IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 51 OF 2001

BETWEEN:

WADABWA……...……. APPLICANT

-and-

UNION TRANSPORT…… RESPONDENT

CORAM: R. Zibelu Banda (Ms.) Deputy Chairperson
Tembenu/ Mambulasa of Counsels for respondent
Dzonzi of Counsel for applicant
Ngalauka; Court Clerk

JUDGMENT

Dismissal-Justification-Grounds for dismissal-Negligence-Reckless driving -Right to be heard-Notice-Investigations-Confrontation of witnesses-Failure to attend a hearing-Reasons for failure-Whether reasonable.

Facts

The applicant was employed on 1 March 1994 as driver. He was dismissed on 7 December 2000. The reason for dismissal was driving a company vehicle negligently and that the shipment the applicant was bringing to Lilongwe from Blantyre arrived in a bad state. The applicant denied the allegations and challenged the dismissal on that basis and on the basis that he was not given the opportunity to be heard before dismissal. The issue is whether the dismissal was fair.

The Law

A dismissal is fair if it complies with section 57 of the Employment Act. This section provides the manner and procedure that must be followed

before terminating any contract of employment. The requirements are that there must be a reason, which must be valid. The burden of proving reasons for dismissal lies on the employer. The employer must show reasons for dismissal and the court must assess whether those reasons are valid. It was thus held in ***Earl v. Slater and Wheeler,*** [1973] 1 WLR 51 that:

> "It is for the employer to show what was the principal or only reason for dismissal…. and that it was a potentially valid reason…. If the employer fails to discharge this burden, the tribunal must find that the dismissal was unfair."

In the instant case the respondent showed that the applicant who was employed as driver was accused of driving recklessly in the City of Lilongwe. At the time the applicant was ferrying client's goods from Blantyre to Lilongwe. The goods were not properly handled and they were damaged. These two allegations are serious enough to warrant disciplinary action. The court finds that there was valid reason for instituting disciplinary proceedings.

Procedure

1. Adequate notice

The next test is whether the respondent having found a valid reason for which to take out disciplinary action against the applicant, did follow reasonable procedures. Disciplinary action is reasonable, where it is found that the employer informed the employee in good time of the allegation leveled against him. The need for adequate notice is to allow the employee to prepare for his case.

2. Investigations

Further depending on the circumstances of the case, an employer must carry out thorough investigations to enable him make an informed decision, see, ***Chitembeya V Malawi posts Corporation*** [Matter No. IRC 87/2001 (unreported).]

3. Confrontation

Where the allegations got the employer through an informer and the employee denies the allegations, the employer is under obligation to invite the informer so that the employee can confront the informer, see, ***Khoswe V National Bank of Malawi*** [Civil Cause No. 718/2002 (unreported).]

In the instant case the applicant told court that he was informed in the morning that he would be required to attend a hearing in the afternoon, 2.00 PM of the same day. The respondent then sent off the applicant to carry out some errands in the City of Lilongwe. The errands involved paying bills to utility companies, delivering goods to clients and depositing cash to a bank. He was driving a company vehicle.

The question is firstly, whether the applicant had been given adequate time to prepare for his case at 2.00 PM on the material date? The answer, according to the applicant was no. He stated that he was not able to make it in good time for the hearing because of the nature of the errands. By the time he came back from carrying out his duties it was after 2.00 PM. The court agrees with the applicant that he was not given enough time to prepare for his case.

Secondly, did the respondent carry out investigations? The allegation was reported to the respondent by a third party. The respondent was obliged to investigate to establish the truth. The respondent told court that he investigated the allegation through an encounter with the complainant. This investigation was not enough because the accused employee was not given an opportunity to explain his part of the story. The investigations were one sided therefore chances of bias were high.

Thirdly, after hearing from the informer and a brief denial from the applicant, the respondent was obliged to bring forward the informer so that the applicant could confront her. The court was told that the informer was available for confrontation but she would have to be called only if she was required. The applicant could not make it for the hearing and the hearing did not take place therefore the court cannot make a finding whether the informer was available or not for confrontation.

Reasonableness

It is trite law that in all employment cases an employer must act reasonably when confronted with the issue of discipline of employees, see generally, ***Polkey V A E Dayton Services Ltd*** (1987) 3 All ER 974 at 983 holding that:

> "Where an employee is dismissed for alleged misconduct and he then complains that he was unfairly dismissed, it is to be anticipated that the industrial tribunal will usually need to consider (a) the nature and gravity of the alleged misconduct, (b) the information on which the employer based his decision,(c) whether there was any other information, which that

> employer could or should have obtained or any other step which he should have taken before he dismissed the employee."

Further, section 56(5) of the Employment Act provides that:

> "In deciding whether the employer has acted reasonably, regard shall be had 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."

This provision relates to disciplinary action other than dismissal and therefore relevant to this case. However the provision raises some important factors to consider when deciding a case involving employee's conduct.

In the instant case, the court finds that the allegations were not thoroughly investigated; the applicant was not given enough time to prepare for his case and was not give an opportunity to be heard. This was violation of section 57 (2) of the Employment Act, rendering the dismissal unfair.

Finding
The court finds that the dismissal was unfair. The respondent violated provisions under section 57(2) of the Employment Act.

Assessment
The court shall set down the matter on a date to be fixed for hearing of assessment of an appropriate remedy pursuant to section 63 of the Employment Act.

Pronounced in open court this 22nd day of February 2005 at **LIMBE.**

R. Zibelu Banda (Ms.)
CHAIRPERSON