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The Regional Labour Office,
P.O. Box 35,
MZUZU.

CASE REF. No. MZU.INT/195/2007.

13th July, 2007.

REPORT ON MEDIATION PROCESS ABOUT MR. A.S.K. GONDWE'S SERVICES TERMINATION (DISMISSAL) BY ESCOM HELD ON 13TH JULY, 2007 AT REGIONAL LABOUR OFFICE – NORTH.

The above mediation (joint discussion) process took place on date and place as indicated above among Mrs. E. Chienda, Employer's representative (ESCOM's Chief Human Resources Officer- ECHRO); Mr. A.S.K. Gondwe, the complainant and Mr. K.G.F. Malema and K. Mataka, Labour Officers also the mediators.

Mr. A.S.K. Gondwe had approached the office of Labour on 4th May, 2007 and complained for unfair dismissal (unfair termination of employee's services) and delayed justice by the Employer-Escom. Gondwe told Labour Office that he was employed by Escom on 2nd September 1991 as a Storekeeper and rose to the position of Stores Supervisor until 20th November 2006.

As per the complainant's submissions to Labour Office, Gondwe's services with Escom were terminated on 20th November, 2006 as evidenced by Escom Letter Ref. No. P3/ dated 20th November, 2006 signed by Chief Human Resources Officer, E. Chienda. He made an appeal against the termination on 25th November, 2006 to the Human Resources Manager which was redirected to the board Chairperson of Escom on 24th January, 2007 as evidenced by Escom letter Ref No. (P3/120) dated 24th January, 2007 signed by Human Resources manager – R.F. Takomana. Thus on 16th February, 2007, Gondwe refiled his appeal case to Board Chairperson through the Director of Administration and Company Secretary. The Director of Administration then forwarded Gondwe's appeal to the Board Chairperson on 7th March, 2007 as evidenced by Escom letter Ref No. SEC/10/08 dated 7th March, 2007 signed by Director of Administration and Company Secretary–Jalide. Thereafter Gondwe's appeal was never responded to by Escom Board Chairperson until 4th May, 2007 when Gondwe complained to Labour Office.

Complaints of unfair dismissal as stipulated by Section 62 Sub Section (1) of the Employment Act No. 6 of 2000, are indeed received and handled by Labour Office. The said section above states that *within three months of the date of dismissal, an employee shall have the right to complain to the District Labour Officer that he has been unfairly dismissed, irrespective of whether notice has been given or not.* However Gondwe's complaint case was received by Labour Office despite the fact that its date of being reported to Labour Office (4th May, 2007) was outside the law requirement period of three months of the date of dismissal. The acceptance of the case was because it was found out that until 7th March, 2007 Gondwe's dismissal case was still in the hands of Escom as Gondwe was still exercising his right to appeal through his appeals made to Escom. Thus the date of 7th March 2007 was taken into account on the reception of Gondwe's case by Labour Office on 4th May 2007.

During the joint discussion (mediation) process, both the complainant and the Employer's representative were the same in telling Labour office that Mr.A.S.K. Gondwe at the time prior to dismissal was the overall in-charge and confirmed company employee of the stores section of the Northern Electricity Supply (NES) in the employment position as a stores supervisor responsible for the following duties: (a) responsible for supervision of all stores staff; (b) ensuring that stores materials are available; (c) responsible for stock taking, reconciliation and production of monthly reports; (d) liaising with user officers in the NES; and (e) responsible for any other Company activities with the stores section as company entrusted overall section in-charge.

The Escom Chief Human Resources Officer (ECHRO), Mrs. E. Chienda present during the mediation process told Labour office that it is true that Mr. A.S.K. Gondwe, the complainant was terminated or dismissed on negligent grounds and not on fraud reasons. Indeed in her termination of services letter Ref. No. P3/. dated 20th November, 2007 addressed to Gondwe, she stated that Gondwe's services with the corporation were terminated following Gondwe's suspension from work for negligence of duty. Further

more, her letter stated that Escom would pay the complainant three months salary in lieu of notice and his pension contributions, whereas, all the complainant's withheld salaries were to be forfeited by the company. Negligence of duties according to the Escom Discipline and Grievance Policy page 2 of Appendix 1 is an offence that attracts first penalty after suspension of *demotion / surcharge* depending on severity and a second one of *a written warning, termination or dismissal*. Labour office wondered if Escom really imposed a correct penalty over the complainant.

In the view of the matter, the complainant thought that his employment termination or dismissal was unfair and that he was denied justice or rather was subjected to delayed justice or unfair labour practice. He therefore told Labour office that he is complaining for unfair dismissal and delayed justice inflicted over him by Escom. According to the complainant's submitted arguments, he indicated that he was not negligent of his duties as he was not the one who was directly involved to supervise the Fuel attendant who was involved in the forging of the fuel issue receipts that led to the heavy loss of Company fuel, but rather was the stores clerk who was directly responsible for the fuel attendant.

After the above submissions by both the complainant and the Employer's representative, Labour office directed the mediating team towards three crucial questions whose justified answers were to be found. The three questions are (1) whether Mr. Gondwe was really negligent or not; (2) whether the punishment of service termination or dismissal imposed was the correct one or not and lastly (3) whether Escom really exercised delayed justice or not over Gondwe's case.

According to the first question, the complainant was further asked whether he had enough evidence to reject his negligent accusation or not. In answer to this question, the complainant responded that he really had enough evidence. He argued with reference to his job description as a Stores Supervisor that he was not directly the one to supervise the Fuel Attendant who defrauded a greater amount of company fuel but rather was the Stores Clerk with direct supervision over the Fuel Attendant. As such Mr. Gondwe was confident that he was not the right person to be accused of negligence of duties. However Gondwe as a Stores Supervisor of the whole NES Stores Section accepted that he was indirectly responsible for the supervision of Fuel Attendant. Labour office through its critical analysis of Gondwe's arguments and cross checking with his job description plus the employer's arguments found out that both *direct and indirect supervision* entail same work of supervision over someone. By this, it simply meant that Gondwe as Stores Section top boss had a role to supervise Fuel Attendant through the stores clerk. Assuming Gondwe's argument was about the degree of negligence comparing to that of the Stores Clerk on failure of their supervision over the over the Fuel Attendant then that would have posed a different issue altogether to position Gondwe on a bit better side. In regard to this Labour Office's analysis, Mr. A.S.K. Gondwe was indeed negligent of his duties.

About the second question, the Employer's representative was asked to justify why Escom decided to terminate Gondwe's services or to dismiss Gondwe from Escom. In response to this question, Mrs. E. Chienda, Employer's representative Stated that dismissal was the correct punishment imposed over Gondwe due to his practiced negligence. Asked why Mr. A.S.K. Gondwe was not being demoted or surcharged as a correct first punishment of negligence offence for a suspended worker according to Escom Discipline and Grievance Policy page 2 of Appendix 1, Chienda argued that Escom decided to skip the first negligence penalty to the second one of termination or dismissal over Gondwe because it had considered severity of the damage caused to Escom property as a result of Gondwe's negligence.

Labour office did not agree with Escom's application regarding the punishment awarded on Gondwe's negligent behaviour. Escom's Guidelines to appropriate penalties for offences of misconduct committed (indeed Appendix 1 of ED & G policy) clearly indicate *demotion or surcharge* depending on severity as a correct first penalty for negligence by a suspended Employee and not *termination or dismissal*. Further more, Labour office observed that Escom's responsible authorities over Gondwe's case misapplied their own Policy guidelines to appropriate penalties. Labour office interpreted the correct way how the term "**Severity**" of offence/misconduct stated in a foot note on page 2 of the Appendix 1 is applied or should be applied or was intended to be applied by the Escom Policy framers to each of the punishment columns of the Appendix table 1. It simply means Escom will *either* impose a written warning or terminate or dismiss a suspended negligent employee for the second time depending on severity. Note the phrase *suspended negligent employee*. By this phrase, it means that if one was just written warned but not suspended before, he/she is not affected by termination or dismissal. Now back to our interpretation above, it means choosing one of the three punishments from the second column along negligence of duty row will depend on severity

of damage. Similarly Escom will *either* demote or surcharge a suspended negligent employee for the first time depending on severity. Again this means choosing one of the two punishments i.e. demotion and surcharge from this first column along negligence of duty row will depend on severity of damage. It does not mean that the term *severity* be applied across the columns as might have been misapplied by Escom Authorities over Gondwe's case as was evidenced by Employer's representative arguments during the mediation process. The application of the term "*severity*" is applied and must be applied absolutely within each column of punishment set for a correct interpretation of the foot note words. Labour office further argued that the Escom Policy writers could not have an intention to mean that the term severity be applied across penalty columns. If their intention were so, then it would be confusing because it would not be correct to say that because Mr. A's first negligence of duty offence is severe then A should not be demoted or surcharged but terminated or dismissed. This would be violating the Policy guidelines because termination or dismissal according to negligence of duties is applicable only to second negligent offenders and not to first negligent offenders. The later instance is exactly what happened to Mr. A.S.K. Gondwe. More than this, any further critical analysis would easily condemn the inclusion of the word severity either in the foot note or in some of the column lines of the appendix table 1 as it seems to bring in redundancies hence a confusion to the policy. Thus Labour office observed and found out that Escom misinterpreted its Policy to punish Mr A.S.K. Gondwe with a wrong penalty of termination instead of surcharge due to Escom's claimed serious severity caused as a result of Mr. Gondwe's negligence of duties.

Thirdly and with the third question rather, the Employer's representative accepted that not all Policy required procedures in connection to Gondwe's case were followed. Labour office then reminded the employer about Section 56 subsection (5) of the Employment Act No. 6 of 2000 which states that: "*In deciding whether the employer has acted reasonably, regard shall be [made] to the nature of the violation, the employee's duties, the penalty imposed by the employer, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee*". From most of the complainant's submitted documents as well as from Mrs Chienda's comments of the case it was clearly seen that Escom to take a dismissal action did not consider some of the important factors of the above quoted section 56 (5) such as penalty imposed, procedure followed as well as the previous conduct and circumstances of the employee. Further more section 61 (2) of the same employment Act provides that "*In addition to proving that an employee was dismissed for valid reasons, an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee*". Justice in this light could mean correct procedure and treatment according to the employer's prescribed rules and regulations prior to dismissal. Unfortunately, this was not strictly followed or observed or applied in Mr Gondwe's case by Escom.

Still on third question, Gondwe's first appeal after dismissal according to the quoted above Discipline and grievance Policy should have been thoroughly handled and investigated by the Executive management and not the Executive management (i.e. Human Resources manager) redirecting the appeal to the Board Chairperson contrary to the policy provision. Escom letter Ref. No. (P3/120) dated 24th January 2007 signed by RF. Takomana, the Human resources manager shows that the executive management did not hear and investigate Gondwe's appeal as it has no any attachment to it showing or explaining of what might have transpired and found out during investigations and appeal hearing. Further more, Jalide, the Director of Administration and Company Secretary in his letter ref. No. SEC/10/08 to the Board Chairperson quoted a Discipline and Grievance policy provision that states that a member of staff has the liberty to appeal to the Chairperson of the Board if he/she is aggrieved by the decision of executive Management. In this regard, Labour Office wondered which decision of Executive Management regarding Gondwe's appeal was being referred to in his letter since it was clear from RF. Takomana's letter that the Executive Management never investigated Gondwe's case but it just redirected it to the Board chairperson. This again shows that some Escom authorities were not serious with Gondwe's case to the extent of reporting or writing on something that seem never to have happened otherwise the complainant would have accessed to such decisive documents if any. Hence labour office did not hesitate to believe that Escom's actions deprived the complainant's right to justice or fair Labour practices.

In summary, the undisputed facts by the employer- Escom's representative regarding the complainant's allegations are: that the Complainant, Mr Gondwe was employed by Escom in July 1991 and that he rose to the position of stores supervisor of the Northern Electricity Supply (NES) stores section, the position he served until termination; that Mr Gondwe's services with Escom were terminated on 20th November 2006.

Secondly, during the mediation process, it was resolved by the Mediating team that Escom was right to dismiss or terminate Gondwe on negligence grounds; that Ecom was unprocedural in handling the complaint case of appeal and finally it was agreed that Labour Office in its written report, the labour office`s opinion regarding the complainant`s case basing on deliberations above be stated which should be used by Escom to review gondwe`s case thoroughly.

Thirdly, on the termination or dismissal punishment imposed and on the claim of injustice, it is in the Labour Officer mediators`s hope that Escom will critically examine Labour Office Mediators`s attempted interpretations above regarding the correct punishment of the suspended Escom first negligent offender as well as labour office`s analysis regarding the issue of injustice being practiced by Escom when reviewing the complainant`s case.

In the view of the above, Labour Office having observed that if the complainant`s case can be brought before any competent court of law, then so many accusations against Escom that may include, among others, the denied or delayed justice to the complainant may emerge as serious issues and in the end, the Company would lose a lot more through compensation and other court remedies that could be determined. Thus Labour Office was quick to advise Escom through Mrs Chienda that it would be very much necessary if Escom can implement the following:

- (a) reverse its decision of termination or dismissal penalty over Mr Gondwe and thereafter impose a correct penalty of demotion or surcharge;
- (b) Or to reverse the earlier decision of dismissal and terminate Gondwe`s employment with Escom on unilaterally condition by the employer and pay him all his necessary terminal benefits (see section 35 of the employment Act No. 6 of 2000). This second option should be used preferably if worst comes to the worst.

CC : The Chief Executive,
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: The Regional Manager,
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: Mr ASK. Gondwe, the complainant,
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Mediation process held this day of 13th July 2007 in the Regional Labour Office- Mzuzu.

By Mr KGF. Malema and K. Mataka- Labour Officers.
