JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NUMBER 91 OF 2007

BETWEEN:

HARRIET CHIOMBA ……..……APPELLANT

- AND –

BANJA LA MTSOGOLO ……..RESPONDENT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Mr Kwakwala, of the Counsel for the appellant
Mr Kanyenda, of the Counsel for the respondent
Mrs V Nkhoma – Official Interpreter

J U D G M E N T

Twea, J

This is an appeal from the Industrial Relations Court. The appellant filed two grounds. The first was that the trial court erred in finding that the appellant was not unlawfully or wrongfully terminated when no reasons were given for termination. Secondly, that the decision was against the weight of the evidence.

The respondent argued the reverse in support of the decision of the trial court.

The facts of this case were really not in dispute. It was the evidence that the appellant was an employee of the respondent: a health service providing Non – Governmental Organization. She was a Clinic Manager.

It was in the evidence that on or about the 15th November, 2001 the appellant was summoned before her senior managers. She was not told what for. However at the meeting she was alleged to have acted contrary to the terms of service of the Respondent Organization. She denied any knowledge of the allegations made against her. The following day she was suspended from duty on full pay. After 15 days the suspension was rescinded and a serious warning issued conditioned that any repetition would lead to termination of services.

The appellant returned to work but was bitter against management's decision to warn her and demanded a proper hearing before a properly constituted and neutral tribunal. There is no evidence of any response from the Respondent thereafter. She continued working until February, 2002 when she applied for and was granted leave. While on leave she was issued a letter of termination dated 22nd February 2003. The termination was with immediate effect. The letter stipulated that the termination was in terms of the organizations Terms and Conditions of Service, but did not particularise what the appellant had in fringed.

The appellant was paid 3 months pay in lieu of notice, leave days accruals, refund for Staff Loan Fund contribution and was informed that she would be entitled to receive her pension fund contribution. Although the quantum of her pension contribution was determined, it was not clear whether or not she had been paid.

The appellant then brought an action for "wrongful and unlawful termination." She sought damages for wrongful and unlawful termination and any other relief the court deems fit.

When the case was called the Chairperson took issue with the heads of action which were based on common law she indicated to counsel for the appellant whether he wished to amend the heads. He declined to do so. At the end of the hearing the trial court dismissed the action entirely on the basis that at common law payment of notice pay made the termination lawful since there was no obligation to give reasons on the part of the employer. The court also found that the notice pay covered all recoverable damage. Further, it declined to give any other statutory remedy under the Employment Act 2000, because they had not been specifically pleaded.

The appellant now appeals the decision for reasons aforesaid. It is my view that the appeal is on a matter of law and has, therefore, been competently brought.

I must mention at the outset that this appeal must succeed.

The Employment Act, 2000, is clear. It applies to the private sector and the government, including any public authority or enterprise: Section 2(1). The new labour statutes created a new labour regime which is not based on common law but human rights and equity. The said subsection creates one regime for all labour issues. This is clear from the decisions of the Supreme Court of Appeal: ***Ndema Vs Leyland Daff MSCA 2 of 2006*** and the High Court ***DHL Vs Aubrey Nkhata Civil Appeal 50 of 2004.*** Clearly the common law approach is not be congruent with the new regime. It is the duty of the courts however, to harmonise them and avoid discriminating litigants on the basis of how an action is instituted.

In the present case, it is clear, as it was to the trial court, that counsel for the appellant had brought the wrongs heads. It was open to the court under its inherent power to amend the pleadings to give effect to the dispute. It is clear from the evidence on record that the claim was for unfair dismissal notwithstanding the way it was styled in the pleadings. The litigant was before the competent court in terms of the Employment disputes. It was the duty of the court to give effective remedy. Where the heads of claim are wrongly of improperly titled, the court should accordingly amend them, more especially where the court is aware of the error. This is the only way that it can ensure that the litigants right to access to justice and effective legal remedies is protected: Section 41 of the Constitution.

In the present case therefore, it was open to the court, of its own motion, to amend the pleading in conformity with the Labour Relations and Employment Acts. The court should not knowingly suffer a litigant to lose his or her right to a legal remedy just because of the default of his or her

counsel. It must be borne in mind that the two Acts enjoin the court to ensure equity and enhancement of industrial peace and social justice.

In the present case, the appellant was called for a hearing, notwithstanding that it may have been procedurally defective. Decisions were made to suspend her and then reinstate her with a warning. Procedurally the "wrong" she may have committed had been pardoned. There was no evidence that she committed any other "wrong" after the warning. It is therefore, not open to the Respondent to use the past "wrong" as is contended. In the case of ***Herrie Nyirenda Vs Northern Region Water Board*** this court made it clear that after a warning an employee can only be disciplined if he has committed a fresh act of misconduct.

In the present case therefore, the letter of termination not having disclosed any act of misconduct, and there being no evidence of any fresh act of misconduct, the Respondent infringed Section 57(1) and (2) of the Employment Act. I therefore find in terms of Section 60 of the Employment Act, that her dismissal was unfair.

I now turn to the remedies that she was denied by the lower court; specifically severance allowance.

Having found that there was unfair dismissal Sections 35(1) and (5) are clear. The appellant is entitled to payment of severance allowance which is payable notwithstanding payment of notice pay. This was the position in ***DHL LTD Vs. Aubrey Nkhata (supra)***. I therefore find that she is entitled to two weeks wages for each completed year.

I therefore find that the appeal succeeds on the head of unfair dismissal and payment of severance allowance. The case is remitted to the Registrar for assessment.

Pronounced in Open Court this 24th day of January, 2008 at Blantyre.

E. B. Twea
JUDGE