

**IN THE INDUSTRIAL RELATIONS COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MATTER NO. IRC 365 OF 2005**

**BETWEEN**

**CHAMBA AND OTHERS ..... APPLICANTS**

**-and-**

**TOURISM INVESTMENTS LTD T/A HOTEL VICTORIA ..... RESPONDENT**

**CORAM: R. ZIBELU BANDA (Ms); CHAIRPERSON**

Malijani, A; Employers' Panellist

Padambo M; Employees' Panellist

Chirwa, JM; Of Counsel for the Respondent

Kacheche; Of Counsel for the Applicants

Chinkudzu (Ms); Official Interpreter

**JUDGMENT**

- 1. Dismissal-Reason-Refusal to take lawful instructions-Refusal to go on transfer*
- 2. Overtime-Proof-Employee to prove entitlement to overtime*
- 3. Deductions-Lawful deductions from employee-An employer entitled to deduct money from an employee's wages as restitution-For property damaged by the employee*

**Facts**

The applicants were employed by the respondent as Waiter, Porter and Conference Assistant. They were dismissed for refusing to take lawful instructions from their Supervisor. They were advised to go on transfer to another of the respondent's establishments. They were to perform the same functions and to retain the same terms and conditions of employment. The applicants refused to take this transfer. The respondent invited them to explain why they were not willing to take the order. The applicants' explanations were not satisfactory, hence the termination. They alleged that the reason for termination was unfair and took out this action. The respondent's averred that the reason was valid, the applicants were given an opportunity to be heard and the termination was therefore fair.

The first applicant Mr Chamba also claimed overtime pay. He alleged that he worked overtime but he was not paid. The respondent disputed this claim. The first applicant also claimed MK 3 840-00 which he said was unfairly deducted from his salary. The respondent contested this claim as well.

**The Law**

Refusal to take lawful instructions from a Supervisor is a valid reason for dismissal; see section 59 of the Employment Act. Refusing to go on transfer is an act of insubordination. It is tantamount to refusing to take lawful instructions from an employer. In this court it has been held that refusal to go on transfer without any valid grounds is a valid reason for dismissal see: *Mendulo v Malawi Revenue Authority* [Matter Number IRC 161 of 2003 (unreported)]IRC.

In the instant case it was not in dispute that the applicants refused to go on transfer. Their reasons for refusing to take this instruction was not valid. Their terms and conditions of employment were not going to change and they were to operate from within the same city of Blantyre. There was not any substantial detriment or inconvenience that was shown to affect the applicants by reason of this transfer.

**Finding**

The termination was fair. The applicants were dismissed for a valid reason. They were given an opportunity to be heard. The action is dismissed in its entirety.

**Overtime**

There was a claim for Overtime. This claim was not substantiated. No evidence was given to prove that the applicant had worked overtime and that he was not paid. In all overtime claims the onus is on the employee to prove that he had worked overtime and that he was not paid. This claim fails.

**Deductions**

One of the applicants, Mr chamba, had his wages deducted to reimburse the respondent for services provided to a client served by the applicant but not paid for. The conditions of service for the respondent did not provide for such deductions. However, section 56(4) and (5) of the Employment Act provide that an employer may deduct a sum of money from an employee as restitution for property damaged by that employee. It provides further that in taking this decision the employer must take into consideration among others the duties of the employee and the penalty imposed on the employee.

In the instant case the court heard that the applicant's duties were that of serving customers. He would take orders and provide for the client. The client would then make payment. The court heard that it was the responsibility of the applicant to ensure that clients paid for services which he, the applicant provided. In this particular case the applicant served a client who did not pay for the services. The respondent deducted money from the applicant as restitution.

Section 56(5) provides that the employer must act reasonably and in any event a court must consider the penalty that the employer imposes on an employee. The court found that this deduction was unjustified. The respondent did not convince the court that the failure of the applicant to get payment from the client arose out of negligence. The court

found that the applicant followed the ordinary and normal procedure for serving a client. It was unfair for the respondent to deduct the money. The court orders that this money MK 3 840-00 must be reimbursed to the applicant with immediate effect.

Any party aggrieved by this decision is at liberty to appeal to the High Court in accordance with section 65 of the Labour Relations Act.

**Made this 30<sup>th</sup> day of January 2008 at BLANTYRE**

Rachel Zibelu Banda  
**CHAIRPERSON**

Aiman Malijani  
**EMPLOYERS' PANELIST**

Maxwell R Padambo  
**EMPLOYEES' PANELIST**