

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 209 OF 2005

BETWEEN

YONA..... APPLICANT

-and-

**ATTORNEY GENERAL (OFFICE OF THE PRESIDENT AND CABINET).....
.....RESPONDENT**

CORAM: R. Zibelu Banda (Ms), Chairperson
Msungama; of Counsel for the Applicant
Respondent; Absent without excuse
Chinkudzu; Official Interpreter

ORDER IN ASSESSMENT OF COMPENSATION

Background

On 30 June 2005 the applicant filed a statement of claim among other things claiming remedies for unfair dismissal and other benefits that accrue to an employee on termination of contract of employment. The respondent did not file a response of intention to defend the matter. As a result on 3 May 2007 the applicant obtained a judgment in default of notice of intention to defend the matter. The matter then proceeded to assessment of remedies. A notice to that effect was served by post to the respondent. On 7 June the matter was called for assessment before this Court. The respondent did not attend court and no reason was given for failure to attend court. Only the applicant attended court on the appointed day. There was no word from the respondent's representatives. This was consistent with the previous conduct of the respondent in this matter. The matter proceeded to disposal in accordance with section 74 of the Labour Relations Act that mandates this Court to proceed with hearing in the absence of a party who fails to attend court without any reason.

Assessment of remedy

In assessment of remedies for unfair dismissal, the Court must aim at awarding the applicant with a relevant and practical remedy. In this case the applicant sought the remedy of re-engagement or in the alternative compensation. Under section 63 of the Employment Act the principal remedy for unfair dismissal is reinstatement, which is different from re-engagement. In this case the applicant asked to be re-engaged but did not show why he should be re-engaged and in what position. The Court was of the view that the applicant was mainly interested in compensation. The Court therefore proceeded to assess compensation from the available evidence below:

The applicant informed Court that he was employed on 4 September 2001 in the National Intelligence Bureau. He was dismissed on 29 April 2004. His last salary was MK 25 525-00 per month. He also stated that he was entitled to professional allowance of MK 2 000-00 per month. He further stated that he was entitled to cellphone units worthy 100 United States Dollars per month. The applicant produced a payslip to prove his salary. It was admitted in evidence and marked as exhibit AP1. It showed a net salary of MK 25 525-00 in that month. The applicant was 29 years old at the time of this assessment. He claimed that he was not able to secure alternative employment because of the nature of his previous employment. He did not elaborate why the nature of his previous employment prevented him from securing alternative employment.

According to section 63 of the Act, compensation must be just and equitable. In considering the amount, a Court must look at the circumstances of the case and determine the loss suffered by the applicant. In this case the applicant told Court that he lost salary due to the dismissal. He asked Court to consider awarding him immediate loss of salary and future loss. The applicant cited a number of cases in support of this approach. Notable of the cases was *Kalinda V Limbe Leaf Tobacco Limited* [Civil Cause Number 542 of 1995 (unreported)].

Just to note that although this case is persuasive in as far as the heads of compensation are concerned, the matter mostly proceeded on damages for infringement of human rights and freedoms under the Constitution. It was also based on English common law, the cause of action having arisen before the current labour laws. Much as this is acceptable and good as reference material, the Court would have preferred the more recent decisions on the subject based on the Employment Act 2000. In that regard, the Supreme Court of Appeal decision in *Stanbic V Mtukula* [MSCA Civil Appeal Number 34 of 2006 (unreported)] becomes more relevant and binding in as far as how a Court should approach the question of assessment of compensation.

Of particular relevance in that case is the fact that the Supreme Court of Appeal considered the applicant's loss in light of the reasons for his dismissal, the faithfulness that he put into his work, the period that he put in, the remaining period before retirement, the loss of employment benefits and future prospects of the employee had he not been dismissed.

In the instant case therefore the Court will take into consideration the factors under section 63 and also derive guidance from the Supreme Court decision cited above. It must be noted that any case of assessment of compensation must be decided on its own merits. No two cases will therefore be the same as far as compensation is concerned.

The applicant had worked for less than five years. He is still a young man of 29 years old. He is capable of securing alternative employment if he puts his mind to it. In *Malawi Environmental Endowment Trust (MEET) v Kalowekamo* [Civil Appeal Number 49/2004 (unreported)] HC, the High Court held that mitigation of loss is a relevant factor in considering an award of compensation. It stated that the employee must demonstrate through employment application letters and rejections to show that he tried in vain to seek alternative employment.

This Court considers that an equivalent of three months salary for each year of service will adequately compensate the applicant under the circumstances of this case. The compensation is based on a salary of MK 25 525-00 which is the proven income lost by the applicant. The Court rejects the 100 United States Dollars for cellphone because it was not proved. Similarly the claim of MK 2 000-00 professional allowance is disallowed because it was not proved. The claims for pension and gratuity were pleaded but no evidence was led to support them. They are dismissed.

The applicant prayed for severance allowance under section 35. This is a statutory entitlement under the labour laws. The applicant is awarded severance allowance to be calculated based on a salary of MK 25 525-00 per month using the First Schedule to section 35 for computations.

The applicant is not awarded compensation for future loss because he was young and energetic at time of assessment and that he did not demonstrate to Court that he was incapable of securing alternative employment. It was held in *Fougere V Phoenix Motor Co Ltd* [1976] IRLR 259 EAT; that in estimating the length of time that a successful complainant is likely to remain unemployed for the purpose of assessing compensation for unfair dismissal, an Industrial Court should take into account as one of the circumstances the personal characteristics of the person dismissed, such as that he was elderly or in poor health, provided these characteristics existed at the date of dismissal.

The Registrar of this court to compute the compensation based on this ruling. Any aggrieved party is at liberty to appeal to the High Court within 30 days of this order.

Pronounced this 10th day of July 2007 at BLANTYRE.

Rachel Zibelu Banda
CHAIRPERSON