



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 254 OF 2016

BETWEEN:

DR GIFT STEN CHINOMBA

PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

Coram: JUSTICE M.A. TEMBO,

Hara, Counsel for the Plaintiff
Itimu, Counsel for the Defendant
Chanonga, Official Court Interpreter

JUDGMENT

This is this Court's decision on the plaintiff's originating summons by which the plaintiff seeks determination of the following questions. Whether the defendant can lawfully interdict the plaintiff without pay in view of section 56 of the Employment Act. Whether the defendant can lawfully interdict the plaintiff without pay before according him the right to be heard. Whether the defendant is guilty of unfair labour practices. Whether the defendant have violated section 43 of the Constitution. Whether the order to indefinitely stop the plaintiff from receiving his salary from Government pursuant to the Malawi Public Service Commission Regulations number 40 (1) and (3) is lawful in itself and in view of the Employment Act and the Constitution.

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28-June

Both parties filed written arguments on their respective positions on the matters at hand.

The subject matter of the dispute herein is the interdiction of the plaintiff by the defendant on no pay as part of the disciplinary process. The plaintiff is employed by the Government in the Ministry of Health as a Senior Medical Officer and District Health Officer at Chiradzulu District. He holds a Bachelor of Medicine and Bachelor of Surgery Degree (MBBS) from the University of Malawi's College of Medicine.

Early in the month of March, 2016 at Chiradzulu District Hospital, the plaintiff duly signed requisitions in the ordinary course of business for procuring emergency drugs from the Central Medical Stores. The officials in the pharmacy department collected the said drugs through Mr. Bakali and the driver Mr. Msuku for delivery at Chiradzulu District Hospital. However, the said officials did not deliver all the drugs and did not record the same in the relevant stock cards as proof of delivery.

It was discovered, with the help of United Kingdom Department for International Development Officials, that some of the consignments were not delivered and the Pharmacy technician was absenting himself from work. The plaintiff and his colleagues, as hospital management, referred the matter to the Police and subsequently the hospital pharmacy technician and driver were arrested.

Three weeks later, when the matter was ready for trial, the plaintiff was invited to Chiradzulu police and was also arrested on instructions from the Southern Region Police Headquarters to be charged with the offence of theft by public servant since he was head of the institution.

On 27th May, 2016, the plaintiff was interdicted indefinitely without pay as the allegations could attract a disciplinary action and up until the court resolves the matter and Health Services Commission decides. The letter of interdiction was signed by Dr. Mc Phail Magwira.

The plaintiff claims that the defendant interdicted him without pay before according him the right to be heard.

The plaintiff asserts that he is facing undue economic social hardships due to want of salary/remuneration and employment benefits. Further, that the Chiradzulu hospital has terminated his tenancy and he risks eviction.

He further stated that having been stopped from receiving his salary and benefits has the implication that his rentals and accounts cannot be paid, the necessities of daily life cannot be purchased and financial commitments cannot be honoured. And that educational expenses for his primary and secondary family cannot be paid.

The plaintiff submitted that it is a term of his contract of employment under Regulation 40 (1) of the Malawi Public Service Commission Regulations which provides that where an employee in the Government is interdicted on grounds of misappropriation of public funds his pay shall be withheld.

The plaintiff was interdicted on suspected misappropriation of public resources being emergency drugs that he requisitioned.

In view of the foregoing, the plaintiff seeks the following declarations or orders. A declaration or an order that the interdiction without pay is illegal and unlawful. A declaration or an order that the defendant could not interdict the plaintiff without first according him the right to be heard. A declaration or an order that the defendant's conduct amounts to unfair labour practices. An order that the defendant has violated section 43 of the Constitution. An order that it is illegal and unlawful to indefinitely stop the plaintiff from receiving his salary from Government pursuant to the Public Service Commission Regulations number 40 (1) and (3) and in view of the Employment Act and the Constitution. An order that the defendant should pay the salaries/remuneration withheld from the plaintiff since the interdiction order including increments as received by members of his level. An order that the defendant do pay the plaintiff damages or compensation for unfair labour practices. An order that the defendant bear the costs occasioned by these proceedings.

The defendant is opposed to the orders and declarations sought and contend that his action herein of interdicting the plaintiff on no pay is on solid legal and constitutional footing.

This Court will determine the questions raised by the originating summons in turn. The first question is whether the defendant can lawfully interdict the plaintiff without pay in view of section 56 of the Employment Act. Section 56 of the Employment Act provides as follows

(1) An employer shall be entitled to take disciplinary action, other than dismissal, when it is reasonable to do so considering all the circumstances.

(2) For the purposes of this Part a "disciplinary action" includes—

- (a) a written warning;
- (b) suspension; and
- (c) demotion.

(3) Subject to subsection (4), no employer shall impose a fine or other monetary penalty on an employee:

Provided that the employer may not pay wages to the employee for the period he has been absent from work without permission of the employer and without reasonable excuse.

(4) An employer may deduct an amount of money from an employee's wages as restitution for property damaged by the employee.

(5) In deciding whether the employer has acted reasonably, regard shall be had to the nature of the violation, the employee's duties, the penalty imposed by the employer, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.

(6) A complaint that disciplinary action is unreasonable may be made to a labour officer for conciliation under section 64 (1).

(7) Where the labour officer fails to settle the matter within one month, the District Labour Officer may institute a prosecution under section 64 (2).

(8) The right of an employee to make a complaint under this section shall be without prejudice to any right the employee may enjoy under a collective agreement.

On this question, the plaintiff submitted that under the Employment Act, an employer is expressly prohibited from imposing any monetary penalty on an employee. Further, that the only circumstances where the employer may withhold

payment to an employee is where the employee absents himself without the employer's permission and without valid reasons and where he damages the employer's property and the employer deducts from the employee's remuneration to recover the damage. The plaintiff referred to section 56 (3) of the Employment Act which provides that

Subject to subsection (4), no employer shall impose a fine or other monetary penalty on an employee:

Provided that the employer may not pay wages to the employee for the period he has been absent from work without permission of the employer and without reasonable excuse.

The plaintiff further referred to section 56 (4) which provides that an employer may deduct an amount of money from an employee's wages as restitution for property damaged by the employee.

The plaintiff submitted further that, the dictates of the law, under section 56(2) (b) of the Employment Act, suspension or interdiction is one of the disciplinary actions the employer may impose on the employee.

The plaintiff also submitted that where the conditions of service provide a particular procedure before a disciplinary penalty can be imposed, imposing a disciplinary penalty other than by the procedure stipulated in the contract is actionable. See *Mtingwi v Malawi Revenue Authority* civil cause number 3389 of 2004 (High Court)(unreported).

The plaintiff then referred to the case of *Khumbalume v Blantyre City Council* Civil cause number 88 of 2010 (High Court) (unreported) in which Justice Mwase stated that

Of course, the defendant may argue that Clause 7.5.1 (iii) of the Terms and Conditions of Service for Blantyre City Assembly Staff (which has been exhibited as SN6) provides that the Chief Executive may suspend the employee for a specified period on half pay or no pay as such they could invoke the same. This argument cannot be sustained because as much as I agree that the law of contract is concerned only with legal obligations as agreed by the parties

themselves and not with any other expectations however reasonable they might be, it is equally trite law that any term in a contract that contravenes express dictates of any written law is void and unenforceable. On this point, the Malawi Supreme Court in *Blantyre Netting Co. v Chidzulo & Others*, [1996] MLR 1 had this to say:

“We have considered the fact that the said rule 6 was a term of contract. But, as was observed by the learned Judge in the lower Court, and as we have endeavoured to show in this judgment, the rule infringes the provisions of Section 31(I) of the Constitution. The learned Judge in the Court below was, therefore, right in declaring the said rule 6 invalid, since the Constitution is the supreme law of the land.”

The plaintiff further submitted that, on the same point Kapanda, J., as he then was, in *Gestetner Limited v Malawi Revenue Authority* Civil cause number 115 of 2008 (High Court) (unreported) stated that

As stated earlier, which I repeat here, there are two instances when a contract is said to be illegal. First, it is when a contract is expressly or impliedly prohibited by a statute; and secondly, it is when the contract itself is for the doing of something which is illegal, immoral or against public policy or where it is founded on an illegal consideration.

The plaintiff contended that, in the present case, it therefore does not matter whether interdiction without pay is provided for anywhere in the terms and conditions of service of his employment. He submitted that the term itself is expressly prohibited by a statute and therefore it is void and unenforceable. The plaintiff submitted that in *Khumbalume v Blantyre City Council* Justice Mwase accordingly found that the defendant could not lawfully impose a half pay suspension on the Plaintiff.

The plaintiff then submitted that the Malawi Public Service Regulations are the terms and conditions for those employed in Public Service. Further, that the Malawi Public Service Regulations and the Public Service Commission Regulations form part of subsidiary legislation which is subservient to and must be consistent the Employment Act or the Constitution as per section 21 (b) of the General Interpretations Act. Section 21 (b) of the General Interpretation Act provides that

where any written law confers power on any person to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of subsidiary legislation—

(b) no subsidiary legislation shall be inconsistent with the provisions of any Act and any such legislation shall be of no effect to the extent of such inconsistency.

The plaintiff submitted that, as such, it cannot be lawful to rely on a term that is inconsistent with the Employment Act and the Constitution to give a monetary penalty as in interdiction without pay.

The plaintiff further alluded to cases from other jurisdictions that he considers persuasive in this matter. He stated that according to Grogan in his book *Workplace Law*, 8th edition at page 102, suspension may occur in two accepted forms, namely, as a holding operation pending further enquiry or as a form of punitive disciplinary sanction. The plaintiff added that Grogan speaks the same language with Chilumpha in *Labour Law*, pp.370-371. He stated that Chilumpha says that apart from precautionary suspension, an employer may also use suspension punitively to penalize an employee who is guilty of some wrongdoing. This type of suspension is a form of dismissal, albeit for temporary period since the employee must return to his job at the expiry of the penalty.

The plaintiff referred to the case of *South African Breweries Limited vs Woolfree and Others* [1999] ZALC 8 in which the court referring to *County Fair vs CCMA and Others* (1998) 6 BLLR 577 (LC) held that suspension without pay as a form of disciplinary penalty is impermissible.

The plaintiff further referred to the case of *Simelane vs Spectrum (Pty) Ltd t/a Master Hardware* [2007] SCIC 8, where the Court held that the essence of a holding operation pending enquiry is that a finding has not been made against an employee and thus the action is not intended to be a punitive measure, but an administrative one.

The plaintiff submitted that the purpose of the holding kind of suspension was described by Denning MR in *Lewis vs Heffer and Others* [1978] (3) All ER 354 CA as follows

Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay, pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far I know, has ever questioned such a suspension on the ground that it could not be done, unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration... At that stage the rules of natural justice do not apply.

The plaintiff further submitted that, in short, there can be no doubt that a suspension without pay adversely affects the suspended employee and constitutes a serious disruption of his or her rights. He added that, in the case of *Furnell vs Whangarei High Schools Board* [1973] AC 660 the Privy Council, recognized that suspension without pay might involve hardship and also a temporary slur on the teacher.

The plaintiff then referred to what was stated by Howie J in the case of *Jacobus John Muller and 5 others vs Chairman of the Ministers Council House of Representatives and 4 others* (1991) 12 ILJ 761 (IC)

A suspension/interdiction without pay constitutes a serious disruption of an employee's right. The implications of being deprived of one's pay are obvious. Rentals and accounts cannot be paid; the necessities of daily life cannot be purchased; financial commitments cannot be honoured. Educational expense of one's children cannot be paid. This kind of prejudice occasioned by a suspension without pay cannot be remedied even if the employee is ultimately vindicated and paid his arrear wages. The potential for prejudice is significantly greater where the earnings of the suspended employees, as in the present matter, only cover the bare cost of living.

The plaintiff submitted that in *Dube and others v Pruman Group (Pty) Ltd t/a Sneakers* [2008] SZIC 13 (The Shobane Case), the respondent had suspended the applicants without pay with immediate effect pending police and criminal investigations. The Swaziland Industrial Court heard that the suspension was merely a holding suspension of the applicants pending investigations. Further, that such a holding suspension is permitted in law, but it should be on full pay. The plaintiff

also alluded to *Simalane vs Spectrum (Pty) Ltd t/a Master Hardware* (Unreported) IC Case No. 681 of 2006. The plaintiff then submitted that the court went ahead and said that a suspension/interdiction without pay has a punitive element and inevitably inflicts financial prejudice on the suspended employee.

He further submitted that it was held in the South African case of *Damane vs Premier, Mpumalanga and Another* 2002 (23) ILJ 477 (T) that suspension without pay and benefits is unlawful and unfair.

He further submitted that in *South African Breweries Limited vs Woolfree and Others* [1999] ZALC 8 the court referring to *County Fair vs CCMA and Others* (1998) 6 BLLR 577 (LC) that suspension without pay as a form of disciplinary penalty is impermissible.

On his part, the defendant submitted as follows. The Employment Act does not define what a monetary penalty is and further, it does not state whether or not suspension should be with or without pay.

The defendant submitted further that, the position held in several cases has been that suspension without pay will be lawful if specifically provided for in the contract of employment.

The defendant referred to the case of *Kabambe v Cargomate Ltd* IRC Matter Number 53 of 2001 in which the court said that suspension is only allowed where it is specifically provided for in a contract, especially where the suspension is without pay.

The defendant submitted further that, such a right to suspend without pay, the court held in the case of *Haldane v. Shelbar Enterprises Limited* [1999] CanLii 9248 (On CA), must be rooted in expressly or impliedly agreed terms in the employment contract (implied based on custom and usage or the presumed intention of the parties), or a policy incorporated into the employment contract.

He added that, absent such an agreement, a suspension without pay has been held to constitute a repudiation of the employment contract permitting the suspended

employee to consider himself or herself constructively dismissed. See *Henderson v. Saan Stores Ltd* [2005] SKQB 34 (CanLII).

The defendant submitted further that, in commenting on suspension without pay, Rachel Sikwese in *Labour Law in Malawi* [2014] LexisNexis at page 192 states as follows

The EA provides that an employer may suspend an employee as a mode of disciplining that employee. However, apart from a decision to suspend being reasonable, the EA does not say anything else in relation to whether or not the suspended employee should receive wages during the period of suspension. The EA provides that an employee's wages may not be deducted as a means of punishment. It however states that an employer may deduct wages from an absent employee where the absenteeism is without permission and without good excuse. Since suspension is absence with authority, the employer may not deduct the suspended employees' wages. For this reason, the Court has found that it is unreasonable to withhold an employee's wages during suspension. It is however allowed to do so where the contract of employment specifically provides for such situation.

The defendant then submitted that the code of conduct for disciplinary action in relation to public officers is made under the Public Service Act under which the Malawi Public Service Commission Regulations were enacted. Further, that these Regulations form part and parcel of the plaintiff's employment contract.

The defendant referred to Regulation 40 (1) of the Malawi Public Service Commission Regulations which provides that

Where an order is made interdicting an officer from the exercise of the powers and functions of his office (hereinafter referred to as an order of interdiction) that officer shall cease to exercise any such powers or functions, shall not leave Malawi without the permission of his responsible officer and shall be entitled to receive-

- (a) Where misappropriation of public funds is suspected, no salary.

The defendant then submitted that it is clear that the withholding of pay during interdiction is expressly provided for under the contract and, as such, it is lawful.

The defendant observed that it was argued by the plaintiff that interdiction without pay is unlawful in light of the provision in the Employment Act. He however submitted that, it should be noted that the contractual provision in the present case is not like any other contractual provision but is a legislative provision as the Regulations are enacted under the Public Service Act.

Further, the defendant submitted that the Employment Act does not criminalise suspension without pay as it does not state whether or not suspension should be with or without pay and in any case it only refers to suspension where that suspension is made as a form of disciplinary measure whereas in the present circumstances the interdiction has not been issued as a disciplinary measure but rather as a way for the defendant to carry out investigations and make a determination as to whether or not disciplinary proceedings should be made against the plaintiff.

The defendant submitted, lastly, that it has not imposed a monetary penalty but rather is withholding pay due to suspected theft, if the plaintiff is absolved of the allegations, the defendant will pay the plaintiff back his money, if he is not, the defendant will be able to recoup some of the losses that the plaintiff would have caused the defendant.

This Court wishes to observe that it is regrettable that both counsel for the plaintiff and the defendants despite alluding to the foreign authorities from Swaziland, Canada and other places, that they want this Court to treat as persuasive in this matter, have not laid any grounds for the authoritative nature of such foreign cases in this jurisdiction. The statutes on which the decisions in the foreign cases have been based have not been highlighted and discussed at all by counsel. The erroneous presumption is that this Court bears the burden of looking at those foreign cases and determining if they are persuasive. That erroneous presumption, entails that it will be very time consuming for this Court to do the job that counsel ought to do in the first place and will also mean that counsel has abdicated their responsibility to assist this Court in determining the issues. This is one of the causes of delay in determination of matters. Counsel simply get quotes from foreign cases and throw them at the Court. The Court then has to find the time to see whether such foreign cases are persuasive or not.

However, the correct position is that foreign cases decided based on statutes which are materially the same as the statute in question are of persuasive nature. Where the statutes are materially different the foreign cases deciding based on such statutes cannot have the same persuasive force. Counsel bears the responsibility of setting up the grounds for this Court to take foreign case law as authoritative.

The reckless citing of foreign case authorities without careful scrutiny will have undesirable effects on our jurisprudence and ultimately leads to the miscarriage of justice because foreign legal doctrine contrary to our law may be imported wholesale without regard to our express statutory provisions. Caution must therefore always be exercised in citing these foreign cases and reasons must be advanced why the foreign case should be treated as authoritative.

Coming to the question at hand, this court agrees with the defendant that section 56 (2) of the Employment Act provides for suspension as one of the disciplinary actions open to an employer. The Employment Act indeed does not state whether such suspension should be with or without pay. However, this Court does not read the Act to mean that therefore the suspension that is allowed there is without pay. The Act simply allows suspension.

Suspension entails that the employee can no longer carry out his or her usual duties under the contract of employment as part of the disciplinary process instituted at the instance of the employer. That has nothing to do with the salary. What has to do with the salary is the prohibition in section 56 (3) of the Employment Act. That provision prohibits an employer from imposing a fine or other monetary penalty as a disciplinary action.

The defendant has cited Sikwese on Labour Law in Malawi as saying that suspension without pay has been held to be unreasonable, unless it is specifically provided for in a contract of employment. This Court fails to understand how the suggested exception can come into play in view of section 56 (3) of the Employment Act.

The plaintiff has rightly observed that section 56 (3) of the Employment Act clearly prohibits fines and other monetary penalties as part of disciplinary action available to the employer.

Although, as submitted by the defendant, the Employment Act does not define what a monetary penalty is, it can easily be seen that the ordinary meaning of the expression 'a monetary penalty' is a punishment involving money or a punishment in money terms. So, if an employee is not paid his salary as part of a disciplinary process, that is a monetary penalty. It matters not that the money may be paid to the employee later after the disciplinary process is over, as argued by the defendant. The point is that an employee will have suffered a punishment pertaining to his money in the salary that is withheld whilst he is on suspension.

More fundamentally, if the statute prohibits a certain course of conduct the parties cannot be allowed to contract out of such a statutory prohibition as envisaged in *Sikwese on Labour Law in Malawi*. If contracting out of statute were to be allowed children would opt to contract out of provisions of section 21 of the Employment Act that prohibit employment of underage employees. And that is against public policy and hence not allowed.

A reading of section 56 (3) and (4) of the Employment Act clearly shows that imposition of a monetary penalty including withholding of salary as part of the disciplinary process is not allowed. The only time wages or a salary cannot be paid is where an employee is absent from work without permission from the employer and without reasonable excuse. The employer may also deduct wages as restitution for property damaged by the employee. This Court therefore agrees with the plaintiff that the defendant cannot legally withhold pay whilst the plaintiff is on interdiction.

This Court further agrees with the plaintiff that, in the circumstances, the defendant's Public Service Commission Regulations that provide for withholding of pay on interdiction are inconsistent with the Employment Act and cannot be effective in view of section 21 (b) of the General Interpretation Act.

In the end, this Court agrees with the line of authorities from this Court and the Industrial Relations Court as cited by the plaintiff, to the effect that interdiction or suspension with no pay is prohibited under section 56 (3) of the Employment Act.

In the view of this Court, the prohibition of imposition of a fine or monetary penalty applies whether the suspension is taken as an intermediate measure or a final measure. But ordinarily, suspension is undertaken as an intermediate measure.

The first question, whether the defendant can lawfully interdict the plaintiff without pay, in view of section 56 of the Employment Act, is therefore answered in the negative.

The second question is whether the defendants can lawfully interdict the plaintiff without pay before according him the right to be heard.

The plaintiff argued that, it is a trite principle of law that no person can be condemned unheard. That this is one of the major principles of natural justice. Further, that these principles have been codified in section 43 of the Constitution. The plaintiff cited the case of *Attorney General v Lunguzi and Another* [1996] MLR 8.

The plaintiff further submitted that this right equally applies in employment matters. See *M'bwana v Blantyre Sports Club* Civil Cause No. 1430 of 2009.

The plaintiff submitted that in the present case, by withholding the plaintiff's wages, the defendant has clearly imposed a monetary penalty on the plaintiff such as the Employment Act expressly prohibits. He added that this conduct would be even more faulted because the defendant proceeded to do so without even hearing the plaintiff. He stated that the question is, for how long should the plaintiff wait for the police to make a decision on the matter and/or if they are not going to make such a decision, what happens next?

The plaintiff referred to *Dzumbira vs Malawi Broadcasting Cooperation*, Civil Cause Number 171 of 2011 (High Court) (unreported) in which Justice Mwase concluded that he was satisfied that the matters with the police have nothing to do with the plaintiff's employment.

The plaintiff submitted that Justice Mwase concluded that the defendant had no right to place the plaintiff on suspension without pay without first according the plaintiff the opportunity to be heard. This was unlawful as it was contrary to rules of natural justice as codified under section 43 of the Constitution.

The plaintiff then submitted that, it is trite law that the employment contract is governed by the general principles of law of contract. See *M'bwana v Blantyre Sports Club*.

The plaintiff then referred to Council of the *Council of the University of Malawi v Urban Mkandawire* Civil Cause No 569 of 2000 in which the Supreme Court of Appeal stated that

We think it is pertinent to say that it is important to always remember that the general principles of the law of contract apply to contract of employment." One of such principles is the principle of privity of contract. The police are not privy to the contract between the plaintiff and the defendant. The defendant cannot therefore hand over matters to do with the plaintiff's contract indefinitely to the police. The defendants cannot therefore contend, as they have done, that their hands are tied...

This Court is not convinced about the citation of the case of *Council of the University of Malawi v Urban Mkandawire* and will disregard the same because the Supreme Court of Appeal has never registered cases in any year reaching the 500s. The citation cannot therefore be properly attributed to the Malawi Supreme Court of Appeal. Counsel ought to verify the citation.

On its part, the defendant submitted that, the plaintiff was interdicted not as a disciplinary measure as envisaged by the Employment Act that provides that an employee may be disciplined in other ways including suspension other than dismissal.

The defendant submitted that interdiction in the present case is simply a temporary freeze on the employment relationship in order to allow investigations to be done after which the plaintiff would then be called for a hearing a decision would be made whether or not to a disciplinary penalty should be meted out to him.

The defendant submitted that the right to be heard does not arise at this stage. Further, that this is similar to what was held in the case of *The State and Malawi*

Development Cooperation, ex-Parte Nathan Mpinganjira Miscellaneous Civil Cause number 63 of 2003 (High Court) (Unreported) that a suspension from employment is simply a temporary freeze on a relationship pending investigation and subsequent disciplinary process or hearing at which the rules of natural justice would apply.

The defendant further submitted that this position was confirmed by the High Court in the case of *The State and The Principal Secretary for Local Government and the District Commissioner for Neno District Ex-Parte Francis Magombo (TA Chekucheku)* Judicial Review Case number 39 of 2014 where in dismissing the application to challenge a suspension of the applicant pending disciplinary proceedings, the Court held as follows

A suspension from employment is simply a temporary measure freezing a relationship to allow for investigations and possible disciplinary proceedings. Accordingly, the applicant's arguments that the rules of natural justice which form part of his constitutional rights were violated and that he was not given reasons for the suspension do not apply and are without merit.

The defendant contended that, similarly, in the present case the interdiction is simply a temporary measure to allow investigations to be completed after which the defendant will be in a position to determine whether or not disciplinary proceedings should be taken against the plaintiff during which he will be given a right to be heard and a decision will be made on whether any disciplinary action should be taken.

This Court agrees with the defendant and the plaintiff's submission that ordinarily a suspension will be imposed to allow for investigations against an employee suspected of misconduct. At that stage the right to be heard cannot arise. The authorities as cited by both the plaintiff and the defendant are clear on that point.

Given the finding that a suspension without pay is prohibited the question whether an employee ought to be heard before being suspended without pay cannot arise. Therefore, a hearing will not cure a suspension without pay.

Where there is a suspension there is therefore no need for a hearing.

The second question whether the defendant can lawfully interdict the plaintiff without pay before according him the right to be heard does not arise.

The third question is whether the defendant is guilty of unfair labour practices. This entails consideration of the other two questions, namely, whether the defendant has violated section 43 of the Constitution. And, whether the order to indefinitely stop the plaintiff from receiving his salary from Government pursuant to the Public Service Commission Regulation number 40 (1) and (3) is lawful in itself and in view of the Employment Act and the Constitution.

The plaintiff submitted that the Industrial relations Court has solidly and repeatedly held that suspension without pay constitutes unfair labour practice. He added that His Honour N'riva, Deputy Chairperson of the Industrial Relations Court, had this to say in *Chalu vs. NBS Bank* Matter number IRC PR 12 of 2010

..... To begin with, suspension without pay might be seen to be contrary to the Constitution and the Employment Act. The provisions that might be contravened are those of unfair labour practices and prohibition of withholding pay as a punishment. See section 31 of the Constitution and section 56 of the Employment Act.

..... section 56 (3) of the EA proscribes imposition of a fine or a monetary penalty on an employee. Suspension without pay is a monetary penalty for all practical purposes. Imposition of a such a penalty is only permissible where the employer wants to effect restitution from the employee for some damaged property. Alternatively, the employee may not pay wages to the employee for a period the employee has been absent from work without permission or reasonable excuse. The question is whether such a monetary penalty would be legally correct in cases where the issue has nothing to do with restitution. From the reading of section 56, that approach has no legal basis. This is because, there is no legal basis for imposing a monetary fine where the person has been suspended.

In short, suspension without pay does not augur well with the law in section 56 of the EA. Nonpayment of wages can be justified to the extent of section 56 of the EA where the aim of the penalty is to attain restitution of damaged property or where the employee is absent for no good reason.

The plaintiff also referred to the case of *Mondiwa vs. Malawi Housing Corporation* Matter number IRC PR 789 of 2011.

On its part, the defendant submitted that Section 31 (1) of the Republic constitution provides that every person shall have the right to fair and safe labour practices and to fair remuneration.

The defendant further submitted that, according to Sekwese R. in her book *Labour Law in Malawi*, (2014) 2ND Ed: Lexis Nexis at Page 254

Fair labour practices in retrenchments entails practices that are even handed, reasonable, acceptable and expected from the standpoint of the employer, employee and all fair-minded persons looking at the unique relationship between the employer and employee and good industrial and labour relations. Laws limiting this right must be reasonable, must not offend international human rights standards and must not wholly abrogate the right.

The defendant further submitted that neither the Employment Act nor the case law in Malawi provide a definition for the term 'unfair labor practices.' As such in determining whether or not conduct amounts to an unfair labor practice the courts have invoked subjective analysis on a case by case basis.

The defendant submitted that, in the case of *Kachinjika v Portland Cement Company* Civil Cause Number 320 of 1998 Chikopa, J, as he then was, stated at 172 that

The duty of the Courts in the new Constitutional dispensation therefore is to look not only at the dry letter of the contract of employment and ask themselves whether or not the terms thereof had been breached or not but also whether looked at in its totality the employer's treatment of the employee was fair or not. What however amounted to fair labor practice or not was, at least at the time of the 1994 Constitution coming into effect, to be left to the tribunal dealing with the matter to decide guided by the Constitution itself.

The defendant further submitted that Professor Danwood Chirwa in *Human Rights Under the Malawi Constitution (2011)* 1st edition: Juta & Co Ltd explains that

fairness in this context is mainly concerned with the manner in which decisions which primarily affect the rights and interests of employees at the workplace are made and implemented.

The defendant then submitted that, in the present case there is the decision to impose an interdiction order without pay pending completion of investigations against the plaintiff.

The defendant contended that in light of the Public Service Act and the Regulations thereunder that provide for interdiction without pay, the defendant's action did not amount to an unfair labor practice.

Having already found that interdiction without pay is prohibited, this Court has no difficulty agreeing with the plaintiff that interdiction without pay is an unfair labour practice as envisaged by the Constitution. This is because the said interdiction without pay is a suspension from work without pay and is prohibited by statute. It cannot be an acceptable course of action and is therefore unfair. The unfairness of this prohibited course of action cannot be cured by affording an employee a hearing. Section 43 of the Constitution cannot therefore be invoked on this argument.

The last question whether the defendant is guilty of unfair labour practices is therefore answered in the affirmative.

For the avoidance of doubt, the defendant can interdict or suspend the plaintiff but it should be on pay. The interdiction imposed on the plaintiff herein shall therefore subsist but he must be paid his salary during the said interdiction.

Consequently, this Court declares that the interdiction without pay herein is illegal and unlawful.

This Court declines to declare that the defendant could not interdict the plaintiff without first according him the right to be heard.

This Court declares the defendant's conduct interdicting the plaintiff without pay herein amounts to an unfair labour practice. However, this Court declines to declare that the defendant has violated section 43 of the Constitution. But this Court declares that it is illegal and unlawful to indefinitely stop the plaintiff from receiving his

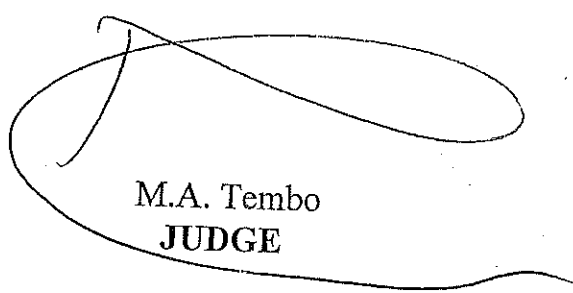
salary from Government pursuant to the Malawi Public Service Commission Regulation number 40 (1) and (3), in view of the Employment Act and the Constitution.

This Court orders that the defendant should pay the salaries withheld from the plaintiff since the interdiction order, including increments as received by employees at his level.

This Court is of the view that the loss suffered by the plaintiff comprises the withheld salaries and as such the order sought by the plaintiff for compensation for unfair labour practices is declined because the defendant has already been ordered to pay the said withheld and any future salaries.

Costs follow the event and are for the successful plaintiff.

Made in chambers at Blantyre this 5th September 2016.



M.A. Tembo
JUDGE