Judgment No. S.C. 117/99
Civil Appeal No. 16/99

MARTIN NORTON MALUNGA AND SEVENTY OTHERS vs

POSTS AND TELECOMMUNICATIONS CORPORATION

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, OCTOBER 25 & DECEMBER 8, 1999

T Biti, for the appellants

J C Andersen SC, for the respondent

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 14 January 1999 in which the appellants' application to declare the payment of different salaries between certain grades of telephone operators discriminatory and unlawful and for the removal of the differences between their salaries and other grades of operators was dismissed with costs.

The facts in the matter are that all the appellants are employed as telephone operators by the respondent. Prior to the job evaluation exercise of 1992 the respondent had three categories of telephone operators, namely the Gateway International Exchange operators, the telephone operators Grade One and the telephone operators Grade Two. The Gateway operators manned the International Exchange in Gweru, the Grade One operators manned major urban exchanges and the Grade Two operators manned rural exchanges. The Gateway operators were graded

higher than the other two categories and the Grade One operators were graded higher than the Grade Two operators. The difference in grading and consequently in salary was based on such matters as the racial policy of the previous regime, the location of the exchanges and the volume and nature of calls processed by the operators.

When the job evaluation was implemented in June 1992 all the operators were graded into one grade, BL2. However, the Grade One operators and the Gateway operators were found to be above the BL2 salary scale. In undertaking the job evaluation exercise the respondent made an undertaking not to reduce the salaries of staff found to be paid above the salary scale of the jobs they were occupying but to pay them at their existing levels. It did not want the exercise to operate to the prejudice of any employees. In the circumstances, the salaries of the former Gateway operators and Grade One operators were not reduced but pegged at their existing salaries at the time of the implementation of the job evaluation.

Mr *Biti*, for the appellants, submitted that payment of different wages for the same type of work has no objective basis and was irrational. He went on to state that it offends against logic and international standards which insist on the concept of equal pay for equal work. He further stated that to argue that the appellants were anomaly employees or that the former Grade One and Gateway operators are enjoying good luck does not obviate the objective need of ensuring that there is equal pay for equal work.

I, however, agree with Mr *Andersen's* submissions on the matter. These are to the effect that on the facts the respondent was not responsible for the

situation which arose - the anomaly - that it has done nothing to perpetuate it, and that, on the contrary, the respondent has taken and is taking steps to remove the anomaly. It is clear that the situation was inherited from a previous administration. In this connection one Miko Nxele, the respondent's director of human resources, says the following in para 4 of his affidavit (the respondent's opposing affidavit):

> "4. … The high anomaly sectors amongst the telephone operators and in other odd pockets within the work force continue to enjoy the good luck of having been overpaid in the past. As these employees retire, resign or move to other posts in the Corporation, there are no vacancies for others on those privileged terms and all new telephone operators come in at the bottom of the BL2 grade salary scale."

It is clear that the appellants cannot point to any breach of their conditions of employment or of the labour legislation. They are being paid the correct wage in accordance with the findings of the job evaluation exercise. Before the job evaluation was carried out it had been made known to the whole work force, that is, including the appellants, that the exercise would not result in the reduction of anyone's salary. The appellants did not object to this and are indeed not asking for the reduction in the salaries of those now receiving more than the recommended wage. I therefore agree that in the circumstances the appellants' claim that the respondent acted irrationally in not increasing their benefits is untenable.

I also agree with Mr *Andersen's* submission that, in view of the respondent's statutory duty to prudently conduct its financial affairs which concern the administration of public funds, it would have acted irresponsibly if it had aggravated the financial situation by adding the appellants to the list of overpaid employees. This is because there is no legitimate expectation on the part of an employee, in this case the appellants, to be paid more than what he is supposed to be

paid simply because other employees may be receiving even greater unjustified benefits.

I also agree with Mr *Andersen's* submission that there is no indication that the respondent has acted in contravention of the provisions of the Constitution of Zimbabwe. A breach of s 23 of the Constitution would only arise where inequality arose either by act of commission or omission on the grounds set out in the section. From the above it is, in my view, clear that no such breach has occurred. The unequal treatment continues as a result of a decision taken on sound financial grounds not to aggravate it. In any event, even if it had been proved that a breach had occurred, the respondent would be protected by the provisions of s 23(3)(e) of the Constitution because the funds in this case are concerned with "the appropriation of public revenues or other public funds".

In the result the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners