IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Civil appeal No.16 of 2015

(Being Lilongwe IRC Matter No 24 of 2011)

BETWEEN
GEORGE MAZHUNDE..... APPELLANT

AND
VANGUARD LIFE ASSURANCE CO.LTD..... RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA
Sauti-Phiri, Counsel for the Appellant
Mpaka, Counsel for the Respondent
Mithi, Official interpreter

JUDGMENT

The appellant appeals against the decision of the Industrial Relations Court (IRC).

The issues which were before the IRC are the following:

1. Whether or not an employee can resign and defer the effective date of the notice of resignation;
2. Whether or not the respondent shortened the appellant's resignation notice period;
3. Whether or not the appellant was unfairly dismissed;
4. Whether or not the appellant is entitled to reliefs outlined in paragraph 8 of his statement of claim, which include an award for unfair termination of contract, severance allowance for 17 months, proportionate amount of gratuity and bonus, profit sharing scheme proceeds, fuel and cell phone allowance for October and November 2010, gym and club fees for October and November 2010, and accommodation benefit for the same period.

The background facts are uncomplicated. The appellant was employed as the respondent's Managing Director on a three year contract beginning on 1st June 2009. It was an express term of the contract that either party may terminate the contract by giving the other three months' notice in writing. On 28th August 2010 the appellant submitted a letter advising the respondent of his intention to resign and to serve his notice period from 1st October to 31st December 2010. In response to the notice the respondent, by letter dated 1st September 2010, accepted the resignation but signified that he should serve his notice from 1st September 2010 up to 30th November 2010. Additionally the respondent directed the appellant to proceed on leave for the months of October and November 2010. The appellant was also advised of the respondent's decision to appoint someone else to act as Managing Director of the respondent company effective 1st October 2010.

On these facts the appellant sued the respondent claiming damages for unlawful and unilateral termination and breach of the Employment Act on the grounds that:

1. the respondent terminated the appellant's contract of employment without any valid reason and without affording the appellant an opportunity to be heard contrary to section 57 of the Employment Act;
2. the respondent capriciously terminated the appellant's employment on 1st September 2010 with the malicious intention of depriving the appellant the right to serve the full notice period up to December 2010 so that he misses out on gratuity, bonus and in the company's profit sharing scheme to which he was entitled under the contract.

The dispute between the parties revolves, in the main, around interpretation of the terms of the termination clause of the employment contract between the parties, as read with some provisions the Employment Act.

At the hearing in the IRC it was only the appellant who testified. The respondent did not adduce any evidence. It has been argued in this court that because the appellant was cross examined on the contents of certain documents then that content should be regarded as the evidence of the respondent at the trial citing as authority the provisions of section 71 of the Labour Relations Act providing for informality in the proceedings in the IRC and dispensing with rules of evidence in civil proceedings. In the opening remarks by counsel for the appellant, during the hearing of this appeal, however, counsel was specific that the appellant was cross examined in order to "identify" the documents. Identification of the documents, particularly where the same is done by a party's adversary in the proceedings, cannot, in my considered

opinion, render it evidence for the opposite party. I must also add that the flexibility granted to the IRC cannot extend to the IRC importing onto the record evidence not adduced before it.

Counsel for the respondent aptly summarized, in my view, the central issue in this appeal, which is two pronged, namely,

a) whether an employee can resign and defer the effective date, and
b) whether an employer can backdate the effective date.

The *Black's Law Dictionary* 8th Edition defines notice, *inter alia*, as follows: "Legal notification required by law or agreement... A person has notice of a fact or condition if that person has (1) actual knowledge of it; (2) has received information about it..." There is no doubt or dispute that the appellant gave notice to the respondent as aforesaid and that the intentions of the appellant, as to when he sought to leave employment, were clear on the face of his letter of resignation. It is also not in dispute that the respondent purported to backdate the notice period.

It is a legal requirement that a notice of termination of employment must be definite and explicit and must specify the date of termination: *Morton Sundour FabricsLtd v Shaw* (1967) 2 I.T.R. 84. The appellant evidently satisfied this requirement by notifying the respondent that he intended to remain in service up to 31st December. One of the objectives behind notice clauses or provisions is, in my view, that the party receiving the notice is availed sufficient time to prepare for the termination. The spirit of our employment law, if the provisions of section 29 of the Employment Act which provides for minimum, rather than specific, periods of notice of termination of employment contracts, are to go by, would seem to me to be that termination clauses lay down minimum termination periods. In this regard I would be of the view that a notice of resignation may properly be longer than the specifically stipulated periods, by a day, or a few days, or even a few weeks, but the extension must be reasonable. If there is legal authority to the contrary, none was cited and I have not come across any such.

Counsel for the respondent alluded to the issue of the appellant's contractual rights and suggested that the reason why the appellant had chosen December 31st as the termination date was for him not to miss out on his contractual dues. That could be so, but no authority was cited to the effect that an employee may not employ such a strategy. On the other hand, the respondent asserted, in the IRC, as one of the grounds supporting the claim for unlawful termination, that the respondent

capriciously terminated the appellant's employment on 1st September 2010 with the malicious intention of depriving the appellant the right to serve the full notice period up to December 2010 so that he misses out on gratuity, bonus and in the company's profit sharing scheme to which he was entitled under the contract. Related to this, the intention seems to manifest, from the appellant's letter of resignation, that the parties had in fact agreed that the appellant would postpone the termination date. This is evident from the appellant's resignation letter where he states, "... as per our discussions I have decided to notify you early so as to facilitate adequate time for alternative arrangements to be made." As earlier pointed out the respondent did not adduce evidence disputing the appellant's. The contents of the appellant's said letter must therefore be admitted as representing what the parties had agreed, namely that the respondent be availed adequate time.

Principles of fairness or "justice and equity" are a hallmark of contemporary employment law and jurisprudence. As such an employer will not renege on his agreements with his employee without falling foul of these principles.

The case of *Caledonian Mining Co. Ltd v Bassett* [1987] I.C.R. 425 is authority for the principle that an employer's act resulting in the deprivation of an employee's statutory rights amounts to a dismissal. In that case employees who had been coaxed by their employer into resigning with the intention, on the part of the employer, to deprive them of their statutory rights, were held to have been dismissed. Applying that thinking to the present case, to the extent that the respondent's decision to backdate the appellant's resignation would reduce his contractual entitlements, the implementation thereof amounted to a dismissal.

It is also a principle of law that a resignation may be turned into a dismissal if the employee is forced to leave earlier than the date of the expiry of his or her notice of resignation: *British Midland Airways Ltd v Lewis* [1978] I.C.R. 782. Further, cases in which an employee's date of departure is brought forward at the behest of the employer, even with the employee's agreement, will not be treated as cases of bilateral termination, but of dismissal: *McAlwane v Boughton Estates Ltd* [1973] I.C.R. 470; *Lees v Arthur Greaves (Lees) Ltd* [1974] I.C.R. 510. It is only cases where the date of departure is brought forward at the request of the employee, that may be treated as cases of bilateral termination: *L. Lipton Ltd v Marlborough* [1979] I.R.L.R. 178. These principles clearly underscore the point that the employee's decision to leave on a specified date is ordinarily binding on the employer.

Section 57 (1) of the Employment Act provides that the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. In the present case the respondent terminated the appellant's employment, by dismissing him, *per* the principles cited hereinbefore, for the reason that he gave notice terminating the contract of employment, itself not a valid reason. Under section 58 of the Employment Act a dismissal is unfair if it is not in conformity with section 57.

Section 61 (1) of the Employment Act provides: "In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to provide the reason for the dismissal and if the employer fails to do so, there shall be a conclusive presumption that the dismissal was unfair." As the respondent laid no evidence before the IRC, it follows without argument that the respondent did not provide any reason for the dismissal of the appellant, and therefore that the IRC should have come to the conclusive presumption that the dismissal was unfair. I hold that to be the case.

It may be important to make mention of one case authority cited and relied upon by counsel for the respondent, namely, *Horwood v Lincolnshire County Council* UKET/0462/11/RN, and to state that to the extent that the same was cited to address the question regarding when the notice was received by the addressee is concerned, I find the case irrelevant to the issues at hand. I have otherwise given all legal authorities cited by the parties the necessary consideration, even though I have not specifically referred to them herein.

The measure of damages to which a dismissed employee is entitled to is in respect of money and benefits the employer has wrongfully prevented the employee from earning: per Salmon L.J. in *Decro-Wall International S.A. v Practitioners in Markerting Ltd* [1971] 1 W.L.R. 361 at 369. The damages itemized by the appellant in this appeal were not contested, the respondent having only contested liability. I would and do hereby award the same as claimed and particularised.

The appeal succeeds wholly.

Pronounced in open court at Blantyre this 5th day of September 2018.

R Mbvundula

JUDGE