



**In the Industrial Relations Court of Malawi
PRINCIPAL REGISTRY**

MATTER NO. IRC PR 88 OF 2005

**IN THE MATTER OF DISPUTE
BETWEEN**

DOREEN MPONELA..... APPLICANT

AND

AIRPORT DEVELOPMENT LTD..... RESPONDENT

CORAM : J. NRIVA; DEPUTY CHAIRPERSON

D. Z. Namandwa Employers' Panellist

Ms E. Mtenje Employees' Panellist

Applicant Represented by D Chiwoni of Counsel

Respondent Represented by Namagonya and Muhome of Counsel

Court Official: Chimkudzu

JUDGMENT

Nriva, DCP:

In this action, according to the statement of claim, the applicant was in 1996 employed by the respondent as secretary to the commercial officer in the respondent's company. In 2004, she received a letter transferring her to the respondents sister company. She refused to take the offer and she was dismissed. She therefore seeks damages for unlawful dismissal. In defence the respondent argues that it was entitled under the labour laws to terminate the contract of employment. Their position is that there was redundancy and that they informed the applicant accordingly but she decided to stay at home. They further argue that they offered an alternative employment for her in Malawi Catering Services Limited but she denied the transfer.

We therefore proceeded to hear the matter to determine whether the respondent unfairly dismissed the applicant. The applicant was the only witness in her case. She stated that she was employed by the respondent in 1996. She testified that on 1st March 2004 she was called into the Personnel and Administration Officer's (Mr Nyondo's) office and told to vacate her office and wait at the entrance where the guard used to operate from. She further alleged that Mr Nyondo advised her to wait at home. On 14th March 2004, she received a letter dated 1st March, 2004 offering her employment with Malawi Catering Services Limited. Her response came through a letter dated 16th March 2004 in which she declined the offer to work at the Malawi Catering Services Limited and offering herself for early retirement. She wrote again on 4th May 2004, giving the respondent 14 days within which to make a decision. The respondent gave their response by a letter of 6th May 2010 disputing the allegation that the respondents advised her to wait at home and reiterated the circumstances in which the redundancy arose and asked the applicant to make her own proposals by 14th May 2004 on how the respondent would incorporate her. The applicant also tendered in evidence a letter from her lawyers dated 13th May 2004 and a letter from the respondent terminating her

services dated 17th May 2004.

In cross-examination the applicant maintained that she remained at home on advice from the respondents. She admitted knowing the reasons for her redundancy, namely the merging of the company secretary's and legal counsel's offices. She stated that she had denied to be transferred to Malawi Catering Services even though her benefits would be the same. She pointed out that she would not have job satisfaction at Malawi Catering Services. As to whether an employee could refuse to be transferred she was not sure on the policy of the company.

The respondent had one witness, Mrs Magombo. She adopted the documents used in the applicant's case and added a document which was a memorandum by Mr Nyondo (deceased) refuting the Applicants allegations that she was told to go and wait at home. The memo further narrated how the applicant had stormed his office and said 'bad' words against him.

Mrs. Magombo testified that there was redundancy in relation to the applicant's services; they informed the applicant about it but she decided to stay at home. The company offered an alternative employment for her in Malawi Catering Services Limited, with no less favourable conditions but she denied the offer.

In cross-examination, the witness said that the respondent and Malawi Catering Services Limited operate under the same management and that staff could be transferred from one company to the other.

That is the summary of the evidence that the parties presented in the court.

In our view we hold the opinion that on the facts of the case, the applicant's position had become redundant. The respondent did not renew the contract of the

officer the applicant was serving (the company secretary). As a result his office was merged with that of the legal officer. As the legal officer was to come with his secretary the applicant's position had become almost redundant. Section 57(1) of the Employment Act justifies operational requirements of an undertaking as a reason with which an employer may terminate an employee's employment. By operational requirements is meant requirements based on the economical, technological, structural or similar needs of the employer. On the evidence of the respondent, the respondent went through some sort of restructuring requiring it to merge some positions. As a result of that merger, the applicant's position became redundant. Of course, when effecting the restructuring, the employer has an implied obligation to act with some fairness. Therefore, the next question is whether the respondents acted with fairness. To act with fairness, among other things, the employer must consult the employee on the issue of redundancy. See International Labour Organisation Convention 158. The decision of *Boloweza and another v Doogles Lodge* [2008] MLLR 362 suggests factors that the court must address itself to establish whether a particular redundancy was lawful. The questions are: whether there were consultations between the employer and the employee(s) or employees' representatives; whether there was any attempt to reach a consensus; whether there was any disclosure of information to the employee; whether the employer afforded the employee an opportunity to make representations; and the selection criteria in relation to the employees who were to be retrenched or redundant.

The circumstances of the case are that there were some changes in the structural requirements on the part of the respondent. We find that the respondent went on to consult the applicant on the issue. They also offered her an alternative job with similar benefits. Beyond that, after she refused the offer, the respondent afforded the applicant to give her representation as to where she would fit in the new organisational structure of the respondent. In this regard we find that we may

respond to the tests as suggested in *Boloweza v Doogles* as follows:

Was there consultation between the employer and the employee? Yes, there was. In our finding, the respondent consulted the applicant on the fate of her position within the organisational structure. Was there an attempt to reach a consensus? Yes. The respondent offered the applicant an alternative employment. The respondent even went ahead to ask the applicant to make suggestions as to how they would fit her in the structure. So this response of ours also answers the question whether the respondent afforded the applicant a chance to make representations. The next test is was there disclosure of information to the applicant? Yes. We find that the respondent took all the steps to inform the applicant about the situation of her employment. That is to say that the some two offices had been merged. Resultantly, there would be one officer and one secretary. Finally what was the selection criterion? The criterion was the choice of the person coming to occupy the office. He already had a secretary. Therefore, he chose the secretary who was already serving him. The criterion was, in our view, reasonable in the circumstances. We cannot question the choice and the exercise of that discretion.

In view of all this, the respondent did not unlawfully terminate the employment. Rather, the applicant failed to cooperate with the respondent when her job became redundant. She failed to collaborate with the respondent when it offered her an alternative employment citing absence of job satisfaction. How more fair would the respondent have been? After all, the conditions and benefits of service were still the same. This action has no merit. We dismiss the action of unfair dismissal in its entirety.

MADE this 9th day of September 2010

J. Nriva

DEPUTY CHAIRPERSON

D. Z. Namandwa

EMPLOYERS PANELLIST

E. Mtenje

EMPLOYEES PANELLIST