IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NUMBER IRC 154 OF 2006

BETWEEN

JASSANI AND OTHERS……..……...……..... APPLICANTS

-and-

TELKOM NETWORKS (MW) LTD……..……...……...RESPONDENT

CORAM: R ZIBELU BANDA (MS); CHAIRPERSON
MRN PADAMBO; EMPLOYEES' PANELIST
D NAMANDWA; EMPLOYERS' PANELIST
M Chisanga; of Counsel for the Respondent
V Nyimba; of Counsel for the Applicants
Gowa; Official Interpreter

JUDGMENT

1. *Dismissal-Reason for dismissal- Misconduct- Abscondment-Breach of Terms and Conditions of Employment*
2. *Abscondment-Serious misconduct-Section 59 Employment Act*
3. *Strike-procedures to strike-Workers to follow procedure-Failing which employees deemed to have been absent from work without excuse and authority*
4. *Procedure- Opportunity to be heard- and defend oneself-Employee to avail himself/herself to the right to be heard*
5. *Check off system-Encourages paid up Union membership-Not to be revoked without valid reasons*

Facts

The applicants were employed on various dates. On 22 March 2006 the applicants received individual letters to show cause why serious disciplinary action should not be taken against them after it was alleged that the applicants had absconded from work on two occasions namely; 31 January - 1 February and 14-16 March 2006. In response the applicants wrote back to management a standard note basically telling management that they were not interested in showing cause why disciplinary action should not be taken against them because according to them the matter was being handled by their trade union, ostensibly on their behalf. However the said Union did not respond to the query made by management on behalf of the applicants.

In essence therefore the applicants failed to give an explanation in their own defence on why they on two aforesaid occasions stayed away from their work. As a result the respondent dismissed the applicants. The applicants were not satisfied with this dismissal and hence this action.

They alleged that their dismissal was unfair because it was based on an invalid reason; namely that they were targeted for dismissal because they were active members of Trade Union who were trying to negotiate on behalf of fellow employees with management on better salaries and an issue concerning sell of the respondent company to another company. They concluded that this termination was aimed at intimidating the workers to prevent them from embarking on any future negotiations with management on salary structure and other issues concerning the welfare of the employees.

The applicants were seeking as a result of this unfair dismissal the following remedies: reinstatement; damages for unlawful dismissal; severance allowance; withheld pension contributions**;** resumption of check off system for union members and salaries from date of dismissal to date of reinstatement.

The respondents opposed the action. They alleged that the dismissal was fair for a valid reason and after a fair opportunity was given to the applicants to explain their side and defend themselves. The respondents conceded that they were in negotiations with the applicants on salary revision and other matters. However before the negotiations were concluded the applicants on 31 January to 1 February absconded from work. They stayed away from work without permission and without any good reason. A few weeks after they resumed work, the applicants for the second time stayed away from work between 14-16 March without permissions and without any good reason.

According to the respondent this conduct was in breach of the terms and conditions employment specifically Clause 25.4.1(b) which provides that: "the following cases of abscondment may warrant dismissal…Illegal industrial action or inciting other employees to participate in an illegal industrial action including but not limited to illegal strikes, work stoppage, boycotts, work to rule, or any other interference with the operations of the company".

It was on the basis that the applicants had violated this provision that the respondents called for the applicants to make explanations in their own defence or else disciplinary action would be taken against them. On failing to provide any satisfactory explanation the respondents felt entitled to dismiss the applicants summarily. The reason for dismissal was abscondment arising from an in illegal strikes. Before the termination was effected the applicants were warned to go back to work within a specified date. They refused to comply and continued to stay away in what was termed a strike.

In court the respondents informed court that the stay away was an illegal strike because the applicants did not follow the statutory preliminary procedures before going on a strike. The applicants conceded that they did not give the requisite notice before going on strike. In court the applicants sought to give an excuse for this conduct. They said that the

strike was not sanctioned by the Union. The workers took it upon themselves to go on strike without the Union's blessing. However the applicants failed to explain what they did as executive members of the Union to prevent their members from refusing to work in a space of weeks.

The Law

An employer is entitled to terminate the services of an employee who is guilty of misconduct inconsistent with the fulfillment of the expressed or implied conditions of his contract of employment, see section 59 of the Employment Act. In this case the applicants were found guilty of misconduct that was inconsistent with fulfillment of their expressed conditions of service. The applicants breached Clause 25.4.1 (b) of their conditions of service. Further abscondment or absenteeism without valid excuse or authority is ground for dismissal, see section 59 of the Employment Act. It has been held in this court that absenteeism is valid reason for dismissal see for example: *Saidi v Chris and Sons* [Matter Number IRC 181 of 2002 (unreported)]IRC. The court therefore found that the reason for termination was valid.

The court made the above finding after noting that the applicants as executive members of the Union were engaged or allowed their members to stay away from work without any valid reason and without authority. The applicants did not convince the court that they were targeted as a way of intimidation. It was in fact shown that the respondents were responsive to the workers needs for negotiations. The mere fact that the respondent allows a Trade Union to operate freely is an indication that they are willing to accommodate workers freedom of association within the workplace.

It was also shown that the respondents and the workers had some form of collective bargaining agreement stipulating how both parties would conduct themselves in certain specified situations including on issues of negotiations, grievance procedures, lay offs and strikes and lock out. Based on these examples, the court could not believe the allegations that the applicants made in this court against the respondents regarding intimidation. It is a well known fact that we still have in this country many big organizations that resist Trade Unions. It is also true that even in those organizations that have trade Unions, it is rare to see as comprehensive a collective bargain agreement as we were shown in this instance.

The obvious conclusion was that the applicants abandoned work without permission and without any valid reason permissible either by law or by their terms and conditions of service. This was therefore a clear breach of terms and conditions of employment; see section 59 of the Employment Act. Hence the reason was valid. If the applicants had not committed any wrong, or had a valid reason for their conduct they should have said so when they were given an opportunity to explain to management.

In case the employees wished to go on strike. It was within their power legally to go on strike. This is a right that is provided to workers both in the Constitution and the Labour Relations Act. There are however procedures that must be followed before workers can embark on a strike. These are provided in Chapter V of the Labour Relations Act. In

summary workers may go on strike if the following things are satisfied: (1) they must give adequate notice to strike and (2) they must comply with all the other procedures stipulated in section 46 of the Labour Relations Act namely that: (a) the dispute must be deemed to be unresolved (b) the dispute is reported to the Principal Secretary and conciliation process is instituted and fails and (c) the matter is not pending for determination in the Industrial Relations Court.

Procedure

The applicants alleged that the reason was not substantiated and that they were not given a proper hearing. The court heard and found that the applicants chose not to defend themselves. They chose not to explain their side of the story. They chose not to utilize the opportunity given to them to have their case heard. They could not allege that the reason was not substantiated when they chose not to say anything in their own defence.

This was not a criminal case where an accused could choose to remain silent. In employment cases an employer is legally compelled to give an employee a right to be heard in a case of misconduct or incapacity, see section 57(2) of the Employment Act. It means that the employee has a corresponding duty to say something in his/her defence when faced with an allegation of misconduct. S/he cannot choose to remain silent without facing consequences of a disciplinary action, see *Mawaya and others V ADMARC* [Matter Number IRC 13 of 2005 (unreported)] IRC.

Interference with Employer's Decision

It has been held in this Court that decisions of employers should not be tampered with if there is no allegation that the process to arrive at the decision was not fair. See the case of *Kachingwe &others V Southern Bottlers Mw Ltd* [Matter No.162 of 2003(unreported)]. In that case the Court quoted with approval a holding of the Labour Appeal Court of South Africa in the case of *County Fair Foods (Pty) Ltd V CCMA & others* [1999]11BLLR 1117 (LAC), per Kroon JA:

> "[interference] with the employer's sanction " is only justified in the case of ……..unfairness." However, the decision of the arbitrator as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all evidential material before the arbitrator."

In the instant case the applicants did not allege that the procedure leading to their termination was unfair. In fact the respondents complied with the Collective Bargaining Agreement 8.2 , providing that before any disciplinary action is taken against any member of the Union, that person should be given chance to explain his/her side of the story. The applicants, who were members of the Union failed without good cause to utilize this opportunity when it offered to them.

Further the applicants who were members of the Union and party to the Collective Bargaining Agreement failed to follow the grievance procedure as provided in 3.5 to try

and reconcile through contact and dialogue. They opted to use a short route of absconding from work without exhausting the grievance procedures.

It was in fact due to the applicants' various violations of the contents of the Collective Bargaining Agreement that on 29 March 2006 the respondents gave notice to revoke the said Collective Bargaining Agreement in accordance with the provisions relating to revocation of the said Agreement.

Finding
The Court finds that the respondent complied with the law. The reason was valid and the procedure was fair. The dismissal was fair according to section 57 of the Employment Act. The action on unfair dismissal is dismissed in its entirety.

Check- Off System
The applicants had alleged on the side that the respondents had suspended a check off system without any valid reason. This is a system where the respondent as an employer facilitates payment of Union membership by deducting membership fees from the source (deducted from the salary before it is committed to the employee). This system encourages more employees to pay their membership fees therefore enhances Union membership.

The respondent did not give a proper explanation as to why they suspended this system. The court agrees with the applicants that check off system encourages more paid up membership to Unions and must be sustained unless good reason is given why it should stop. The court allows this application and orders the respondents to immediately reinstate the check off system.

Any party aggrieved by this decision is at liberty to appeal to the High Court within 30 days of this judgment.

Made this 30th day of January 2008 at **BLANTYRE.**

Rachel Zibelu Banda
CHAIRPERSON

Maxwell RN Padambo
EMPLOYEES' PANELIST

Daphetr Namandwa
EMPLOYERS' PANELIST