application is opposed by the respondent.

The background facts to this dispute are as follows. The applicant was employed by the respondent as an ambulance driver. On 3 November 2000 he was involved in a road traffic accident when his ambulance collided with a tractor. The evidence on record suggests that after the accident a breathalyser test was conducted which revealed that he was not under the influence of alcohol when the accident took place. The results of the breathalyser test do not form part of the record. On the same day some five or so hours after the accident blood samples were taken from him and submitted to a laboratory for testing. The results from the laboratory revealed an alcohol content of 260.0 mg/dl, which is significantly higher than the 80mg/dl which is the maximum permissible for a person to drive a motor vehicle at law. Based on the above results, the respondent charged the applicant with the misconduct of driving under the influence of alcohol. He was found guilty of misconduct and dismissed from employment. Internal appeals were equally dismissed. On 18 May 2007 the applicant instituted the instant application.

The grounds of review as set out in the court application are as follows:

“(a) The Disciplinary Committee erred in not considering the negative results of the

- breathalyser test.
- (b) the Disciplinary Committee also erred and showed bias and unreasonableness by not allowing the Zimbabwe Republic Police people to testify who would have testified that the applicant was sober at the time of the accident. Further the respondent erred in not calling the evidence of Mrs Chinheya to the effect that she conducted the breathalyser analysis.”

The first ground is clearly not a ground of review. It must therefore be disregarded.

The second paragraph raises only one possible ground of review – that of bias. The rest of the allegations are not grounds of review. The test is whether there is a real danger of bias, see *Chiura v PSC & Anor* 2002 (2) ZLR 562 (H). In *R v Cough* (1993) 2 All ER 724 (HL) at 737-738 the court held that the test for bias is whether there was “a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him”. ‘Real danger’ has been held to mean “a real possibility rather than a real probability of bias.” See *Bailey v Health Professions Council of Zimbabwe* 1993 (2) ZLR 17 (S) at 22F. The only reference to bias in the founding affidavit is in para 11 thereof. The applicant complains in that paragraph that the conduct of the Presiding Officers “showed a lot of bias on the part of the Presiding Officers who suspected that I had used the ambulance for campaigning for the Movement for Democratic Change”. The precise factual basis upon which that assertion is made does not appear in the affidavit. Further, no evidence of bias has been led through the affidavit. There is therefore no evidence to establish a real danger of bias.

The applicant also complains about the reliance which was placed upon the laboratory results which showed the alcohol content in the applicant’s blood. The applicant argues that the Disciplinary Committee ought to have relied on the breathalyser test whose findings were exculpatory of the applicant. Quite apart from the fact that there is no written evidence of the breathalyser test attached to the applicant’s papers, the analysis of the applicant’s blood in a laboratory is clearly more cogent and conclusive evidence of the alcohol content in the applicant’s blood. A report on affidavit which was prepared by D.B. Nhari an analyst at the Government Analyst Laboratory in Harare shows that the amount of alcohol found in the applicant’s blood was 260mg/dl. The laboratory is not under the control of the respondent. The suggestion that someone else’s blood could have been sent to the laboratory is fanciful. The applicant placed no evidence before the court to justify that conclusion.

There was therefore no gross unreasonableness or irregularity in the manner in which the Disciplinary Committee relied on the evidence of the Government Analyst. The evidence

on record shows that the blood samples from the applicant were taken on the same day that the accident took place. The validity of the examination process has not been challenged by the applicant.

Before concluding this matter, something must be said about the time that the applicant took to have the matter set down. The application was instituted on 18 May 2001. The matter was only set down for argument more than fifteen years later in 2016. Even if there had been merit in the applicant's complaints this court would have found it unacceptable to grant the relief sought. Where an employee challenges his or her dismissal on whatever grounds and seeks an order for reinstatement or even payment of damages he must prosecute his case expeditiously. That is so because the relief that the employee seeks is likely to be affected by the changes in the organisational structures of the company.

Also, it is not reasonable to expect that any company would have waited for such a long time to employ a person to take over the position of the applicant.

In all the circumstances of this case, the application is without merit.

Accordingly, the application is dismissed with costs.

Mwonzora and Associates, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners