

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

INDUSTRIAL RELATIONS COURT APPEAL NO. 06 of 2011

BLANTYRE NEWSPAPERS LIMITED…………..APPELLANT

AND

CHARLES SIMANGO…………………………….RESPONDENT

**CORAM:**

**JUSTICE D. MWAUNGULU**

Kalua, Of Counsel, for the Applicants

Chayekha, Of Counsel, for the defendant

Mwanyongo, Official Court Interpreter

**Mwaungulu, J**

**JUDGMENT**

*Précis*

Fourteen years after the Employment Act 2000 passed this case examines decisions in this Court and the Supreme Court to resolve this appeal. Resolution depends on interpreting sections 63 of the Employment Act. On the matter under consideration, the Employment Act is *in* *pari materia* sections 115 to 123 of the Employment Rights 1996, United Kingdom. In seminal decisions on the Act, *Nkhwazi v Commercial Bank of Malawi Ltd* (1999) Civil Cause No 233 (HC) (PR) (unreported) and *Kalinda v Limbe Leaf Tobacco Ltd* (1995) Civil Cause No 542 (HC) (PR) (unreported), despite the Supreme Court decision in *Chawani v Attorney General* [2008] M.L.L.R 1, United Kingdom decisions, especially *Norton Tool Co Ltd v Tewson* [1973] 1 All E.R. 183, informed this Court. In the United Kingdom, unlike in Malawi, there is a cap compensation awards that. The compensation principles, however, compare. The Employment Act prescribes a minimum which is misapplied and, in some cases, leads to illogical results.

*History*

This discourse arises from an order that is, in every sense, unsophisticated. Liability never arose in a case where the Industrial Relations Court’s decision based on a judgment on admission. The court below, however, made a compensation award vehemently contested and supported by, respectively, the employer and the employee. The appellant, a media company from two centuries, on 9 September 2003 employed the respondent, a renowned editor, a Consultant Editor. Either party could terminate the contract on three months’ notice in a contract for an unspecified time. The contract entitled the respondent to a house, electricity, telephone and water allowances, K10, 000 fuel voucher per month, use of a company vehicle and 25% of gratuity of gross salary for each completed month of service. The contract, according to the respondent, implied that the contract could determine based on the respondent’s capacity or the appellant’s operational requirements.

On 30 June 2003, the appellant, without giving reasons, terminated the contract, giving one month salary in lieu of notice. On 19 August 2003, the respondent sued for damages for wrongful and unfair dismissal. The respondent obtained a judgment on admission on 19 February 2010. On 15 February 2011 the court below made an award for loss for up to May 2005 when the respondent found another job. It concluded that, despite the respondent’s self-employment, little came out of that employment.

*The Appeal*

The appellant contends that the lower court’s award of 22 months compensation was based on a wrong principle of law and against the weight of evidence. The appellant argues that the Industrial Relations Court erred, on the evidence and facts, in finding that the respondent mitigated damages.

*Competence of the Appeal*

The respondent’s Counsel , relying on section 65 (1) of the Labour Relations Act, and the Supreme Court of Appeal decision in *Magalasi v National Bank of Malawi* [2008] MLLR 47, contends that the appeal is incompetent:

*(1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.*

*(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered.*

The Supreme Court just acknowledged the section. There is little or nothing from the statement of Mtambo, J.A. The appellant’s Counsel contends then that this Court can act under Order 59, rule (10) (3) of the Rules of the Supreme Court 1965. That rule dealt with appeals from the High Court to the Supreme Court and not to appeals from the Industrial Relations Court to this court. Moreover, that rule, concerning the Supreme Court, is repealed because of section 8 (b) of the Supreme Court of Appeal Act. The Supreme Court of Appeal, without provisions in indigenous rules, now employs the Civil Procedure Rules 1998. In England and Wales, the High Court has no appellate civil jurisdiction. We, therefore, do not have contiguous rules for appeals from county courts in England and Wales. Counsel for the appellant then relies on a statement of in *Barbour, Robb & O’Connor v Continental Motors* (11 MLR 217, 222), cited in a similar fashion in The Industrial Relations Act was passed in 2000. The decision in *Barbour, Robb & O’Connor v Continental Motors* cannot stand to this statutory provision.

# Sitting at courts of first instances and on appellate jurisdiction, I have always understood the position to be where the evidence is contradictory or undermined, yet there is unundermined evidence nevertheless, the effect of provisions like section 65 (2) is that the appeal court appeal cannot interfere. Conversely, where evidence lacks, whether there was evidence is a question of law. Equally, where, as is contended for the appellant, all the evidence on the record is against the finding of a particular fact, there is a question of law. In *Stewart -v- Cleveland Guest (Engineering) Ltd*; EAT 6-Jul-1994.Mummery J P, on a similar provision, said:

*“Whenever an appeal is based on the perversity ground, this Tribunal must be extremely cautious not to conclude that the decision of the Industrial Tribunal is flawed because the Appeal Tribunal would have reached a different conclusion on the evidence or thinks that another Industrial Tribunal would have reached a different conclusion on the evidence. An appeal should not be allowed on this ground simply because the Employment Appeal Tribunal disagrees with the Industrial Tribunal as to the justice of the result, the merits of the case or the interpretation of the facts. This Tribunal should only interfere with the decision of the Industrial Tribunal where the conclusion of that Tribunal on the evidence before it is ‘irrational’, ‘offends reason’, ‘is certainly wrong’ or ‘is very clearly wrong’ or ‘must be wrong’ or ‘is plainly wrong’ or ‘is not a permissible option’ or ‘is fundamentally wrong’ or ‘is outrageous’ or ‘makes absolutely no sense’ or ‘flies in the face of properly informed logic. This variety of phraseology is taken from a number of well-known cases which describe the circumstances in which this Tribunal (and higher courts) have characterised perversity. The result is that it is rare or exceptional for an appeal to succeed on the grounds of perversity. The reason why it is a heavy burden to discharge is that it has been recognised by those with wide experience and practical wisdom that there are many factual situations arising in the field of industrial relations, including sex discrimination, in which different conclusions may be reached by different tribunals, all within the realm of reasonableness. It is an area in which there may be no ‘right answer’. The consequence of this approach, also approved in cases of high authority, is that it is not appropriate or fruitful to subject the language of the decision of the Industrial Tribunal to ‘meticulous criticism’ or ‘detailed analysis’ or to trawl through it with a ‘fine tooth comb’. What matters is the substance of the Tribunal’s decision, looked at ‘broadly and fairly’ to see if the reasons given for the decision are sufficiently expressed to inform the parties as to why they won or lost the case and to enable their advisers to identify an error of law that may have occurred in reaching the conclusion.”*

The appeal is competent. Moreover, if I understand correctly, the appellant challenges the actual award because its excess bases on applying correct principles wrongly or applying wrong principles. That, to my mind, makes the appeal here based on a point of law.

*Congruency between the Employment Act and the Employment Rights Act 1996 UK*

Section 35 (1) of the Employment Act provides:

“(1) On termination of contract, by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule.

Section 35 (5) of the Employment Act provides:

“(5) The payment of a severance allowance under subsection (1) shall not affect the employee’s entitlement, if any, to payment in lieu of notice under section 30 or to a compensatory or special award under section 63.)”

Section 63 (1) of the Employment Act provides:

*“ If the Court finds that an employee— complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies—*

*(a) an order for reinstatement whereby the employee is to be treated in all respects as if he had not been dismissed;*

*(b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties; and*

*(c) an award of compensation as specified in subsection (4).”*

Section 63 (3) of the Employment Act provides

*“Where the Court finds that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.”*

Section 63 (4) of the Employment Act provides:

*“An award of compensation shall be such amount as the Court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.”*

Section 63 (5) provides:

*“ The amount to be awarded under subsection (4) shall not be less, than—*

*(a) one week’s pay for each year of service for an employee who has served for not more than five years;*

*(b) two week’s pay for each year of service for an employee who has served for more than five years but not more than ten years;*

*(c) three week’s pay for each year of service for an employee who has served for more than ten years but not more than fifteen years; and*

*(d) one month’s pay for each year of service for an employee who has served for more than fifteen years,*

*and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57 (3).”*

The Employment Rights Act 1996 in the United Kingdom (and its predecessor Industrial Relations Act 1971) greatly influenced our Employment Act. Section 118 of the Employment Rights Act provides:

*“ (1).Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—*

*(a)a basic award (calculated in accordance with sections 119 to 122 and 126), and*

*(b)a compensatory award (calculated in accordance with sections 123, 124.”*

Section 119 of the Employment Rights Act provides:

*“ (1)Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*

*(a)determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*

*(b)reckoning backwards from the end of that period the number of years of employment falling within that period, and*

*(c) allowing the appropriate amount for each of those years of employment.*

*(2)In subsection (1) (c) “the appropriate amount” means—*

*(a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,*

*(b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*

*(c) half a week’s pay for a year of employment not within paragraph (a) or (b)”.*

Section 121 *of the* Employment Act provides:

*“The amount of the basic award shall be two weeks’ pay where the tribunal finds that the reason (or, where there is more than one, the principal reason) for the dismissal of the employee is that he was redundant and the employee—*

*(a) by virtue of section 138 is not regarded as dismissed for the purposes of Part XI, or*

*(b) by virtue of section 141 is not, or (if he were otherwise entitled) would not be, entitled to a redundancy payment.”*

Section 123 *of the* Employment Act provides:

*“(1)Subject to the provisions of this section and sections 124 [*[*F1*](http://www.legislation.gov.uk/ukpga/1996/18/section/123#commentary-c2001707)*, 124A and 126]*[*F1*](http://www.legislation.gov.uk/ukpga/1996/18/section/123#commentary-c2001707) *, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

*(2)The loss referred to in subsection (1) shall be taken to include—*

*(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and*

*(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

*(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—*

*(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or*

*(b)any expectation of such a payment,*

*only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.*

*(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*

*(5)In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—*

*(a)calling, organising, procuring or financing a strike or other industrial action, or*

*(b)threatening to do so,*

*was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.*

*(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

*(7)If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.*

*(8)Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.”*

Section 124 of the Employment Rights Act provides*.*

*(1)The amount of—*

*(a)any compensation awarded to a person under section 117(1) and (2), or*

*(b)a compensatory award to a person calculated in accordance with section 123, shall not exceed £68,400.*

*(1A)Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 105(3) or 105*

*(3)In the case of compensation awarded to a person under section 117(1) and (2), the limit imposed by this section may be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).*

*(4)Where—*

*(a)a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and*

*(b)an additional award falls to be made under paragraph (b) of that subsection,*

*the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).*

*(5)The limit imposed by this section applies to the amount which the [*[*F4*](http://www.legislation.gov.uk/ukpga/1996/18/section/124#commentary-c1633249)*employment tribunal] would, apart from this section, award in respect of the subject matter of the complaint after taking into account—*

*(a) any payment made by the respondent to the complainant in respect of that matter, and*

*(b) any reduction in the amount of the award required by any enactment or rule of law*

*Adjustments under the Employment Act*

*Where an award of compensation for unfair dismissal falls to be—*

*(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards, or*

*(b) increased under section 38 of that Act (failure to give statement of employment particulars), the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).”*

*Supreme Court of Appeal Decisions before 2000*

The year when legislation passed is important. It excludes certain principles in this court and Supreme Court, the most conspicuous being principles in *Chawani v The Attorney General.* The Court in *Malawi Revenue Authority v Mpaso* (2004) Civil Appeal Case No. 59 (HC) (PR) (unreported) probably reacted to Counsel’s submission to dissuade the judge from relying on the case because, with the Employment Act, passed in 2000, principles in *Chawani v The Attorney General* were anachronistic. *Chawani v Attorney General,* by tenor and purpose, was aliunde the Employment Act 2000 Some statements on ‘damages’ for ‘wrongful dismissal’ could not inform contemporary jurisprudence on ‘compensation’ for unfair dismissal. I am using the words ‘damages’, ‘wrongful dismissal’ advisedly; they are not used in the Employment Act. *Leyland DAF (Malawi) Ltd v Ndema* [2008] M.L.L.R. 14; *Kankhwangwa and others v Liquidator Import and Export (Mw) Ltd* [2008] M.L.L.R. 26; *Malawi Telecommunication Ltd v Makande and another* [2008] M.L.L.R. 35 *Magalasi v National Bank of Malawi Ltd* [2008] M.L.L.R. 45; *National Bank of Malawi Ltd v Moyo* [2008] M.L.L.R. 51and *Stanbic Bank Ltd v Mtukula* [2008] M.L.L.R. 54 were Supreme Court of Appeal decisions on the Employment Act. They depart from bellicose common law and legislation section 68 of the Employment Act repeals.

*What is payable for unfair dismissal under the Employment Act*

Where, like here, there is unfair dismissal and compensation is necessary with or without re-instatement and re-engagement, the Employment Act provides for four payments. Section 35 of the Employment Act creates a severance pay (a basic pay under section 118 (a) of the Employment Rights Act). Section 63(4) creates a compensatory award (section 118 (b) of the Employment Rights Act). These payments are unrelated to notice pay or payments in lieu under sections 29 and 30 for concerning these the employer must pay as a matter of course under section 30 (2) of the Employment Act and paid independent of severance pay (section 35 (5) of the Employment Act).

For severance pay, the limits are set out in the schedule to the Act. Severance pay is only paid by the employer. 35 (5) of the Employment Act clearly provides that severance pay will be paid notwithstanding payment in lieu of notice under section 30 or compensatory or special awards under section 63 of the Employment Act. Section 63 (1) provides that compensatory or special awards can be made together with other statutory remedies, namely, reengagement and reinstitution. Damages at common law, what is payable in lieu of notice, are preserved in sections 29 and 30 of the Employment Act.. The Employment Act, beyond this, requires that an employee pay severance pay, a compensation award and a special award. These are statutory awards beyond damages properly defined at common law.

Section 124 of the Employment Rights Act, absent in our Act, sets a cap, revised periodically, for a compensatory awards. Section 63 (5) sets the minimum beyond which an award may never be awarded (*Malawi Environment Endowment Trust v Kalowekamo* [2008] M.L.L.R. 227).

*Compensation for losses not Damages*

The Malawi statute talks of ‘compensation’, not damages. Section 63 (1) and (4) of the Employment Act provide for ‘compensation’ for ‘loss’. Neither the Employment Rights Act nor the Employment Act defines the words ‘loss.’ That is for courts.. The first attempt is in *Norton Tool Co Ltd v Tewson.* The heads of loss are not created by statute. In *DHL International Ltd v Nkhata* (2004) Appeal from the Industrial Relations Court No 50 (HC) (PR) (unreported) the Court said:

*“ The case of* ***Chawani*** *and those that have followed it are based on the common law approach to employment and contractual obligations. The case of* ***Magola*** *and Others were also based on the common law but the High Court had attempted to fuse the current Employment Act 2000 in interpreting the rights. The Court based its view on an English Act that has since been repealed. It is pertinent to note that in these cases, the Courts have not come up clearly on how or why they ignore the current Employment Act, when computing awards. Lastly in the case of* ***Mtingwi*** *the Court relied**heavily on interpretation of the Contitution**in trying to interpret the Employment Act. The problems raised by these various cases is well articulated in the case of* ***Mpaso****. It is is clear from the judgment of Chipeta J., that the approach of the lower court leaves much to be desired, but he stopped short of interpreting or proffering a the proper approach in deciding what would be “just and equitable in the circumstance. The case of Maso however, leaves no doubt that the applicable law as far as contracts and contracts of employment are concerned is as interpreted by the Malawi supreme Court of Appeal in the* ***h*** *case. ”*

In *Magola* and earlier cases, there was no reliance on the Industrial Relations Act 1971, In *Norton Tool Co Ltd v Tewson,* just like in *Magola* and other cases, courts, tried, as courts, to determine the scope of ‘loss’ mentioned in the two statutes. The heads never based on any statutory cataloguing by the Employment Rights Act or the Industrial Relations Act 1971, UK repealed. Indeed in *Dunnachie v. Kingston-upon-Hull City Council* [2004] UKHL 36 the House of Lords considered whether injury to feelings are included in the word ‘loss’ in section 123(1) of the Employment Rights Act 1996. Lord Steyn said:

*“In the Court of Appeal only Evans-Lombe J thought that "loss" in section 116 could include non-economic loss: para 63. I am not persuaded by his reasoning. I agree with the statement of Brooke LJ that it is inconceivable that in this particular context Parliament intended the word to mean anything other than financial loss: para 93. It is noteworthy that Sedley LJ accepted that the "more natural meaning [of the word "loss"] in section 123 is pecuniary loss": para 34. He then proceeded to conclude that tribunals may award compensation for non-economic damage on the different basis that "in section 123(1) loss is not the defining category but a subset of the larger category of just and equitable compensation": para 32-33.*

*19.  Counsel for the employer made a telling point about the consequence of adopting the reasoning of Evans-Lombe J on the meaning of the word "loss" in section 123. He asked: What in the language of section 123(1) would then rule out an award of aggravated or exemplary compensation by way of penalisation of the conduct of the employer? The answer is that only if the word "loss" in section 123(1) is restricted to financial loss are such awards ruled out on the face of the legislation. And nobody could seriously suggest that Parliament intended to allow such awards.*

*20.  Sir John Donaldson in Norton Tool observed that the natural meaning of "loss" in section 116(1) does not include injury to feelings. He added that this view is reinforced by the elaboration in section 116(2) of the 1971 Act, now section 123(2) of the 1996 Act. It is significant that in sections 116(2) and 123(2), and indeed in the remainder of sections 116 and 123, there is no reference to non-economic loss.”*

The Employment Act is mentioned in the seminal cases and is a basis of some awards and only because those claims arose before the Employment Act and the employers relied on the Constitutional rights for compensation beyond common law damages.

In these cases, moreover, there was no need to concentrate on the definition of wages and remuneration. Wages, salaries, remuneration, etc., are ‘loss’; not all loss are wages. Section 63 (1) and 63 (4) talk of loss. Cases like *Magola* try to define loss, which include but are not restricted to wages. The definition for wages is important for other provisions where wages and remuneration are integral. The distinction is unnecessary under a compensation award under section 63 (4) of the Employment Act where remuneration may not be the only loss consequent on unfair dismissal. Nevertheless, section 63 (4) creates a remedy or right *sui generis* for an employee on just and equitable grounds to recover all ‘loss’ arising from the ‘unfair dismissal’, not wrongful dismissal.

*Categories of loss are not closed*

There is a duty on the court to ensure an employee is compensated and the employee compensates justly and equitably. ‘Justly’ and ‘equitably’ are broad concepts and are properly met by envisioning what the foreseeable and direct loss emanates from a dismissal which, by the turn of things, becomes unfair. It must be that there is room for more cards in the suit as courts, on multitudinous and multifarious situations, try to have employers compensate equitably and justly employees whose dismissals are adjudged unfair.

*Heads are important*

Heads of loss are important. Philips J., in *Blackwell v GEC Elliot Process Automation Ltd* [1976] IRLR 144 said:

*“That practice applied equally in the Employment Appeal Tribunal and is current in all industrial tribunals now, and it is absolutely essential that industrial tribunals, when determining the amount of compensation, should explain and act out, in the matter prescribed in that case, the details of the individual heads under which compensation it awarded and, briefly at all events, the manner and reasoning by which they have arrived at those figures. It is necessary to do that for a number of reasons. First of all, if it is not done, the parties cannot see whether the amounts awarded are correct. Secondly, if they wish to consider and appeal, they cannot decide whether it is an appropriate case in which to appeal. Thirdly, the appeal tribunal, if it is not done, cannot see whether the order appealed from was right. And there is perhaps a more important point than any of those that, fourthly, the very discipline of having to set down in orderly manner the heads under which the compensation is awarded and the brief reasons for it, ensures that the tribunal does not make a mistake, does not omit anything and arrives at a reasonable figure.”*

*Compensation is not awarding for previous work or contribution*

The compensation should never be understood as compensation for previous work or contribution. The employee earned a salary or wage up to the point of dismissal. Section 63 (4) of the Employment Act apply to loss the employee incurs immediately after and in the future. There is a gap between the termination and the time the court makes the award.

*Futuristic nature of compensation made under section 63 (4) of the Employment Act*

Naturally, loss from unfair dismissal can only be futuristic and, therefore, the employer will pay the employee money well before it is earned. It is unjust and inequitable that the award should overlook this fact, for, if it is, the employer will overcompensate.

*Loss up to the award should not be subject to accounting for that money is earned in advance*

An employee unpaid up to judgment loses opportunity to invest the money and, as with certain employers, the employer invests unpaid sums in the business. Courts award interest, under statute, agreement or equity (*Kankhwanga and others v*. *Liquidator Import and Export (Mw) Ltd* [2008] M.L.L.R 26). According to the Supreme Court interest cannot be paid on lost wages. Employment contracts do not provide for interest on unpaid wages. At common law, however, interest is payable on unpaid wages and, in my judgment, this must be the case in any case where the employer operates for profit (*Rishton v Grissell* (1870), L.R. 10 Eq 393; *McCullough v Newlove* (1896) 27 O.R. 627 (Canada). It is, therefore, unjust and inequitable that compensation up to judgment should be discounted for as if it is future earnings, more especially where there is a prospect that the employee may never get a job at all or may get one in the distant future, let us say, by training or acquiring new skills.

*Future Compensation must account for that money is given well before it is earned*

Consequently, this Court in *Nkhwazi v Commercial Bank of Malawi Ltd* (1999) and *Kalinda v Limbe Leaf Tobacco Ltd* and *Magola v Press Corporation* based on *Norton Tool Co Ltd v Tewson* split immediate compensation, the compensation up to the award as having already accrued so that it is not subjected to the reduction based on that the money is earned earlier before it is earned. Awards for after judgment have to be subjected to this reduction.

Counsel for the appellant relied on *Kachinjika v Portland Cement Company* [2008] MLLR 161 where the Court said:

*“[A]s a matter of principle we think it incorrect to award damages for wrongful termination of the contract of employment while separately making another award in respect of salaries for the period in between the termination and this judgment. That would most likely not only needlessly complicate the compensation process but also result in over-compensation.”*

It is difficult to see how accounting for what actually accrued complicates compensation. On the contrary, it is easier to compute what accrued than leave it to speculation. Moreover, paying which actually accrued actually is not over compensation; it is in fact under compensation unless, of course, the court orders interest It must always be, therefore, that the duality, which I never even imagined I was creating, between future and immediate loss will stay with us as long as courts endeavour to make just and equitable compensation.

The Court continued:

*“It would also be a technically and conceptually flawed. It would proceed on the assumption that the plaintiff was never terminated which is not true. That he continued being an employee of the defendant company which is also not true…”*

Dismissal adjudged unfair implies that it should not have happened; the contract of employment ends as on the date of the determining event. Consequently, the employee begins to incur the loss immediately upon the termination of the employment. The loss is paid based on that the contract is determined, not on that the contract is continuing (per Tindall, C.J., in *French v Brooks and another* 6 Bing. 354, 360).

The Court continued:

*“Thirdly it would give the impression that the plaintiff is being awarded damages for something else other than wrongful termination. Like for instance not having been, in between the termination and judgment, able to work which might not be true. “Fourthly, we might, if we compensated separately for that period, end up paying the plaintiff a salary that he has never in fact lost for the simple reason that he was in gainful employment elsewhere.”*

Section 65 (1) and (4) are not talking about ‘damages’. The section talk of ‘loss’ and loss*,* “sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.” The loss under discussion is recoverable and how it should be recovered and quantified is a different consideration from its eligibility or the nature of its eligibility. The Court will deduct an employee’s earnings after dismissal, as we see shortly, from the compensation.

The Judge continues

*“Instead the plaintiff should only be compensated for the wrongful termination. And the correct way about it is not to pay him salaries for which he did no work but to, as much as possible, award him damages, in the ‘general damages’ mould for wrongful termination that will take into consideration whatever was lost as a result of the wrongful termination.”*

# The Act does not talk of ‘wrongful’ termination. It talks of ‘unfair dismissal.’ The Act speaks of ‘compensation’ for ‘loss’ not ‘damages’ or ‘general damages’ or ‘special damages.’ In a totally different context, *Fothergill v Monarch Airlines Ltd* [1981] AC 251; [1980] 2 All ER 696; [1980] 3 WLR 209; [1980] 2 Lloyd's Rep 295, (33 ICLQ 797), Lord Scarman said: “Linguistically, I agree with the American judge in Schwimmer v Air France (1976)14 Avi 17,466 at 17,467 that in ordinary usage 'Damage is damage and loss is loss'. The word ‘loss’ in section 63 of the Employment Act was restricted to financial loss in equivalent sections in the Employment Rights Act 1996 (*Dunnachie v. Kingston-upon-Hull City Council*).

# The Court continues:

*“… as to how the court gets to just and equitable or in the alternative what consideration it should take into account we think the suggestion that the award be split into parts, namely immediate loss of wages and future loss of wages is untenable. In respect of immediate loss the award would result in the payment of a bonus which would be wrong in principle.”*

If the suggestion is that only losses after judgment should be awarded, an employee dismissed unfairly can only recover future losses. Consequently, an employee who finds a job between suing and the award loses the action completely because there is no future loss. That cannot be correct. The court will award the employee for loss up to the date of employment; the court will award nothing for up to the date of the award and future loss. There is no bonus.

*Loss compensation under section 63 (4) should not be expressed in months or years*

A practice is emerging where compensation for loss bases on number of months or years. I understand that using months or years emanates from that section 63 (5) of the Employment Act, much like the Employment Rights Act 1996, UK, sets the minimum compensation based on the number of years. Consequently, the Supreme Court of Appeal and the High Court in *Stanbic Bank Ltd v Mtukula* confirmed the award of 57 months. Section 63 (5) (d) provides “The amount to be awarded under sub section (4) shall not be less, than … one month’s pay for each year of service for an employee who has served for more than 15 years”. This section is understood to mean that the Industrial Relations Court can award more than one month’s salary for each of the years after 15 years employment. I doubt this interpretation.

The Supreme Court in *Stanbic Bank Ltd v Mtukula* approved three months for each of the 19 years because, it was thought in the Industrial Relations Court, the High Court and the Supreme Court, that the section means that the court could award more than a month, three months in that case, for each year served. This interpretation comports that the court, by fiction, can, in its discretion, award any number of months – 1 month to twenty months – for any served year. That would be absurd. The legislature could not have intended such an outcome. The section properly understood means that any compensation under section 63 (4) must not be less than one month for each year served if an employee has served more than 15 years.

*Minimum award under section 63 (5)*

Section 63 (5) can be a problem at the top end of earnings and many years service. The award exceed losses under section 63 (4) of the Act. An employer who dismisses a long serving employee unfairly finds oneself paying more than actual employee’s losses under section. An employee who worked from the age of 20 with an employer and is dismissed unfairly a year before the retirement age of 65 actually loses one year earnings. Under the section, the employee gets 54 months’ salary.

Conversely, the minimum may lead to under compensation. An employee who has worked for 16 years from the age of 20 and has 29 years before retirement, *ceteris paribus*, loses earnings of 228 months to which a minimum of 16 months under the section may not be reflective of the losses.

*Compensation under section 63 (4) must be expressed in monetary terms*

This, therefore, implies that the awards should not be for number of months or years. Section 63 (5) prescribes the number of weeks or months in each year below which the court cannot award a just and equitable compensation. Loss must be worked out in money at anything above amounts determined by considerations of section 63 (5). It is because of this, I suspect, that the Employment Rights Act prescribes a cap beyond which loss cannot be compensated. I fail to see how loss can base on the number of months in a year. The suggestion cannot be that if an employee does not work for one year, the loss is one month earnings; the loss is in fact a whole years earnings. The award must not therefore be based on the number of weeks or month served in a particular and multiplying it by the number of years at which the contract would have determined under the contract. This cannot be an accurate measure of loss emanating from unfair dismissal. The correct measure must represent actual (immediate) losses at the time of the award and future losses arising from that the employee is out of work unfairly.

*Determining the actual loss*

On the present law, namely the Employment Act, there is no such capping on the losses recoverable under the compensation award. Capping itself may be precarious. Capping can only be based on known wage or salary trends and making an economic and mathematical determination about what should be the cap. That may be unrealistic. An employee who earns 100, 000 quid per a week would not be covered by the limits set by the cap in section 124 of the Employment Rights Act.

The correct measure of the loss is the time when the employment was to determine and the loss flowing from the termination of the contract. In C*lan      Transport      Company      (Private)      Limited      v     Clan      Transport      Workers    Committee* (Civil Appeal No. 227/00), the Supreme Court of Zimbabwe, Ziyambi, J.A., said:

*‘The general rule governing the measure of damages in such cases is that:*

*“the employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer.”’*

 A person, retiring at 60 years and unfairly dismissed at 45, loses fifteen years of employment and earnings the years covered, all considered. Equally, a person on a five year contract unfairly dismissed at one year loses employment for four years and earnings in those years. This is the loss envisioned in sections 63 (1) (c) and 63 (4) of the Employment Act. Remuneration and wages may not be the only financial loss emanating from unfair dismissal. Generally, remunerations are used to determine the actual loss in monetary terms.

*The onus of proving the loss is on the employee*

The onus for proving the loss is on the employee. Compensation needs more detail and evidence and will be considered shortly. In *Wawanya v Malawi Housing Corporation* (2007) MSCA Civil Appeal No 40 (unreported) the Supreme Court felt constrained not to award compensation under the Act because of pleadings. Section 63 (1) of the Employment Act is mandatory as to the remedies. The Court must award one or more of the remedies. A court should not be restrained by pleadings. Moreover, the hallmark of these proceedings, according to section 71 (1) of the Labour Relations Act, are ‘informality, economy and dispatch.’ This is instilled by Rule 25 (4) of the Industrial Relations Court (Procedure) Rules. *Wawanya v Malawi Housing Corporation* overlooked a decision of the same court: *Kankhwangwa and others v Liquidator Import and Export (Mw) Ltd.*

I do not think that given the Act and subsidiary legislation a court can award anything different from what is prescribed. The substance of awards under the Act is that compensations be just and equitable. While what is in the pleadings may be just, in the sense that it is according to the law (of pleadings) it is in equitable because we rely on the Chief Justice’s foot for equity. Where, therefore, like here, there is evidence on which a just and equitable compensation can be made and the employee claims generally for compensation for unfair compensation the award must be just and equitable.

As indicated, the loss an employee suffers immediately on the unfair dismissal comprises the loss of earnings from the date of termination to when the termination would have ended. The Supreme Court in *Stanbic Bank Ltd v Mtukula* attempted to define the words ‘remuneration’, ‘wage’ and ‘salary’ as to include many things. As stated earlier, this definition is restricted to specific provisions in the Employment Act. For purposes of severance pay or payment in lieu of notice these definitions are important. Salaries, wages or remuneration are neither the only losses covered by section 63 (4) of the Employment Act nor the only losses suffered by an employee”. The expression ‘loss’ is wide enough to cover financial losses not envisaged in the definition as being consequent from such unfair dismissal not covered by the wider definition of the terms. Consequently, the cost of advertising, travelling, etc while looking for employment for an employee unfairly dismissed may be claimed by the employee after finding a job as a loss emanating from unfair dismissal. An expatriate employee whose contract does not include repatriation may have to use his salary or severance pay to a place of recruitment because under the contract the employee was not entitled to such a benefit or payment. Section 63 (4) will consider repatriation as a loss emanating from unfair dismissal.

*Ascertaining the loss*

The first task, therefore, is to receive evidence of the earnings and factoring the tax burden on those earnings. Those losses are proved by evidence. In *Magola v Press Corporation* this Court said:

“*The assessment of the award bases on the employees loss which includes salary (including overtime payments) and other benefits which the employee might reasonably be expected to receive: the use of the company car free or cheap accommodation, tips, mortgage allowances, school fee allowances, medical insurance as these cases show:* Noha v Granitstone (Galloway) Ltd*, [1974] ICR 173;* Crampton v Dacorum Motors Ltd*, [1975] IRL 168; De Cruz v Airways Acro* Association Ltd, (6066/72, IT); Bradshaw v Rugby Portland Cement Ltd, *[1972] IRLR 46;* Hedger v Davy & Co. Ltd, *[1974] IRLR 138;* Butler v J Wendon & Son*, [1972] IRLR 15; and* Lee v IPC Business Press Ltd *[1984] ICR 306.”*

The employer is not supposed, for future or immediate earnings, to pay taxes. With tax resolved, court must determine the loss which is a lump sum, based on non-inflationary simple interest rates 1-3 %,that constitutes an annuity that will exhaust, from income and outgoings, during the employment contract. It is precisely easy to locate the exact payment by working the years of duration of a contract from just multiplying the annual earnings proved by 20. 20 does not represent years!

*Mitigation*

The actual loss determined, the court considers against it many things. First the court considers whether the employee mitigated the loss. An employee, where there are opportunities of work, who voluntarily and without reason, does not seek employment, will be acting unjustly and inequitably. In my judgment, failure to mitigate does not mean that the employee recovers nothing. It is in the court’s discretion, all circumstances factored, to award nothing or partly on the facts. If there is justification for why an employee never sought work, the Industrial Relations Court may still award full compensation. This might be the case where the man is elderly or has spent many years as a dockworker, for example, and a new job requires additional skills that the employee cannot attain. *Chawani v Attorney General*, if decided under the Employment Act, is justified on this principle.

In all other cases, it may be just a question of assessing a chance that the employee will find a job and awarding based on probabilities. Again, the case of *Chawani v Attorney General* was a case where the Supreme Court assessed the chance of an employee who worked in the civil service for a long time and had little prospect of succeeding in finding and actually performing in any new job. Where, for example, on a scale 1 to 5, an employee has a chance of 4, the award should be a fifth of the estimated loss. If the employee has a zero chance, there should be full compensation. If the employee has a chance of 5, the award will depend on whether the job is permanent and the earnings and terms of the new employment.

First, on this principle, it must be that where, before judgment or the award, the employee finds a job, similar consideration apply. If the job is the same and offers similar terms as the one the employee was unfairly dismissed for, the Industrial Relations Court may have to assess the risk that the job could be lost. It would be wrong not to award an employee who has a temporary job. Secondly, the Industrial Relations Court, on just and equitable principles, could still award an employee who has found a less paying job. It would be unjust and inequitable not to award an employee who, unfairly dismissed, earns less by the dismissal.

The award, as seen earlier must take into account the fact that the awards are made much earlier before the contract would have ended. Awards are made generally on the non inflationary rates of between 1-3% and we are looking for an annuity that by income (interest) and reductions from the annuity to meet the annual remuneration would exhaust at the time that the employment would have ended. Consequently, if there were other benefits accruing as a result of termination, for example pensions and gratuities, they are awarded and on the principle that they are paid well before the event. Consequently, the loss is really a matter of kwachas and tambalas, precisely because in cases where reinstitution and reengagement are impossible, money seems to be the best solace though not a perfect one.

In jurisdictions, like the United Kingdom, there is a rule of thumb that compensation would generally not cover periods of more than 24 months, precisely, because, speaking generally, that is sufficient time for one to find a job. In Malawi, the times are much longer and there is a prospect that one cannot find a job at all.

Applying these principles to this case, the Industrial Relations Court award is not excessive and this Court should not interfere. The court below awarded the employee for 22 months the sum of K3,047,400.50 comprising of salary and house, electricity , water telephone and security allowances

Secondly, the employee is entitled to a compensation award for losses arising from the unfair dismissal. The actual loss, as demonstrated, is the loss of earnings up to the time the contract would determine or on his life expectancy whichever is the earlier. This involves determining a lump sum that by reduction from income and the annuity expires at the determination of a contract. It is unnecessary to determine that sum because the employer found a job within 23 months of unemployment. He, therefore, wants to be compensated for the loss up to the time he found another job. Normally, this is awarded almost as a matter of course. For paucity of decisions on this matter, two decisions of the Supreme Court of Zimbabwe come in aid: *Clan      Transport      Company      (Private)      Limited      v     Clan      Transport      Workers      Committee* and *Duly Holdings Ltd. v Spanera* (Civil Appeal Case No 89/03). In *Duly Holdings Ltd. v Spanera* Chidyausiku C.J., said:

*“I find myself in agreement with the submission by Mr. Phillips that on the authority of Ambali’s case, supra, the respondent is entitled to damages calculated on the basis of his income from the date of his dismissal to the date when he found employment.*

He cited the statement of McNALLY JA in *Ambali v Bata Shoe Company* 1999 (1) ZLR 417, 419:

*“He (the employee) will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected to find alternative employment.”*

 In *Gauntlett Security Service (Pvt) Ltd v Leonard*1997 (1) ZLR 583 at 586, the Court said.

*“Since the respondent's contract of employment was not one of fixed duration or terminable by the appellant upon notice given, I consider it was incumbent upon the Tribunal to call for evidence as to the reasonable period it would take a person in the position of the respondent (disregarding the injury) to obtain similar employment.   And having made the necessary finding, then to deduct from the monthly wages paid by the appellant, the amount the respondent actually earned or could reasonably have earned during such period.*

Counsel for the employer, however, says that the award is excessive for two reasons. First, relying on *Malawi Environment Endowment Trust v Kalowekamo* and *Community of Saint Egidio v Mbale* (2010)Civil Appeal No 15 (HC) (PR) (unreported) Counsel for the employer submits that the employer did not mitigate damages because for two years the applicant made only two job applications. The decisions cited by Counsel seem to suggest that the period taken and the number of applications are determinative of the issue. We are, by this approach, going to find ourselves determining on a case to case what is seeking for employment, how much time is or how many letters are sufficient seeking; that is very problematic for the courts. Besides, given, as we see shortly, that the burden of proof of non-mitigation is on the employer, courts, like the Supreme Court in Canada (British Columbia), are reluctant to infer non-mitigation from an employee’s inertia. This was the case inn *Bird u. Warnock Hersey Professional Services Ltd;* [1980]B.C.] No. 2057 (S.C.). The Court in that case, unimpressed with the employee’s efforts, nevertheless determined that want of efforts per se was insufficient to demonstrate failure to mitigate. The Court said:

*“I was not much impressed, however, with the effort-I should say lack of effort-by the plaintiff to obtain other reasonably comparable employment. But the onus here is on the defendant to prove not only failure in fact, but that had the plaintiff taken reasonable steps to mitigate, he would have been likely to obtain comparable alternate employment: see Munana v. MacMillan Bloedel Ltd. (1977),2A.C.W.S. 364 (B.C.S.C.). I do not think the defendant satisfied the burden on the latter point so I will not reduce the award.”*

In this case, I am, just as the court below was, impressed that the employee worked on his finding alternative employment. The gravamen of his evidence was that, in the local area, and this Court will take judicial notice of that, there were not many players in the industry. More significantly, he exited at a very senior position that was not available elsewhere. The appellant’s counsel submits that the respondent should have found a lower paying job. I, like the court below, am persuaded by the respondent’s explanation that, given his qualifications, lower jobs were more difficult because of rivalry from senior managers to who the respondent would have been constant threat and competitor. Besides, there is no obligation on the employee to find a lower job or a lower paying job. That would be appeasing the unfair dismissing employer and leaving the employer to face adversity.

Moreover, in my judgment nothing can be a better proof of that the employee was mitigating damages by seeking another job than by showing the court that the employee found one. With all this evidence showing the employee’s efforts in mitigating damages it was up to the employer to demonstrate that the employee would have found a better or similar job earlier. The employer never discharged that burden by evidence aliunde or weakening the employee’s evidence.

*Malawi Environment Endowment Trust v Kalowekamo* and *Community of Saint Egidio v Mbale* cases seem to place the burden of proof for non-mitigation on the employee. The burden of proving non-mitigation is always on the one who raises the defence. The burden of proof is on the employer to show that the employee did not mitigate the loss. In *Michaels v. Red Deer College,* [1976] 2 S.C.R. 324 the Canadian Supreme Court, Laskin C.J., said:

*But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one) for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.*

The employer must demonstrate that the employee failed to mitigate and that the employer, if the employer had searched, would have found a job. In *Fast v Western Railco Products Ltd* [2000] B.C. No. 2074 (S.C.) the Court said:

*“... the onus is on the defendants in this case to prove firstly, that there was a failure on the employee's part; and secondly, that the employee would have likely found another comparable position if one had been searched for.”*

In *Bartholomay v Sportica Internet Technologies Inc.* [2004] B.C. No. 750 (S.C.) the Court said:

“*I am satisfied on the evidence that the plaintiff took all reasonable steps to mitigate his losses after his contract was breached. In any event, in order to succeed on this defence, the defendants must prove not only that the plaintiff failed to reasonably seek out new employment in a timely fashion after he was discharged, but also that, had he done so, he probably would have obtained employment then. The defendants have not discharged the onus upon them in either respect.”*

The threshold of proof is not, in my judgment, reached by the quantity or quality of evidence. That would be introducing the best evidence rule; it is not a rule of evidence. The standard of proof can be achieved by proof of one or more or less inquiry. Once the employee attains the threshold, the employer, on who the burden is, has, by evidence aliunde, to show that the employee did not seek enough. In this particular case, if the employee was able to show by two letters that there was seeking for employment, the threshold was reached. The employer then had to show by evidence, let us say, by producing advertisements in newspapers to show that there were jobs and the employee never applied. I do not think the situation is as Counsel for the employer submits that the employee must be scaling the world for jobs that are not advertised and going from one end of town or from town to town and searching for all manner of jobs to mitigate consequences of an unfair dismissal. That is raising the standard of proof very high. The standard of proof is on preponderances. In *Michaels v. Red Deer College,* [1976] 2 S.C.R. 324 the Canadian Supreme Court, Laskin C.J., said:

“In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.”

Of course, proof by the employer by newspaper ads goes to discharge the burden; it is not without problems as can be seen from *Edge v. Kilborn Engineering (B.C.) Ltd.,* [1987] B.C.] No. 992 (S.C.) where the Court said:

*“Turning now to the question of other potential job opportunities. Copies of ads from various newspapers were put into evidence for the purpose of indicating jobs that could have been obtained by the plaintiff had he only tried. By way of reply, the plaintiff said many of these were outside his field of expertise or were at a lower level of employment, were outside of British Columbia, or were unsuitable for various reasons. Again, it seems to me the defendant must do more than just produce newspaper ads. If it relies on these ads, it should produce the employer who placed them so he can be cross-examined. A newspaper cannot be cross-examined. The defendant must prove the job was available, the lengths of its term, its nature and the rate of pay. Only then can a judge decide whether or not it was unreasonable for the plaintiff to turn the offer down.”*

The second argument is that the employee was dismissed after working briefly for the company. Counsel for the appellant relied on two Supreme Court of Appeal decisions *Wawanya v Malawi Housing Corporation* and *Stanbic Bank Limited v Mtukula* and two decisions of this Court in *Chakhaza v Portland Cement Ltd* [2008] M.L.L.R 118 and *Action Against Hunger v Magombo* (2008) Civil Appeal No. 70 (HC) (PR) (unreported). It was said that the employee worked for a short time. In *Wawanya v Malawi Housing Corporation* the Supreme Court was laying no principle except, perhaps, to suggest that the decision depends on particular facts or circumstances. To suggest that, however, is not to propose that longevity comports a bigger award. It is only to suggest that, among many things, an employee is compensated on longevity of employment. The premise is that there is reaping where the employee never sewed. Suppose an employer, an expert in aerodynamics, comes to a company briefly on a project that brings. It is problematic awarding such an employee less than an employee with mediocre contribution lasting many years. The only way to defend this is to suggest that this is an exception to the general rule. Normally, the difference between the general and special rule is that they are separate rules.

The rule that loss depends on longevity creates two irreconcilable scenarios. First, employers will conveniently dismiss employees earlier or deploy employees on short term contracts knowing that consequences are milder. Secondly, it will mean that employees who transform establishments may be quickly and harshly thrown into the labour market. That is not the spirit of the employment Act. Is it protecting the employee too much? So be it! The power to dismiss is always with the employer. Without this rule, the employee is vulnerable to be unfairly dismissed as long as (little) money, subject to the power of reinstatement or reengagement, is all the employer pays. The rule as proposed brings balance in an otherwise unbalanced relationship where the employee is the one without any or with the least leverage.

Moreover, once am employer has dismissed an employee unfairly, it appears to me odd that the employer can come to the housetop, knowing that the employee has actually lost the job that would have assured him of earnings up to the end of the employment, to suggest that I will pay you for a shorter time. Subject to considerations of the capacity of the employer, such considerations would lead to illogical results. Suppose two employers on a fixed time contract of ten years are dismissed one at the end of four years and another at 6 years. Such a rule comports that one dismissed at 6 years is compensated more than the one whose contract terminates at four years. This is why section 63 (4) talks about losses. The two employees have lost 6 and 4 years of employment and earnings and must be compensated for their losses.

Arguments about contribution to the company or resources that other employees previous contributed are unnecessary. First, an employer who hires knows of the capacity and wealth of the establishment. It should matter less to the new employee how it is that the employer acquired the withal. Secondly, unless the employer reinstates or reengages the employee, the unfairness of the dismissal will be more manifest, pronounced and painful when the employer replaces the employee unfairly dismissed. Where, therefore, there is no reinstatement or reengagement, it is inane, in my judgment to regard that the employee worked for a shorter time and that the employee has not contributed to the employer previously.

I would distinguish the Supreme Court of Appeal decision in *Wawanya v Malawi Housing Corporation* from this case because all that the Supreme Court did was to confirm what the lower court had decided on just and equitable grounds. The Supreme Court never approved or considered the principles of justice and equitability that the lower court used in arriving at the three months. Moreover, the Supreme Court seemed to have been bound by the pleadings. In this case the appellant pleaded unfair dismissal and claimed damages for it. Moreover, the lower court in *Wawanya v Malawi Housing Corporation* never ascertained the loss to the employee in order to apply principles of mitigation or fault required by the Act. This is evidenced by that the employee’s losses were awarded in months or years. I would also distinguish it on the basis that this case, unlike *Wawanya v Malawi Housing Corporation and Stanbic Bank v Mtukula,* was not a case of an employee claiming losses for duration of the contract; the employee is claiming for losses only up to the date of the next job.

The decision in *Stanbic Bank Ltd v Mtukula* does not stand for the proposition that the shorter the period of employment the less the award. The employee actually worked for nineteen years. As I demonstrated earlier that decision is problematic. First, the principle on which the award was made is very unclear and precisely for the second reason, namely, that the lower court never ascertained the actual loss. Conceptually, I have problems that losses can be expressed in months, except, of course, may be in years if all you are trying to decide the multiplier. The High Court decisions cited by Counsel are subject to this observation. The loss the employee suffers on an unfair dismissal is earnings up to termination of a contract as agreed between the parties. This sum is subject to mitigation, employee’s fault and, in some cases, a discount because money is given before it is earned. That loss cannot be worked out based on years previously served. It should be worked out based on years that the employee has yet to serve. That award seems to be awarding the employee for served years. The award cannot be for loss “sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.” As discussed earlier, *Stanbic Bank Ltd v Tukula* could be a case of over or under compensation, depending on how many years had left in his employment.

In my judgment, longevity of employment should not be raised at all to reduce losses resulting from unfair dismissal. The duty of the court is to ascertain the losses under section 63 (4) that are “sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.” on just and equitable principles. The statute requires that these losses be reduced by non-mitigation and employee’s contribution to dismissal adjudged unfair. The losses of employees whose contract terminate earlier are more than those for an employee whose contract terminates later. It cannot be a principle of justice or equity that an earlier unfair dismissal ameliorates such loss and awards an employee who loses less because dismissal is closer to end of a contract.

As I have said, taking into account all the heads upon unfair dismissal and the fact that the employee actually mitigated the loss and is claiming actual loss was up to the time of next employment, I find no principle on which to interfere with the award. Actual losses up to the date of the next job are paid, almost unmitigated. For actual losses the employee up to the next job there cannot be a defence that the employee walked for a short time. The award is not excessive. Moreover, the employee was under compensated; it appears that there were no awards for notice pay, leave days and other consideration

I, therefore, dismiss the appeal with costs.

Made in court this 20th Day of January 2014

D.F. Mwaungulu

JUDGE