

DISTRIBUTABLE (41)

Judgment No. S.C. 67/99
Civil Appeal No. 348/98

KUDZANAI MANDIKISI v
THE SECRETARY FOR THE PUBLIC SERVICE
COMMISSION

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, MAY 13 & JUNE 1, 1999

The appellant in person

J Musimbe, for the respondent

SANDURA JA: This is an appeal against the judgment of the Labour Relations Tribunal ("the Tribunal") which dismissed the appellant's application for the condonation of the late noting of his appeal against the decision of the Public Service Commission ("the Commission") which confirmed his dismissal from employment by the Secretary for Justice, Legal and Parliamentary Affairs.

The background facts are as follows. The appellant was employed as a clerk in the Ministry of Justice, Legal and Parliamentary Affairs ("the Ministry") and was based at the Hwange magistrate's court. He was appointed in February 1987.

After the enactment of the Criminal Procedure and Evidence Amendment Act No. 1 of 1992, which designated Saturday as a court day, the Chief

Magistrate directed all magistrates and their supporting staff to make arrangements for court sittings on Saturdays.

Subsequently, in November 1995 the Provincial Magistrate at Hwange instructed all the clerks at the station to report for duty on Saturdays with effect from 4 November 1995. The appellant attended the meeting at which the instruction was given.

However, notwithstanding the instruction given by the Provincial Magistrate, the appellant did not report for duty on 4, 11, 18 and 25 November and on 2 December 1995. He was warned by the Provincial Magistrate for Matebeleland North that if he continued absenting himself from duty on Saturdays he would be suspended from the Service, but ignored that warning.

He was subsequently charged with an act of misconduct in terms of the Public Service (Disciplinary) Regulations 1992 (SI 65 of 1992) and was found guilty. He was ordered to pay a fine of \$400 and was, in addition, severely reprimanded. That was in December 1995.

However, when the appellant continued to ignore the warning he was again charged on 28 December 1995 and was subsequently found guilty of absenting himself from duty without good cause. He was discharged from employment by the Secretary for Justice, Legal and Parliamentary Affairs on 15 March 1996.

He appealed to the Commission against that decision on 2 April 1996, but the appeal was dismissed on 13 November 1996. Thereafter, he wrote to the Commission on a number of occasions requesting the Commission to review its decision, but on each occasion he was informed that the Commission's decision was final.

Thereafter, on 18 July 1997 he noted an appeal to this Court but was later advised in March 1998 to appeal to the Tribunal first, which he did in July 1998.

The matter was subsequently heard by the Tribunal in October 1998. However, because the appeal had been noted out of time, the appellant applied for condonation of the delay in noting his appeal. The application was dismissed because the Tribunal was of the view that the appellant did not have any prospects of success on appeal. The question which now arises for determination by this Court is whether the Tribunal erred when it arrived at that conclusion.

The hours of work for officers and employees in the Public Service are set out in s 8 of the Public Service (General) Regulations 1992 (SI 125 of 1992) ("the Regulations"). The relevant subsections read as follows:-

"8. (1) Subject to this section, the normal hours of work for officers and senior employees on any weekday other than a public holiday shall be from 7.45 am to 1.00 pm and from 2.00 pm to 4.45 pm.

(2) A head of Ministry, with the approval of the Commission, may, by notice to the officers and senior employees concerned, fix hours of work other than those referred to in subsection (1) which shall be the normal hours of work for a particular department or class of officers or senior employees and in so doing may fix the normal hours of work on a Saturday, and, additionally, or alternatively, on a Sunday or a public holiday.

(3) The normal hours of work for junior employees shall be as fixed by the head of Ministry.

(4) In fixing the normal hours of work in terms of subsection (3), the head of Ministry -

(a) may fix the normal hours of work on a Saturday, and, additionally, or alternatively, on a Sunday or a public holiday; and

(b) ...

(5) A person may be required by his head of department or any person so authorised by the head of department to attend at his office or to be on duty at times other than, and, if necessary, in addition to, the normal hours of work.”

It is clear from the provisions of s 8(5) of the Regulations that an officer or employee in the Public Service may be required by his head of department, or any person so authorised by the head of department, to be on duty at times other than the normal hours of work.

It was common cause that the Chief Magistrate directed the magistrates at the Hwange magistrate's court and their supporting staff to be on duty on Saturdays. It was also common cause that subsequently the appellant was personally instructed by the Provincial Magistrate to report for duty every Saturday with effect from 4 November 1995, and that he refused to do so. He gave a number of reasons for that refusal.

The first reason was that as he could cope with his work during the normal working days of the week there was no need for him to work on Saturdays. In my view, this argument has no substance. Both the Chief Magistrate and the Provincial Magistrate considered it necessary for the appellant and others to report for

duty on Saturdays because the court sat on Saturdays. Undoubtedly, there would have been some work for the appellant to do. In any event, Saturday had been designated a working day and the appellant was obliged to be on duty.

The second reason was that he had to go to church on Saturdays and could not, therefore, report for duty. This reason was raised by the appellant long after he had absented himself from duty without good cause on a number of occasions. Assuming that he had to go to church on Saturdays, it was incumbent upon him to approach either the Provincial Magistrate or the Chief Magistrate and seek exemption from the requirement to report for duty on Saturdays. He had no right to be absent from duty before the requirement was waived.

Thirdly, the appellant relied upon Order 1 Rule 5(2) of the Magistrates Court (Civil) Rules, 1980 ("the Rules"), which reads as follows:-

“Where anything is required by these rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period.”

He interpreted this provision to mean that he was not expected or required to work on a Saturday, Sunday or public holiday. In my view, he was clearly wrong. Rule 5(2) is very clear. What it means is that if something is required by the Rules to be done within a certain number of days or hours, in computing that period Saturdays, Sundays and public holidays are to be excluded. Thus, for example, if a certain pleading should be filed within a period of ten days, the rule says that in computing that period Saturdays, Sundays and public holidays are to be excluded. The rule has nothing to do with whether or not a clerk in the civil or criminal section of the

magistrate's court may be required to work on Saturdays, Sundays and public holidays.

Finally, in his heads of argument the appellant relied upon another argument which he had not raised before the Tribunal. He submitted that compelling him to work on Saturdays was against the conditions of service which were in existence in 1987 when he joined the Public Service and in terms of which he was employed. I disagree. In terms of the conditions of service then in existence, both officers and employees in the Public Service could be required by the head of department to work on Saturdays, Sundays and public holidays.

As far as officers were concerned, s 11(3) of the Public Service (Officers) (General) Regulations, 1979 (SI 537 of 1979) provided as follows:-

“An officer may be required by the head of department or any person so authorised by the head of department to attend at his office or to be on duty at times other than and, if necessary, in addition to the normal hours of work.”

There was a similar provision for employees in the Public Service at the relevant time. Section 8(4) of the Public Service (Conditions of Service for Employees) Regulations, 1971 (Rhodesia Government Notice No. 529 of 1971) provided as follows:-

“An employee may be required by his head of department or by the officer or employee under whose immediate control or supervision he is, to attend at his office or to be on duty at times other than and in addition to the normal hours of work and, unless otherwise provided in these Regulations, shall have no claim to additional remuneration or overtime payment.”

It is, therefore, quite clear that the conditions of service in terms of which the appellant was appointed in 1987 included the provision that he could be required by his head of department to be on duty at times other than and in addition to the normal hours of work. That included being required to be on duty on Saturdays, Sundays and public holidays.

In the circumstances, the appellant has not advanced any valid argument for his refusal to report for duty on Saturdays. He does not, therefore, have any prospects of success on appeal, and his application for condonation of the delay in noting the appeal was correctly dismissed by the Tribunal.

The appeal is, therefore, dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.