

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.453 OF 1988



BETWEEN:

E.D. MWASI PLAINTIFF

- and -

MALAWI CERTIFICATE EXAMINATION & TESTING BOARD DEFENDANT

CORAM:

TAMBALA, J.

Nakanga, Counsel for the Plaintiff
Mandala, Counsel for the Defendant
Kadyakale/Chigaru, Official Court Interpreters
Maore, Court Reporter

JUDGMENT

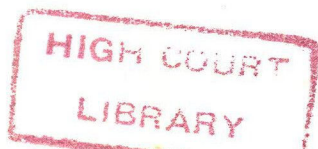
The plaintiff claims from the defendants K2,816.74 being the defendants' contributions made towards a pension fund and for the benefit of the plaintiff, K8,071.35 termed as a shortfall in his gratuity and a sum of K10,878.00 being his pension which was guaranteed for 10 years after his retirement. He further claims damages for breach of contract. Finally, he seeks a declaration that he is entitled to superannuation benefits which would have accrued to him at the age of 60 years. The action is contested by the defendants.

The plaintiff worked as a teacher in secondary schools. He was later promoted and went to work at the Ministry of Education Headquarters as a Senior Education Officer. He retired in 1970. For a short period he joined Malawi University and worked as a lecturer. In 1978 he secured a job with the defendants. The contract of employment was contained in a letter of appointment dated 15th December, 1978. It was signed by the plaintiff on the 18th December. He was employed as an Examination Officer/Research and Testing Officer. The appointment was on permanent and pensionable terms.

At the time of his appointment the defendants were operating a superannuation scheme for the benefit of their employees. The plaintiff was entitled to join the scheme. According to the conditions of the scheme an employee was required to pay 5% of his salary and the employer was contributing 10% of the employee's salary. The plaintiff joined the scheme upon his appointment.

The plaintiff was 52 years old at the time when he was employed by the defendants. When he gave his evidence he told this Court that he was told by the defendants that he would be retired at the age of 60 years. This has been contradicted by all the three defence witnesses. They explained that at the time when he joined the defendants there were in existence superannuation scheme rules which were made in 1979 and that these rules provided that the normal retirement age was 55 years.

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The evidence of Mr. Chirwa DW2 was to the effect that as early as 1980 he told the plaintiff that they were advised by Hogg and Robinson that he was due for retirement at the age of 55 years. The plaintiff asked Mr. Chirwa to allow him to retire at the age of 60 years. Mr. Chirwa told him that he would refer the matter to the management for consideration. Mr. Chirwa wrote a memo to Assistant Director (Admin) in which he reported his discussion with the plaintiff and conveyed the plaintiff's sentiments on the matter. It would seem that the management did not make any decision on the matter.

From the evidence before me I find that when the plaintiff joined the defendants the retirement age for employees was 55 years. I also find that no one told the plaintiff that in his particular case the retirement age would be raised to 60 years. It would, however, seem that he tried unsuccessfully to persuade his employers to raise retirement age to 60 years to suit him.

In the month of January, 1981, the rules of the superannuation scheme were amended and provided that retirement age would be 60 years. This obviously pleased the plaintiff who continued to make contributions to the scheme. Then in 1983 luck eluded the plaintiff, once again. The rules of the scheme were amended; the retirement age was brought back to 55 years. This amendment took effect from June, 1983.

On 17th February, 1984 the defendants wrote to the plaintiff advising that following the change of the retiring age from 60 to 55 years he was due for retirement on 31st December, 1982 and that his terminal benefits would be processed with effect from that date. The letter stated that the defendants decided to offer him an appointment on contract for 24 months with effect from 1st January, 1983. It finally advised that he was not, as a result, required to make contribution towards the superannuation scheme and that any such contribution made between January and December, 1983 reverts to the defendants. The letter enclosed contract forms for the plaintiff's signature. He accepted the offer of employment on contract terms and duly signed the forms on 21st February, 1984.

The terms of the contract were that the plaintiff was appointed as a professional officer. His salary was K6,957.00 per annum. At the end of the contract period he was entitled to gratuity at the rate of 15% of the basic salary. His employment with the defendants ceased at the end of the contract period.

The plaintiff testified that when he was informed that he would be retired with effect from 31st December, 1982 he felt that he would be deprived of some terminal benefits to which he would have been entitled had he been left to retire at the age of 60 years. He said that he made some rough calculations and arrived at the sum of money of which he has been deprived.

He said that his full pension would be K1,378.00 per annum if he retired at the age of 60 years. He would have opted to commute $\frac{1}{3}$ of this amount as a lump sum gratuity. The balance would be K918.60. The pension is guaranteed for 10 years. The amount of pension for 10 years comes to K9,186.50. To this must be added gratuity of K5,741.85. The total comes to K14,928.35.

When he was retired at the age of 55 his annual pension was K282.00. This brings the figure to K2,820.00 after 10 years. He received gratuity of K2,010.41 from Old Mutual who were running the superannuation scheme. He finally received gratuity of K2,130.30 at the conclusion of his two years contract. The shortfall is therefore K14,928.35 - K6,960.71) K7,967.64. The plaintiff then testified that the defendants did not pay him their contributions made after his normal retirement. The contributions totalled K2,816.74. He has, therefore, been deprived of a total of K10,784.38.

The plaintiff pointed out that his terminal benefits were calculated with effect from 31st March, 1981. The contract period covered 1st January, 1983 and 31st December, 1984. There was, therefore, a gap of 21 months which was neither covered by his employment on permanent basis nor his contract employment.

I must say that I found no fault with the plaintiff's calculation of the terminal benefits which he would have received had he retired at the age of 60 years. Although the defendants disputed the calculation they were unable to come up with alternative figures. I found their contention that the calculation of such benefits is only done by experts employed by Old Mutual who are based in South Africa unattractive. Therefore, in the event that I find that the defendants were in breach of their contract with the plaintiff when they altered the retiring age from 60 to 55 years I shall hasten to award him the sum of K7,967.64 being the difference between the pension and gratuity which he would have received and the pension and gratuity which he actually received.

Regarding the defendants' contribution towards the plaintiff's pension made between April, 1981 and December, 1983 the position of the defendants is that they were paid to the plaintiff. They however argue that he was not entitled to have these contributions paid to him; the defendants made an ex-gratia payment of such contributions, they insist. The plaintiff contends that he did not receive them.

Then there is conflict of evidence regarding the actual contributions made by the plaintiff and the defendants during this period. The plaintiff says that his contributions totalled K1,116.32 and those made by his employers amounted to K2,816.74. The defendants produced in Court a schedule which showed that the total contributions of the plaintiff came to K913.24 while their own contributions totalled K2,310.49.

The plaintiff contention is supported by a letter, Exhibit P4. It is dated 28th May, 1984. It was written by Mr. Matewere DW3 and addressed to the defendants. It says:-

"Further to our letter of 15th May, 1984 we are now pleased to enclose herewith cheque No.24036 of 9th May, 1984 for K3,933.06 which is a refund of contributions plus interest made after normal retirement date for Mr. Mwasi.

Please note that the member's contributions are K1,116.32 and the difference is the employers' contributions."

This letter appears to be supported by another letter from Mr. Matewere, DW3, dated 27th June, 1984 and addressed to the defendants. It was produced by the defendants. It confirms that the plaintiff's and the defendants' contributions were refunded to the defendants by a cheque for K3,933.06. This letter, however, mentions that the cheque was sent under cover of a letter dated 31st May, 1984. I am of the view that this discrepancy in the date of the letter which forwarded the cheque to the defendants is just an error; it is not in my view an error of any significance. From the evidence before me I am satisfied that both the plaintiff's and the defendants' contributions covering the period between 1st April, 1981 and 31st December, 1983 were refunded to the defendants. I further find that the total of such contributions came to K3,933.06. There is evidence that the plaintiff received a refund of K1,336.97. This appears to be the plaintiff's contributions plus part of the defendants' contributions. The balance of the defendants' contributions would be K3,933.06 - K1,336.97) K2,596.09. I am satisfied that the defendants did not pay the plaintiff this sum of K2,596.09.

After carefully considering the plaintiff's action I am of the opinion that even if I find that the defendants were in breach of their contract with the plaintiff when they reduced the retiring age from 60 to 55 years the plaintiff would not be entitled to this sum of K2,596.09. The shortfall of both pension and gratuity amounting to K7,967.64 would fully compensate him.

I shall now seek the assistance of case authority to decide whether the defendants were entitled to alter the retiring age from 60 to 55 years and whether such alteration was binding on the plaintiff. The case of Yeo v. Steward and Others (1947) 2 K.B. 28 is pertinent. The plaintiff in that case was a member and agent of the Scottish Legal Life Assurance Society. The defendants were the trustees and Board of Management of the Society.

In 1936, the plaintiff applied on a printed form, for appointment as an agent in the Brixton area. It was made so that he could acquire from a man who was then an agent in the area an "insurance book"; a nominated agent of the defendants could on the existing rules, sell his insurance book to a purchaser approved by the defendants upon the termination of the agency.

The plaintiff was approved and he entered into a written agreement with the defendants on 22nd February, 1936. At the time of the contract the rules that were in force were the 1933 rules. Rule 30 gave a nominated agent like the plaintiff a right to sell his book within a stated period provided that he fulfilled certain prescribed conditions. It also included a right to transfer the business obtained by the agent, not directly by his own activities but through the Board of Management.

The defendants proposed to amend rule 30. The amendment was authorised by rules 39 and 40 of the Society. The amendment would remove the agent's right to transfer business which was given to him by the Board of Management. There was a second amendment which gave the defendants power to purchase insurance books from nominated agents, whereas previously they had no such power. The broad object of the alterations was that the defendants wanted to terminate the practice of nominated agents in preference for salaried agents.

The plaintiff sued the defendants on his own behalf and on behalf of other members of that assurance society and sought, "inter alia", a declaration that he was employed as an agent of the society on the conditions contained in the rules of the society which existed in 1936, when he entered into an agreement with the defendants, and that the proposed alteration of the rules should not be binding upon him.

The central issue which required the Court's decision appears to be this: "Was the contract of the plaintiff with the defendants, which was to some extent subject to the rules of the society, on the basis of the rules in force at the time of the making of the contract so that, so far as the plaintiff was concerned, the rules were fixed and unalterable, or was the plaintiff's contract on the basis of the rules as they existed from time to time, if properly amended?"

Clause 3 of the contract between the plaintiff and the defendants stated:-

"That I will comply with all the duties and conditions applicable to agents as stated in the rules of the society, and strictly adhere to all the instructions contained in the collecting book."

The plaintiff argued that clause 3 only brought in the rules which were applicable to the duties and conditions of an agent, and that it did not include all the rules and, in particular did not include rules 39 and 40 which provided for amendment in certain events. He further argued that the rules which were applicable to the contract in regard to duties and conditions were those which existed in 1936 at the time of making the bargain.

It was held that the clause incorporated, as part of the terms of the contract, all the rules of the society, in so far as they were applicable to agents and to the duties and conditions of agents and also include rules 39 and 40 dealing with the amendment and alteration of the rules of the society.

At page 33 of the report SELLERS, J., said:-

"I think that view is supported by Page v. Liverpool Victoria Friendly Society (1927) 43 T.L.R. 713 which was also the case of a friendly society and the head-note of which is in these terms:

The plaintiff was appointed an agent of the defendants a friendly society, whose rules, though subject to alteration, provided at that time for the retention of

agents in office so long as their conduct was satisfactory. After the plaintiff reached the age of 65 the defendants altered their rules by providing that agents should be compulsorily retired at the age of 65, and in accordance with the amended rules the defendants terminated the plaintiff's employment. In an action for a declaration that the defendants were not entitled to do so, Held, that as the rules, on the face of them were alterable the plaintiff was not entitled to the declaration claimed and the action failed."

In his judgment ROWLATT, J., said (43 T.L.R. 712) that:-

"The plaintiff took office under a rule of the society, but the rules on the face of them, were subject to alteration. The rule under which the plaintiff claimed what was equivalent to a freehold tenure was alterable, and it was duly altered and the plaintiff was retired in accordance with the rule as altered."

The Court's decision in Yeo v. Steward and Others was that the plaintiff's contract with the defendants was subject to the rules of the defendants as amended from time to time and that the subsequent amended rules were applicable to the plaintiff so long as they were properly amended. The plaintiff's action failed.

I am satisfied that the decision in the case of Yeo v. Steward and Others "supra" governs the present case. It must be noted that the plaintiff was appointed when the retiring age was 55 years. When it was later raised to 60 years, he did not complain. He now complains because it has been brought back to 55 years; but the process which raised the retiring age from 55 to 60 years is the same process which has brought it back. The plaintiff is not being rational here. I am satisfied that the plaintiff was bound by the rules of the superannuation scheme as amended from time to time. The defendants were not in breach of their contract with the plaintiff when they amended the rules in 1983 and reduced the retiring age to 55 years.

Then there is the case of S.W. Strange, Ltd. v. Mann (1965) All E.R. 1069. The plaintiff employed the defendant as manager of its company. The contract of service was entered into on November 5th, 1956. Under that contract the defendant was engaged for 10 years, but the appointment could be terminated upon the happening of certain specified events. Under clause 6 of the contract the defendant was given the overall control of the business of the company and he had power to recruit or dismiss staff and to determine the terms and conditions including remuneration of the staff working under him. By clause 9 the appointment could be determined by the plaintiff upon giving the defendant one month salary plus two years salary. Then clause 13 contained the usual restrictive covenant against setting up similar business or to join rival trader within 12 miles from the plaintiff's place of business within 3 years after termination of his employment with the plaintiff.

At a Board Meeting held on 25th March, 1964 the defendant's appointment as manager was terminated. A son of the Chairman of the company was instead appointed manager. The defendant was given the position of assistant manager for the credit department. Under the new appointment the defendant's employment could be terminated upon being given reasonable notice. On April, 27th, 1964 the plaintiff dismissed the defendant. He was offered 1 month salary in lieu of notice. He declined the offer. The plaintiff eventually brought an action to enforce the restrictive covenant.

At page 1075 of the report STAMP, J. said:-

"The parties might no doubt either expressly or by necessary implication have varied the service agreement by agreeing that on March, 31 Mr. Mann should cease to be manager and that the parties should thenceforth be released from their respective obligations under clause 1 to clause 12 inclusive of the service agreement but not from their obligations under clause 13 and clause 14 and Counsel for the plaintiff asks me to hold that that was the effect of what was said and done. I do not think that this is correct. It was only by the effect of the new oral agreement which was inconsistent with the continued existence of the service agreement that the terms of the latter ceased to apply. By entering into the new agreement the parties did not, in my opinion, vary the terms of the service agreement but replaced it; and in my judgment the respective rights and obligations were thenceforth governed by a new contract which superseded the old. The contention that the two contracts could continue to exist separately and not as a single varied contract seems to be contrary to principle, and I am fortified in that conclusion by a consideration of the reasoning in Coldburn v. Patmore (1) where, parties having entered into a second agreement which was inconsistent with an earlier agreement, it was held that the whole of the earlier agreement, and not merely the inconsistent terms, was abrogated."

In the present case the contract of employment which was made in 1978 offered the plaintiff a permanent and pensionable position. The agreement signed by the parties on 21st February, 1984 provided that he was engaged on contract and was no longer pensionable. In the earlier agreement he was bound by the rules of the defendants' superannuation scheme rules. In the 1984 agreement those rules were inapplicable. He was previously engaged as an Examination Officer/Research and Testing Officer; he was subsequently engaged simply as a Professional Officer. I am satisfied that the terms and conditions of the 1984 agreement were totally different and inconsistent with the terms and conditions of the contract which was made on 15th December, 1978. On the authority of S.W. Strange, Ltd. v. Mann "supra" I am satisfied that the contract which was signed by the parties on 21st February, 1984 abrogated and replaced the earlier contract made in 1978. It is not, therefore, possible, at this stage, for the plaintiff to claim terminal


benefits which were provided for in the 1978 agreement. That agreement was abrogated and all the rights, privileges and benefits which flowed from it are unavailable to the plaintiff.

The conclusion I reach on the examination of the two cases is that the plaintiff cannot succeed because when the defendants altered the rules of the superannuation scheme and thereby reduced the retiring age they were not in breach of their contract with the plaintiff. Alternately, he cannot succeed because the contract of employment which was made in 1978 was abrogated and replaced by the contract which he signed on 21st February, 1984.

I am indebted to Counsel for the defendants who cited both cases in his submissions.

I am constrained to dismiss the plaintiff's action. I grant costs for this action to the defendants.

PRONOUNCED in open Court on this 18th day of November, 1991, at Blantyre.


D.G. TAMBALA
JUDGE