

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 718 OF 2002

BETWEEN:

BENJAMIN KHOSWE.....PLAINTIFF

- and -

NATIONAL BANK OF MALAWI.....DEFENDANT

CORAM: CHIMASULA PHIRI J.

Mrs Kanyongolo of Counsel for the plaintiff.

Mr Msungama of Counsel for the defendant

M. H. Fatch - Official Interpreter.

JUDGMENT

Chimasula Phiri J.

The plaintiff's claim is for general damages allegedly for unfair and unconstitutional dismissal and costs for this action. The defendant denies the claims made by the plaintiff and prays that the action be dismissed with costs.

PLEADINGS

By the Amended Statement of Claim, the plaintiff pleaded as follows:-

1. The defendant is a registered limited liability company doing

banking business in Malawi.

2. The plaintiff was employed as a clerk by the defendant on the 29th December 1980 and the plaintiff and the defendant duly entered into a contract of employment.
3. Over a period of twenty-two years, the plaintiff whilst in the employ of the defendant rose to the position of Customer Accounts Officer.
4. It was a term of the said contract of employment that in every disciplinary case the defendant would provide the plaintiff an opportunity to be heard by providing the plaintiff with copies of reports on the case, allowing the plaintiff to present his side of the story and bring his witnesses.
5. In a letter dated 13th day of December 2001 the defendant without hearing the plaintiff and in breach of the conditions of employment wrongfully suspended the plaintiff from work.
6. The said suspension resulted from a payment of the sum of K360,000.00 to an alleged fraudulent customer which the plaintiff had been involved in authenticating.
7. The plaintiff only had the mandate to authorize payments up to a limit of K200,000.00 and therefore was not the responsible officer for authorizing the payment of the said K360,000.00.
8. The said wrongful payment was not due to gross negligence on the part of the plaintiff as was alleged by the defendant.
9. Further, following the said suspension and despite the reasonable prudence displayed by the plaintiff in his handling of the alleged fraudster, the defendant in

breach of the conditions of service unfairly dismissed the plaintiff from employment.

Particulars of unfairness

- (a) Failing to make available to the plaintiff reports on the case, submitted to the defendant by other officers, thereby denying the plaintiff an opportunity to fully respond to the allegations made against him and to cross examine witnesses.
 - (b) Failing to give plaintiff an opportunity to call his witnesses.
 - (c) Failing to take into account the role played by the plaintiff and other officers in the transaction that led to the dismissal.
 - (d) Failing to consider the plaintiff's long service of 21 years.
 - (e) Failing to consider the plaintiff's 21-year-old clean record, without any case of indiscipline.
 - (f) Failing to consider the plaintiff's social responsibilities and consequent economic hardship.
 - (g) Having an interested party in the matter, one Nkango, investigate the case leading to the plaintiff's dismissal.
10. The said dismissal was also discriminatory as it singled out the plaintiff and a cashier for dismissal leaving out the authorizing officer who had the final authority to authorize payment and actually authorized payment to the alleged fraudster.

11. Further the said dismissal was unconstitutional for being in breach of fair labour practices.
12. As a result of the said wrongful suspension and subsequent unfair and unconstitutional dismissal the plaintiff has suffered loss and damage -

Particulars of loss and damage

- (a) Loss of the right to earn a living.
- (b) Loss of Pension.
- (c) Loss of dignity and reputation.
- (d) Embarrassment.
- (e) Loss of medical aid scheme.
- (f) Loss of remuneration.
- (g) Loss of annual bonuses.
- (h) Loss of leave grants.
- (i) Loss of concessionary interest rate on house loan
- (j) Loss of National Bank staff shares scheme.
- (k) Loss of annual salary increments.
- (l) Loss of access to defendants various recreational facilities.

(m) Loss of in-house and external training opportunities.

13. And therefore the plaintiff claims:

- a. Reinstatement
- b. And/or in the alternative general damages
- c. Exemplary damages
- d. Costs of this action.

The defendant amended its defence and pleaded as follows –

AMENDED DEFENCE

1. The defendant refers to paragraph 4 of the Statement of Claim and denies that it was a term of the contract of employment that the plaintiff be provided an opportunity to be heard.
2. The defendant states that the letter of suspension dated 13th day of December 2001 and referred to in paragraph 5 of Statement of Claim was written in accordance with the conditions of employment.
3. The defendant therefore denies having wrongfully suspended the plaintiff as alleged in paragraph 5 of the Statement of Claim.
4. The defendant denies that the suspension resulted from an inadvertent authorisation by the plaintiff as authorizing officer as alleged in paragraph 6 of the Statement of Claim and states that the said suspension resulted from the loss of the sum of K360,000.00 occasioned by the plaintiff's own negligence in discharging his duties.

- i. Failure to take heed of a caution given to him by the Commissionaire to the effect that the customer who had presented himself was not the person who he introduced himself to be but was in fact a well known fraudster.
 - ii. Failure to establish that the face on the driving licence was correspondent with the name on the driving licence.
 - iii. Failure to relay the warning from the commissionaire to his superiors to whom he presented the transaction for further authorization.
 - iv. Failure to notice that the signature at the back of the withdrawal slip was in fact different from the specimen signature provided by the owner of the account.
 - v. Failure to ask the drawer to sign the withdrawal slip in his presence especially in view of the discrepancy in the signature.
5. The defendant denies that the plaintiff acted with reasonable prudence in handling the said fraudster as alleged in paragraph 8 of the Statement of Claim and states that the plaintiff's lack of prudence resulted in the defendant's customer losing the sum of K360,000.00.
6. In the circumstances, the defendant denies having unfairly dismissed the plaintiff as alleged in paragraph 8 of the Statement of Claim and states that the said dismissal was justified and in line with the defendant's conditions of service.
7. The defendant denies having acted in a discriminatory manner and puts the defendant to strict proof thereof.

8. The defendant denies having acted in breach of fair labour practices as alleged in paragraph 10 of the Statement of Claim and puts the plaintiff to strict proof thereof.
9. The alleged loss and damage are denied.

The plaintiff made a reply to the Amended defence as follows:

Reply to the amended defence

1. The plaintiff denies that he was cautioned by the Commissionaire to the effect that the customer was in fact a well-known fraudster and avers that the commissionaire's caution was to the effect that the customer resembled a known troublesome customer and that he should take care.
2. The plaintiff denies that he failed to establish that the face on the driving licence was correspondent with the name on the driving licence and that the plaintiff in fact checked with the parent branch and the road traffic commission.
3. The plaintiff denies that he failed to relay the warning from the commissionaire to his superiors to whom he presented the transaction for further authorization as the plaintiff in fact told his superior, Mr Nkango what the commissionaire had told him, that the customer resembled a troublesome customer.
4. The plaintiff denies that he failed to notice the signature at the back of the withdrawal slip as there was no such signature at the time at the back of the withdrawal slip that was presented to the plaintiff.
5. That having noticed no discrepancy in the signature, the plaintiff denies that he failed to ask the drawer to sign in his presence.

THE ISSUES

The plaintiff's claim is for reinstatement and/or in the alternative general damages and exemplary damages for unfair and unconstitutional dismissal. The plaintiff had worked for the defendant for 21 years when he was summarily dismissed allegedly for negligence in the performance of his duties. The defendant denies the claim of unfair dismissal. The plaintiff was the only witness for the claim. The defence called three witnesses –

The major issues for the determination of the court are:-

- a. Whether indeed the plaintiff was alerted that the presenter of the cheque was a fraudster.
- b. Whether the dismissal of the plaintiff was unfair taking into account all the circumstances surrounding the matter.

THE EVIDENCE

On the part of the plaintiff, it was his evidence that he joined National Bank ("the Bank") at the position of a clerk. He rose through the ranks to the position he held at Zomba Branch of the Bank. It was his evidence that his employment was terminated on the 4th of June 2001 because of a transaction he handled in respect of a bank account belonging to one of the customers of the bank, Mr Juma. It was his evidence that what happened in relation to this account is as follows: -

On the 13th day of November, 2001 he reported for duties at his station in Zomba. Later in the morning, a gentleman presented himself as Phillip Juma. He demanded that he be allowed to draw MK360,000.00 from his account which was held at Churchill Road Branch of the Bank. The customer presented his passbook and withdrawal slip to one of the cashiers Mr Wandisanga

Kayira, who in turn referred the withdrawal transaction to his own supervisor, Mr Msambozya. After Mr Msambozya had satisfied himself that the transaction was fine, he referred the same to the plaintiff because Mr Msambozya himself could not proceed further because the amount was beyond his authorization limit of MK100,000.00. After receiving the transaction, the plaintiff was approached by the commissionaire guard who indicated to him that the person who had presented himself as Phillip Juma resembled some troublesome character. Thereupon the plaintiff embarked on a verification exercise. He took the drawers licence and the Road Traffic Commission verified that the driving licence was a genuine one. Further he called Churchill Road Branch and faxed them the withdrawal slip and the driving licence. Churchill Road initially verbally confirmed that the transaction was in order and subsequently faxed the paper after verifying the customer's signature. The plaintiff maintained that during this verification exercise he was dealing with Mrs Unyolo, who was then the Customer Service Manager at Churchill Road. He said he actually spoke to Mrs Unyolo. The plaintiff also indicated that he verified from the computer system that the driving licence details tallied with the details on the driving licence which was presented to him. After all the verification had been done, the plaintiff said he took all the papers to his supervisor, Mr Nkango who was Customer Service Manager for further authorization because the amount was beyond his, i.e. plaintiff's authorization limit of MK200,000.00. It was his evidence that he left all the papers with Mr Nkango. He said he also relayed to Mr Nkango what the Commissionaire had told him about the customer. Mr Nkango subsequently approved the transaction and sent the papers straight to the cashier, Mr Kayira who proceeded to give the cash to the customer.

All appeared to have been well until early December 2001 when it was discovered that actually the person who had come to the Branch to cash MK360,000.00 in the name of Phillip Juma was actually a thief.

On the 6th of December, 2001 Mr Kamwana, an investigator from the bank's head office interviewed him. After orally explaining to Mr Kamwana what had transpired in relation to the withdrawal, he was given a police form on which he was requested and explained actually what he knew about the matter. The document was tendered as exhibit P6. He saw Mr Kamwana interviewing other officers including the commissionaire, Mr Msambozya and Mr Kayira. On

the 13th day of December 2001 Mr Nkango wrote him a letter requesting him to explain. This letter was put in evidence as exhibit P7. He later received a letter suspending him from duty. The letter of suspension was tendered as exhibit P8. He wrote a letter of explanation in response to the letter of P7. This letter was put in evidence as exhibit P9. He then responded to the letter of suspension by his letter which he tendered as exhibit P10. He did not hear again from the Bank until he received a letter of dismissal dated the 4th of January 2002. Subsequently, he lodged a written appeal to the Bank's Chief Executive. The letter of appeal was tendered as exhibit P12. The Chief Executive reverted to him, dismissing his appeal. The letter from the Chief Executive was tendered as exhibit p13. It was his contention that certain disciplinary procedures were not followed before being fired. It was his evidence that he was not invited to a disciplinary hearing nor was he allowed to call witnesses to support his side which he said, was contrary to established procedures of the Bank.

For the defendant, the first witness was Javis Sanderson Nkango, an employee of the defendant.

In 2001 he was stationed at the defendant's Zomba Branch. His position was that of Customer Services Manager. It was his evidence that on the 13th day of November 2001, the plaintiff presented to him cash withdrawal papers for the sum of K360,000.00 for authorization. The withdrawal papers related to an account belonging to Mr Juma which was maintained at Churchill Road Branch in Limbe. It was his evidence that the plaintiff indicated to him that he had already done all the preliminary checks and the transaction was in order. He thus requested DW1 to authorise payment, which he did. He handed the papers back to the plaintiff and the withdrawal was in fact fraudulent. When he tried to find out what had actually transpired, he learnt that the Commissionaire at the Branch had actually warned the plaintiff that the person who had presented the withdrawal papers was not Juma, but Sinkamba who was a well known fraudster. This piece of information was relayed to him by the Commissionaire himself, Mr Chuma who has since died. He was very emphatic in stating that the plaintiff did not relay the Commissionaire's warning to him and had the plaintiff mentioned the warning he would have refused to authorize payment and would have initiated the arrest of the fraudster.

The second witness was Joseph Kamwana. He stated that he is employed by the defendant as Internal Investigations Officer. One of his duties is the investigation of frauds. Upon receipt of a report concerning fraud at Zomba Branch of the defendant, he went to the said branch where he conducted investigations. He interviewed the following people: Mr Kayira, the cashier, the plaintiff, the Commissionaire, Mr Nkango and Mr Msambozya. He indicated that in his explanation, the Commissionaire indicated to him that he had warned both Mr Kayira and the plaintiff that the person who was trying to withdraw money in the name of Juma was in fact a well-known fraudster known as Sinkamba. Upon being questioned, both the plaintiff and Mr Kayira admitted that they had been warned by the Commissionaire. However, when he questioned Mr Nkango, he indicated that neither the plaintiff nor Mr Kayira relayed to him the warning they had received from the Commissionaire. Mr Nkango, the Commissionaire and the plaintiff were among the individuals who were requested to submit written reports which they duly did. (These were all tendered in evidence). Both the plaintiff and Mr Kayira were subsequently dismissed over their handling of the transaction. The fraudster was subsequently arrested by the police.

The last witness for the defendant was Mrs Rachael Unyolo. She is employed by the defendant as Quality Assurance Manager. At the time of the incident under consideration, she was stationed at Churchill Road Branch in the capacity of Customer Services Manager. Mrs Unyolo stated that she was never contacted by the plaintiff in relation to the withdrawal. She further said the issue discussed with the plaintiff at around the time of the incident related a transaction involving an account maintained by one of the bank's customers at Zomba Branch. She totally denied ever having authorised the withdrawal. She actually stated that it was not possible for here to authorize such a transaction as it involved an amount which was beyond her limit of MK200,000.00. Mrs Unyolo further indicated that Mr Juma's identity document used when opening was a passport and not a driving licence. She further stated that because Mr Juma submitted a passport as an identity, it was not possible for the bank's computers to contain details of Mr Juma's driving licence.

THE LAW AND ANALYSIS OF THE EVIDENCE

Section 31 of the Constitution provides that every person shall have right to fair and safe labour practices and to fair remuneration.

Section 58 of the Employment Act 2000 provides that a dismissal is unfair if it is not in conformity with Section 57.

Section 57 provides as follows:-

- (1) *The employment of an employee shall not be terminated by an employer unless there is valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.*
- (2) *The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.*

Section 59 provides for summary dismissal as follows:-

- (1) *An employer is entitled to dismiss summarily an employee on the following grounds -*
 - (a) *where and employee is guilty of serious misconduct inconsistent with the fulfilment of the expressed or implied conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship*

- (b) *habitual or substantial neglect of his duties;*
 - (c) *lack of skill that the employee expressly or by implication holds himself to possess;*
 - (d) *wilful disobedience to lawful orders given by the employer; or*
 - (e) *absence from work without permission of the employer and without reasonable excuse.*
2. *In subsection (1), "summary dismissal" means termination of the contract of employment by the employer without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

Section 61 provides for proof of reason for dismissal as follows: -

1. *In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to provide the reason for dismissal and if he fails to do, there shall be a conclusive presumption that the dismissal was unfair.*
2. *In addition to proving that an employee was dismissed for reasons stated in section 57(1), an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.*
3. *In the circumstances mentioned in section 60, it shall be for the employee to provide the reason which made the continuation of the employment relationship unreasonable.*

Remedies for unfair dismissal are provided for in section 63 as follows: -

- 1) *If the court finds that an employee's 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 reasonable 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).*
- (2) *The court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.*
- (3) *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.*
- (4) *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 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.

- (5) *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 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 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 maybe awarded where dismissal was based on any of the reasons set out in section 57 (3).

- (6) *Where the court has made an award of reinstatement or re-engagement and the award is not complied with by the employer, the employee shall be entitled to a special award to an amount equivalent to twelve weeks' wages, in addition to a compensatory award under subsections (4) and (5).*

VALIDITY OF THE REASON FOR DISMISSAL

The plaintiff was dismissed for negligence of duty. The question therefore is whether this was a valid reason or not. The plaintiff gave evidence on the events that led to his dismissal. The evidence was clear that that payment of K360,000.00 involved a

number of officers and the final authority was Mr Nkango, the Customer Services Manager. On his part the plaintiff's evidence showed that he actually went to great length to scrutinise the withdrawal request including interviewing the customer, verifying the signature with the parent branch, verifying the licence identity with the Road Traffic Department and getting the relevant final authorisation from the Customer Services Manager.

The defendant through its witnesses alleged in part that the negligence was due to an alleged failure by the plaintiff to warn the Customer Services Manager that that the customer was a well know fraudster as allegedly mentioned by the commissionaire. On this point, the defendant relied on the written evidence of the commissionaire. However, the evidence on what the commissionaire actually told the plaintiff is very suspect. In the first place, there are two documents both purporting to have originated from the commissionaire. The first one mentions of a warning to Mr Kayira that the customer was a fraudster and that he should be careful and that the same was mentioned to Mr Khoswe. The second one mentioned that the warning to Mr Kayira was for him to "take care" as the "customer was not an honest one". The contradiction in the two letters raised doubt as to their authenticity and reliability. Further, the second report indicates that the commissionaire told Mr Khoswe that the customer is Sinkamba and not Juma and that Mr Khoswe replied that "I have already faxed Churchill Branch so we are waiting for a reply". The response does not seem to tally with the warning and raises further doubts as to whether that was the warning that was given.

On his part Mr Khoswe gave evidence that the commissionaire only mentioned to him that the customer resembled a troublesome customer. He indicated that this is what he told the Customer Services Manager and that he could not tell him any other information that was not in his possession to wit the customer was a fraudster or a person known by another name. Defence witness Mr Nkango actually confirmed that the warning of a troublesome customer would have been of no consequence to him.

However having had the whole case hinge on the word of one officer as against another the defendant should have further scrutinised the evidence of the three officers, the plaintiff, the commissionaire and the Customer Services manager in order to assess the demeanour and credibility of each one of them. Further doubt on the information and warning given by the commissionaire is raised by the failure of the commissionaire to take further action after noticing that the fraudster had indeed withdrawn the money. It is submitted that had it been that the commissionaire was indeed positive on the identity of the alleged fraudster one would have expected more action on his part beyond merely warning the officers.

The importance and seriousness of the alleged warning was highlighted by the evidence from the defence witnesses number 1 and 2, that around the same time a similar fraud was committed in Lilongwe on the same account involving K420,000.00, but the officers involved were not dismissed, nor were officers within the Branch who claimed to have had such information. In the same vain if the disciplinary committee had properly and fairly scrutinised the evidence and found that the plaintiff did not have in his possession the warning as alleged, it is unlikely that it would have dismissed the plaintiff.

PRINCIPLES OF NATURAL JUSTICE

(a) Opportunity to be heard

Apart from the reason for the dismissal, unfair dismissal is based on the manner in which the dismissal was handled. Termination of employment, could be unfair and unlawful, if there was compromise of principles of natural justice whether or not the contract refers to the principles. (*Grainger BS Nkwazi vs Commercial Bank of Malawi civil cause number 333 of 1999*).

In *Fair mount Investments Limited vs Secretary of State (1976) 2AER 865*, it was said that if a party is adversely affected by any evidence and is given the right to comment on that evidence, the principle of right to be heard is complied with.

When evidence is given as to why dismissal occurred it is clearly better if everyone is in general agreement, and this is better sorted out before dismissal. The employer before dismissal is supposed to make sure that all the evidence is available and clear. (*Employment Law, James Holland and Stuart Burnett, Blackstone Press, 2000*).

The principles of natural justice were properly incorporated in the defendant's rules and regulations. These were further detailed in a management guide for all officers to follow. They were actually therefore a term of the contract of employment between the plaintiff and the defendant. The defendant's rules clearly stated that every officer was entitled to a hearing which would involve informing the employee of the charge against him, making all reports available to the accused, hearing both sides and allowing cross examination. All this was not done in the case of the plaintiff. According to the evidence of the plaintiff, he was asked to write a report on the incident by the investigator and the manager. He was not shown any of the reports written by the employees including the crucial reports by the commissioner and the Customer Services Manager. He was never invited to any hearing nor was he given an opportunity to cross examine those who gave conflicting reports. Whilst on suspension and awaiting the disciplinary hearing the plaintiff received a letter of dismissal. The lack of a clear charge was evident from the different reasons that were given for the suspension, the dismissal and the upholding of the dismissal on appeal by the Chief Executive of the defendant company. The plaintiff's evidence on lack of hearing was not in any way contradicted by the defence.

Even if the defendant were to argue that the earlier reports collected during the investigation were an opportunity to be heard this would not satisfy the requirement of the law. Where facts of a case are in dispute, it is necessary to give an oral hearing to satisfy the rules of natural justice or the duty to act fairly. A fair hearing becomes the employer's justification for termination of

employment where there is disagreement of facts. The duty to apply principles of natural justice does arise beyond the broader principle that where one is to affect another's rights adversely for a reason, the other reasonably expects to be satisfied of the reason. In the case of *Grainger BS Nkwazi vs Commercial Bank of Malawi civil cause number 333 of 1999*, it was said that the principles of natural justice, apart from the constitution, to our justice system and where necessary, should receive deserved attention from courts.

In *R vs Race relations Board, ex parte Selvarajan (1975) 1WLR, 1686*, it was held that the race relations Board was acting fairly in considering written witness statements as opposed to allowing an oral hearing as the facts in the case were not in dispute. Where the facts are in dispute the requirements of natural justice seem to stipulate an oral hearing.

In the present case, the defendant dismissed the applicant where the evidence as to who was responsible for the negligence that occurred was in conflict. The plaintiff gave evidence that he reported what the commissioner had said to him about the troublesome customers to the Customer Services Manager. On the other side the Customer Service Manager denies that he was informed of this, although it would not have made any difference to his judgment. The employer in this case should have summoned both the applicant and Customer Services Manager to an oral hearing before reaching a decision to assess the credibility and demeanour of each side.

Further, there is a conflict of evidence between what the commissioner is said to have said to the plaintiff and what the plaintiff says as to what the commissioner had told him. The defendant alleges that the commissioner mentioned the real name of the alleged fraudster to the applicant while the applicant say the commissioner just said that the customer resembled another troublesome customer. It is surprising to see that the defendant chose to believe the side of the commissioner and not that of the plaintiff without any explanation or without

allowing the two sides with conflicting evidence to state their story in the presence of each other and to cross examine each other.

Apart from being provided under the Bank rules, (Procedures for Gross Misconduct), this is also a fundamental principle of natural justice that where the duty to act fairly demands an oral hearing, there is a right to cross examine witness. In *R vs Board of visitors of Hull Prison, Expart St Germain (no2) (1979) 1 WLR 1401*, it was held that where witnesses were giving hearsay evidence, fairness may dictate allowing the person affected the opportunity to cross examine witnesses. However the plaintiff was denied even a disciplinary hearing contrary to the rules of natural justice.

In *Mc William Lunguzi and another vs Attorney General MSCA civil application number 23 of 1994 (unreported)*, it was stated that section 43 of the constitution restates principles of natural justice that a man shall not be condemned unheard and that these principles of natural justice ensure that the decision making process is fair.

(b) Bias

It is also a general principle of law that a person who holds an inquiry must be seen to be impartial, that justice must not only be done but must be seen to be done, that if a reasonable observer with full knowledge of the facts would conclude that the hearing might not be impartial that is enough. Even if the decision-maker has not been biased at all, a decision may still be quashed if they have any professional or personal interest in the issues, because justice must be seen to be done. In *R vs Susses Justices, Expart McCarthy (1924)1KB256*, a conviction for dangerous driving was quashed when it came to light that the justices clerk was a partner in the firm of solicitors acting for the plaintiff in related civil proceedings, even though it was shown that there was not actual bias.

In a case of Moyes vs Hylton Castle Working Mens Social Club and Institute(1986) IRLR 483, two witnesses to an alleged act of sexual harassment by a club steward towards a barmaid were members of the committee which dismissed the steward. It was held that it was a breach of natural justice for an apparently biased committee to hold the disciplinary matter.

In the present case the Customer Services Manager, (Mr Nkango) who was also involved and had the final say in the release of the said money took part in investigations that finally led to the dismissal of the plaintiff. This is so because in giving evidence partly using his witness statement, Mr Nkango told the court that he was personally involved in carrying out the investigations which led to the dismissal of the plaintiff. In addition to this he also told the court that he personally obtained a written statement from the commissionaire, which implicated the plaintiff. Nowhere in his evidence did he mention that he was requested to write his own report as he was also involved in the matter. It is obvious that the Customer Services Manager was not a proper person to conduct the investigations because he was connected with the alleged fraud. His involvement might and actually did prejudice the case against the plaintiff and there was a very high probability of bias. The witness could also have been influenced by the need to protect himself and therefore his evidence is unreliable.

The plaintiff also complained that he was unfairly singled out for disciplinary despite being one of the persons involved.

This is so because the one who actually authorized the payment of the money was not dismissed but his junior, the applicant who had only the authority to release K200,000 and not anything above that. The Internal Investigations Officer, Mr Kamwana in his evidence confirmed that the Customer Services Manager authorized the withdrawal on the strength of Mr Khoswe's scrutiny. The plaintiff gave evidence that when he was given the authority to sign as "A" signatory he was told not to sign because another signatory has signed before him and/or that he would be responsible for the Customer Services Manager's signature which was to come

later after the plaintiff had signed. Mr Nkango signed on the basis of the plaintiff's scrutiny, he was supposed to check the documents on his own to establish the withdrawal's authenticity and the customer's identity. Mr Nkango and all other officials of the bank gave evidence that they did not find anything wrong on the face of the documents that were presented for the withdrawal of the cash. The fraudster, if all he was one, played on all bank officials involved in the transaction and the plaintiff it is obvious from any reasonable man that he could not have known or detected the fraud after all the procedures he had taken. Mrs Unyolo, another defence witness actually admitted that none of the officers who had handled the said matter at her branch detected the fraud. The plaintiff was victimized despite all the diligence he exercised in handling the matter.

I hold different views because it was not only the plaintiff who was dismissed. Even Kayira was dismissed. Of course Nkango was not affected. This may not necessarily point to discrimination but probably the explanation of Nkango was more credible to the investigation officer than that of Kayira and the plaintiff. I would not subscribe to the view that Nkango too should have been dismissed. Inasmuch as Nkango authorised the payment to the fraudster, it is clear that he did so very much on the strength that the plaintiff had taken the necessary steps to verify the genuineness of the transaction. In my view, the plaintiff had indeed taken diligent steps to verify that genuineness of the transaction although it later transpired that it was a fraud by a trickster.

The plaintiff further submitted that the defendant's treatment of the plaintiff was unjust and inequitable because they failed to consider the plaintiff's impeccable and clean record of twenty one (21) years with the bank. No evidence was adduced by the defence on whether this factor was taken into account. The extent to which the plaintiff has suffered was clear from his evidence on how he is struggling to get employed to date despite numerous applications for work. This is above the loss of remuneration and a right to earn a living, the pension he had worked for in the 21 years, the dignity and reputation accorded to the employee and the embarrassment of being labelled a failure. The length of time and the specialised nature that the plaintiff was involved in all his career shows how difficult it is for the plaintiff to go elsewhere but in the banking industry.

It is indeed sad that the plaintiff has suffered to the extent of being jobless and being unfit material for employment. He could not have found himself in this situation if the defendant had exercised some little justice and fairness. The high handedness manner in which the defendant treated the plaintiff has ruined the life of the plaintiff immeasurably. The plaintiff deserves constitutional and statutory protection if his right to fair labour practice is to be of any meaning. My specific finding of fact is that the dismissal of the plaintiff was unfair taking into account all the circumstances surrounding the matter. If at all the plaintiff was negligent, I do not find it to have amounted to gross negligence to warrant such a harsh decision. My view is that the plaintiff took necessary and reasonable steps in the execution of his duties. I do not believe it that the commissionaire alerted the plaintiff that the presenter of the cheque was a fraudster. I opt to believe the version of the plaintiff which in line with the steps he took i.e. seeking clearance from the domicile bank as well as verifying the genuineness of the identification document which was used. The fact that the identification document used on opening the account was a passport, it does not imply that the customer could not use other acceptable identification documents such as a driving licence. Further it does not matter whether or not Mrs Unyolo spoke with the plaintiff to clear the transaction. What is material is the fact that the domicile bank had authorised the transaction that the account existed and funds were available to honour the transaction.

CONCLUSION

On the balance of probabilities the plaintiff has proved that he was unfairly dismissed from his employment. I order that the defendant is liable to pay general damages for such unfair dismissal. The Registrar should assess damages.

The issue of costs is generally in the discretion of the court. Normally costs follow the event. In this case the plaintiff has successfully pursued his claim and is entitled to an award for costs incidental to this action.

PRONOUNCED in open court this 26th day of August 2004 at Blantyre.

Chimasula Phiri
JUDGE