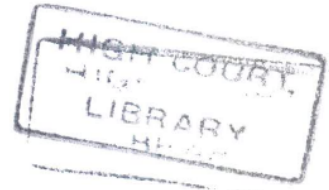


**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3182 OF 2001**



BETWEEN:

KEITH BANDA.....PLAINTIFF

- and -

FINCA MALAWI.....DEFENDANT

CORAM: CHIMASULA PHIRI J.

Gulumba of Counsel for the plaintiff.
Ngwira of Counsel for the defendant
Nsomba - Official Interpreter.

JUDGMENT

Chimasula Phiri J,

The plaintiff's claim is for damages for unfair dismissal and K516,730.78 representing total sum of alleged unpaid terminal benefits and interest on the sums due. The plaintiff also claims collection charges calculated at 15% of liquidated claim.

FACTS

By a letter dated 5th September 2000, the plaintiff applied for a job as a Human Resources Manager. In the letter aforesaid the plaintiff stated that since Brown and Clapperton Ltd went into liquidation he was a part time Lecturer at the Polytechnic.

By a letter dated 10th October 2000 the defendant informed the plaintiff that they had offered the plaintiff a job as a Human Resources Manager. The conditions of the employment were contained in a letter of offer and the plaintiff duly signed the said letter.

The plaintiff completed his probationary period and was duly confirmed as the Human Resources Manager. In March 2001, the plaintiff had his salary raised.

In May 2001, the defendant started a restructuring of the organisation and the plaintiff was consulted. By his memo dated the 21st May 2001 the plaintiff acknowledged being consulted. The defendant had a discussion with the plaintiff where several possibilities were considered which included possibilities of the plaintiff's suitability in any other post within the organization.

Further, during a meeting on 30th May 2001 the plaintiff was offered a position of Zone Manager of Karonga Branch at higher and an incentive package. He was given up to 4th June 2001 to accept the post so as to finalise the transfer.

By his letter dated the 4th June 2001 the plaintiff chose being employed in a capacity as a Zone Manager. On 20th June 2001 the defendants received a letter from the Ombudsman asking them why they had demoted the plaintiff. On the 19th June 2001, the plaintiff further declined the plaintiff's offer of redeployment to Karonga Branch.

The defendant by their letter dated the 28th June 2001 terminated the plaintiff's employment on grounds of redundancy and his terminal benefits were duly given to him. The plaintiff had been in employment for a period of 8 months.

PLEADINGS

The plaintiff in his statement of claim alleges that the termination of his employment was unfair, unjustified and unlawful because of the following reasons amongst others:-

- (a) The post of Human Resources Manager was the only one declared redundant amongst 150 posts in FINCA Malawi;

- (b) In or about July 2001, the defendant advertised a vacancy for the of Office Manager whose duties and functions encompassed those to carried out by the plaintiff;
- (c) FINCA Malawi continues to employ more staff in its operations hence the necessity of a human resources expert.

The plaintiff also avers that he was not paid his terminal benefits in full and therefore claims for the following remedies:-

- (a) Damages for unfair dismissal;
- (b) The sum of K516,730.78 being the total sum of unpaid terminal benefits;
- (c) Interest at the bank lending rate on the amount of claim from the date it was last due for payment;
- (d) K77,509.62 being legal practitioners collection charges;
- (e) Costs of the action.

In its defence, the defendant denies that the said termination of the plaintiff's employment was unfair, unjustified or unlawful and contends that the plaintiff was notified of the defendant's decision to terminate his employment.

ISSUES FOR DETERMINATION

- a. Was that dismissal in the present case under the present rules unfair dismissal?
- b. Was the plaintiff given all the payments that were due to him upon termination of his contract of employment by the employer? Is the plaintiff entitled to damages?

EVIDENCE

The plaintiff was the only witness to testify. He adopted his witness statement as follows –

By a letter of offer of employment dated 10th October 2000, he was employed by FINCA Malawi in the capacity of Human Resources Manager. The Managing Director of FINCA Malawi at the material time was Mr Larry Hastings who was the Chairman of the interviewing panel at the time that the plaintiff went for his interviews.

During the interviews, he made it clear to Mr Hastings that the salary he was being offered was not very much different from the salary he was getting in his previous job. The main attraction for him was the offer of use of a company vehicle for business and reasonable personal use. Although this was not specified in the letter of offer of employment, it was specifically agreed upon during the interview and it was implemented not too long after he began working for FINCA Malawi.

After working for FINCA Malawi for a period of about three months, he was confirmed in his appointment by a letter dated 29th December 2000 signed by Mr Larry Hastings.

In or about February 2001, Mr Hastings got a job in Mozambique and was replaced by Mr Ishtiaq Mohiuddin who joined FINCA Malawi in the capacity of Acting Managing Director.

Upon taking up his post, one of the first things Mr Mohiuddin did was to attempt to downgrade the plaintiff's position by means of reducing his remuneration package. He thus attempted to rescind the plaintiff's entitlement to the use of a company vehicle. The plaintiff was obliged to seek the advice from Lawson & Company who advised that such an action would amount to breach of the contract of employment. The Acting Managing Director was thus forced to temporarily suspend his decision.

By a letter dated 19th March 2002, FINCA Malawi effected a salary review of its employees and his monthly salary was fixed at K49,500.00. The plaintiff's benefits at this time included:-

- (a) personal use of company vehicle;
- (b) lunch allowance of K2,000.00 per month;
- (c) personal use of mobile phone up to a limit of K2,250.00 per month;
- (d) leave allowance of K3,000.00.

In the month of March 2001, employees of FINCA Malawi presented grievances to do with salary and general working conditions through the plaintiff as the Human Resources Manager. The employees further threatened to withhold their labour if management failed to respond positively to their demands. Due to his position, the plaintiff was obliged to take the list of grievances to the Acting Managing Director.

The immediate reaction of the Acting Managing Director upon being presented with the said grievances was that the plaintiff should issue letters of termination of employment to all the employees who had appended their signatures to the list grievances. The plaintiff then advised the Acting Managing Director that collective bargaining was one the rights of employees under current labour legislation. He further advised that the most viable solution was through negotiation between management of FINCA Malawi and the representatives of the employees.

The advice was not well received by the Acting Managing Director. The Acting Managing Director told the plaintiff that he was disappointed that the plaintiff seemed more inclined to protect the rights of the workers than to enforce the interests of management. From that moment onwards, the plaintiff was completely sidelined in all management decisions.

In or about April 2001, the Acting Managing Director managed to reduce the plaintiff's remuneration package by ordering that the plaintiff henceforth, share use of the company vehicle assigned to him with Internal Auditor. The relevant instruction was however given through the Chief Finance Officer. This was done in spite of the clear legal advice previously given to FINCA Malawi by its legal practitioners, Messrs Lawson & Company.

On Monday, the 21st May 2001, the Acting Managing Director summoned the plaintiff and informed him that the post has been declared redundant. At this meeting, the Acting Managing Director intimated that he would assign the plaintiff another job of equal status and benefits. The plaintiff was then asked to specify what job would be relevant to his qualifications and experience.

However, the Acting Managing Director called the plaintiff in his office for another meeting on 30th May 2001 and confirmed the declaration of redundancy of the post. And instead of offering the plaintiff an alternative post of equal status and benefits as intimated earlier by him, the Acting Managing Director asked the plaintiff to either leave FINCA Malawi immediately or take a junior post of Zone Manager in Karonga.

It is quite surprising to the plaintiff that out of 150 positions in FINCA Malawi at the material time, only the position of Human Resources Manager was declared redundant. This is even more surprising considering that the position was only five months old.

Further, FINCA Malawi advertised for the job of a Human Resources Practitioner with 10 years experience about twice in the months of May and August 2000 which convinced the plaintiff that the company was committed to establishing the post of Human Resources Manager.

In addition, management approved in April 2001 to expand the Human Resources Department by appointing a Training Supervisor and a Personnel Assistant. And in general, FINCA Malawi had been employing more in response to an expansion in the company's

programmes in all the three regions of the country. The growth in staff numbers thus only confirmed the company's need for a full-time Human Resources Manager.

Although the Acting Managing Director insisted that the declaration of redundancy of the plaintiff's post was a result of corporate restructuring, the Human Resources Director and the International Audit Manager were both not aware of this development. They were the people who should have initiated the whole exercise.

When the plaintiff eventually left FINCA Malawi's employment, terminal benefits were paid to him. However, the said amounts only took into account salary, leave pay and housing allowance. Other benefits such as phone allowance, lunch allowance, pension contributions, medical aid contributions, leave grant and transportation were not paid to the plaintiff.

Apart from the failure to pay him all of his terminal benefits, he was convinced that the termination of his employment was totally unfair as the reasons given were manifestly untrue and therefore, invalid.

He also tendered a number of exhibits including additional conditions of service, various correspondences between the plaintiff and the defendant and newspaper cuttings. He stressed that he had already accepted on 4th June 2001 to work as a Zone Manager with the hope that the economic climate would improve. The plaintiff concluded that the redundancy was not a genuine one but a way of getting rid of him. He was cross-examined and re-examined.

THE LAW

Section 58 of the Employment Act provides as follows:-

A dismissal is unfair if it is not in conformity with section 57 or is a constructive dismissal pursuant to section 60.

Sections 57 and 60 provide as follows –

- 57 (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.*
- (60) *An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship.*

In the present case section 60 does not apply because the defendant expressly dismissed the plaintiff.

Section 61 makes provision for proof of reason for dismissal in the following terms:-

- (1) *In any claim or complaint arising out of dismissal of an employee, it shall be for the employer to provide the reason for dismissal and if the employer fails to do so, 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 sections 57 (1), the employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.*

Lastly, severance allowance has been provided for in section 35 (1) as follows: -

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.

FINDINGS

The evidence does not show that the plaintiff committed any act of misconduct. Further, there is no evidence to show that if at all the plaintiff committed any such act of misconduct there was fair opportunity to defend himself. According to the evidence, the employment of the plaintiff was not terminated for valid reason connected with his capacity or conduct. The next question is whether it was based on the operational requirements of the undertaking. The evidence of the plaintiff clearly shows that there were discussions between the plaintiff and the defendant touching on restructuring of the defendant company. The plaintiff, in my view, fully cooperated with the defendant despite his having some misgivings. He accepted a post of Zone Manager for Karonga Branch – notwithstanding that he would be moving away from the city of Blantyre to go to the rural town of Karonga and in a position which appeared to be junior. The u-turn in the arrangement was the sudden dismissal of the plaintiff by the defendant on the 28th June 2001 by letter which reads as follows:

June 28, 2001

*Mr Keith Banda
Finca Malawi
Private Bag 382
BLANTYRE.*

Dear Mr Banda,

Re: Termination of Services

Further to your letter of 19th June 2001 and the letter from the Ombudsman dated 20th June 2001, it is clear that you have turned down our offer for the post of Zone Manager.

We therefore write to advise you that your services have been terminated on grounds of redundancy as already explained to you. Your terminal benefits will be paid to you immediately after you are through with the handover to the Internal Auditor by 29th June

2001. Arrangement will be made to process your pension benefits immediately and you will be paid accordingly.

We take this opportunity to thank you for the period that you have been with us; and wish you all the best in your future endeavours.

Yours sincerely,

*Ishtiaq Mohiuddin
Managing Director, Finca-Malawi*

From this letter it is quite clear that there are other letters which the defendant ought to have produced to the court namely, the letter of 19th June 2001 from the plaintiff and the letter from the Ombudsman dated 20th June 2001. The defendant did not even list down these letters in its list of documents. The burden to prove that the plaintiff had turned down the offer of post Zone Manager was on the defendant and was not discharged. To the contrary it is the plaintiff who proved that he had accepted the alternative employment on 4th June 2001, albeit, with reluctance. This letter reads as follows: -

PRIVATE AND CONFIDENTIAL

4th June 2001

*Mr Ishtiaq Mohiuddin
Managing Director
FINCA-MALAWI
Private Bag 382
Blantyre.*

Dear Mr Mohiuddin,

CORPORATE RESTRUCTURING

I refer to all correspondences as regards the above matter.

Firstly, where the choice is between unemployment and underemployment, I feel compelled to choose the latter-hoping things will work out well in future.

To this effect it is only reasonable that I spend sometime with the Acting Operations Manager and also participate in the various induction programs as per attached schedule.

Secondly, the Employment Act clearly states that in "in lieu of providing notice, the employer shall pay the employee a sum equal to the remuneration that would have been received and confer on the employee all other benefits due the employee up to the expiration of the required period of notice;

I therefore attach a summary of my remuneration package for three months in lieu of notice in respect of the post of Human Resources Manager plus severance allowance for payment.

Yours sincerely,

KEITH BANDA

The plaintiff also produced evidence to show that after his dismissal the defendant went ahead to advertise for position of Office Manager who would be responsible for running the administration functions of the company. The duties/jobs assigned to that office were not very different from what the plaintiff was doing before his employment was terminated. I have not doubt in my mind that the defendant terminated the employment of the plaintiff with a view to get rid of him and not because of any proposed restructuring of the organisation. I find this to be unfair dismissal.

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).

The plaintiff was paid terminal as shown in exhibit P14 as follows:-

MR KEITH BANDA TERMINAL PAY

3 MONTHS NOTICE PAY	99,000.00
LEAVE DAYS	
2000/01 18 DAYS	19,528.76
HOUSING ALLOWANCE	49,500.00
Total Amount	168,028.76
Less tax Free element	50,000.00
Taxable Amount	118,028.76
Taxation	41,310.07
Housing Advance	75,000.00

	51,718.69
	=====

It is clear that the plaintiff was deprived of certain entitlement claimed in paragraph 16 of his statement of claim totalling K516,730.78. There is no evidence from the defendant to challenge these entitlements.

CONCLUSION

From the foregoing it is the view of this court that the plaintiff was unfairly dismissed. However, the damages he would be entitled to be awarded would be limited to the total sum of unpaid terminal benefits which is K516,730.78 and I so order. The payment of interest is discretionary upon pleading as the plaintiff has done in the Amended Statement of Claim. I refuse to exercise my discretion. I feel that the plaintiff should have pursued his claim through the District Labour Office and/or the Industrial Relations Court, if dissatisfied with resolution of the District Labour Officer. Employees should not rush to court just for the sake of it when other institutions have been put in place under the law to deal with such claims. The

plaintiff's legal practitioners are awarded the collection charges of K77,509.62 and no more by way of legal costs.

PRONOUNCED in open court this 18th day of August, 2004 at Blantyre.

A handwritten signature in black ink, appearing to read 'Chimasula Phiri', with a stylized flourish at the end.

Chimasula Phiri
JUDGE

