



REPUBLIC OF MALAWI
IN THE INDUSTRIAL RELATIONS COURT OF MALAWI
SITTING AT BLANTYRE
IRC MATTER NO. 14 OF 2014

BETWEEN:

HESTINGS KAUKUTI & 8 OTHERS.....APPLICANTS

-and-

MOTOR ENGIL (MALAWI) LTD.....RESPONDENT

CORAM: H/H PETER M.E KANDULU, AR

Mr. Peter Minjale, Counsel for the Applicants,

Mr. Madula, Counsel for the Respondent,

Mr. Dan Kanyatula, Court Clerk.

ORDER ON ASSESSMENT OF COMPENSATION

Background

1. This is an assessment of compensation that is payable to the applicants pursuant to Judgment of Hon. the Chairperson dated 23rd November, 2021. On page 12 paragraph 5 and on page 13 paragraph 6, the said Judgment makes the following awards to the applicants:
 - Compensation for unfair dismissal to be assessed,
 - Severance pay to be assessed and deduct money already paid
 - Overtime pay to be assessed and deduct money already received.

Issues

2. Accordingly, the only issue before the Court is that compensation should be assessed on the heads as outlined in paragraphs 5 and 6 of the pages 12 and 13 of the said Judgment dated 23rd day of November 2021.
3. What is the applicable quantum of compensation for unfair dismissal, overtime pay and amount of severance pay that each applicant is entitled?

Burden of proof

4. On having so pleaded, the onus is on the applicants to prove their claims as the burden of proof rests upon the party, who substantially asserts the affirmative of the issue *Joseph Constantine Steamship Line –vs.- Imperial Smelting Corporation Ltd* (1942) AC 154.
5. The burden is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it. *B. Sacranie v. ESCOM*, HC/PR Civil Cause Number 717 of 1991.

Standard of Proof

6. The standard required in civil cases is generally expressed as proof on a balance of probabilities *Miller v. Minister of Pensions* 1947] All ER 372. It follows in this matter that the Applicants have a burden to prove on the balance of probabilities the claims against the respondent in their pleadings.

The applicable law

7. The law governing these matters can be summarized as follows:

8. Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.
9. In the case of *Tourism Development and Tourism Company and another v Mhango* [2008] MLLR 319 it was stated that unfair dismissal is a statutory wrong and in assessing compensation a court has a wide discretion. That discretion must be exercised judicially and in accordance to principles.
10. The basis of an award of damages is to give a claimant compensation for the damage or any loss or injury that he has suffered. This is a position taken by Lord Blackburn in *Livingstone vs Rawyards Coal Company* (1880) 5 AC 25.
11. According to lord Scarman in *Lim vs Camden & Islington Area Health Authority* (1980) AC 174, compensation should be as nearly as possible to put the party who has suffered in the same position he/ she would have been in as if he/ she had not suffered the wrong.
12. In as far as employment is concerned, the word ‘damage’ is replaced by compensation. Section 63 (1) of the Employment Act provides that 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) reinstatement
 - (b) re-engagement
 - (c) an award of compensation as specified in subsection (4).
13. As outlined by Section 63 (1) (c), in awards for compensation for unfair dismissal, the guiding principles are as specified in Section 63 (4) read together with subsection (5) of Employment Act. Section 63 (4) provides as follows:

“An award of compensation shall be such an 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 far 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”

14. Section 63 (5) then provides some guidance as to the amount of compensation the court may award. It provides that ‘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 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 than 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 than fifteen years; and
 - d) One month’s pay for each year of service for an employee who has served for more than fifteen years.’
15. Further to these, the court is given wide latitude to the extent that entrenched common law principles are applicable in assessing compensation provided the same revolves around the principle enacted in Section 63 (4). This was reflected in the Supreme Court decision in *Wawanya vs Malawi Housing Corporation*, Civil Appeal No.40 of 2007.
16. In that case, the question whether the compensation could be said to be compensation under common law or under Employment Act was answered by the Supreme Court at page 8 of the transcript in this way:
- “Our reading of Section 63 (4) is that a court has considerable latitude in awarding compensation under the Employment Act. In the end it really should not make any difference whether one wants to call the award an award under Section 63 of the Employment Act or a common law award or any other description as one may please.”*
17. As promulgated by the provision of Section 63 (4) of the Employment Act, the fundamental principle in making the award of compensation for unfair dismissal is that it should be just and equitable in the circumstances.
18. Now, to ensure that the compensation is fair, just and equitable to both parties, Section 63 (5) then provides for the starting point. Thus, the discretion of how much maximum compensation to award to an employee who has been unfairly dismissed is given to the court. In exercising this discretionary powers, however, what essentially Section 63(4) states is that the court must consider a proven loss sustained by the Applicant due to

the dismissal in the first place and that the dismissal must be attributable to the actions of the employer. And finally that the loss suffered must be examined in light of the actions of the employee himself/herself, as to whether he or she has contributed in one way or the other.

19. Another important factor, of course, in determining how much to award as compensation, and it is now trite in all employment cases dealing with issues of compensation for unfair dismissal, is that of mitigation of loss. Under this requirement, the dismissed employee must take initiative to mitigate the loss. He is not supposed to sit idle on the pretext that the court will make good no matter what the time. He must move on and try to fetch for himself another job (See *Archibald Freighting Ltd vs Wilson* [1974] IRLR 10). The reason being that it is not “just and equitable” for the Court to assist litigants who sit idle and fail to make effort to alleviate their loss (See also *Msiska vs Dairiboard Malawi*, IRC, Matter No. 6 of 1999). This takes different forms but the obvious ones include trying to look for alternative employment. If this is not shown at trial, it is a ground on which discretion could be exercised by the court in an unfavorable way to the Applicant.
20. In addition, the employee’s age, physical fitness or health, type of contract and skill or qualifications in relation to one’s chances of getting another employment at the prevailing labour market in his/her field at that particular time are also factors to be considered in deciding the amount to award to the dismissed employee (See *Kachinjika vs Portland Cement Company* [2008] MLLR 161 and *Davie Daudi and 7 others vs Glory Investment*, Matter No. IRC 769 of 2019).
21. In the case of *Norton Tool Company vs Tewson* 1973]1 ALL ER183, Sir John Donaldson, President of the National Industrial Relations Court said: -
“The amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle. First the object is to compensate, and to compensate fully, but not to award a bonus...second, the amount to be awarded is that which is just and equitable in all circumstances having regard to the loss sustained by the complainant. Loss does not include injury to pride or feelings”

22. The above quote clearly indicates that the court has to show satisfactory on how it arrived at figures for compensation. See the case of *Kachingwe vs Group Commodity Brokers Limited*, IRC Matter No.117 of 2000.
23. Furthermore, in the case of *Terrastone Construction Ltd vs Solomon Chathuntha*, MSCA Civil Appeal No 60 of 2011, the Supreme Court of Appeal determined the question of what amounts to a just and equitable compensation and how the Court would apply its discretion in order to arrive at a just and equitable compensation with reference to Section 63(4) of the Employment Act.
24. The Court held that ‘a court has to take into account the loss sustained by an employee as a result of the unfair dismissal but that the assessment does not have to end on the enquiry of loss. The court has to determine the matter on terms which are reasonable and that reasonableness will be achieved, if the interests of both the employee and the employer are taken into account’. The court then guided and advised that Section 63(4) of the Employment Act should be read together with Section 63(5) of the same Act and added that ‘it is important that reasons should always be given for coming up with the assessment of damages which are in excess of what is set down in the law.
25. In the case of *Sothern Bottlers (SOBO) vs Graciam Kalengo*, [2013] MLR 345 the Supreme Court of Appeal also stated the following at Page 348:
26. *“Let us reiterate what was said in Standard Bank vs R. B Mtukula, Misc Appeal No. 24/2007 (High Court) that where the court wishes to exceed the minimum compensation in Section 63(5) of the Employment Act, it must give clear reasons so that the employer, employee and also the appeal or review court are able to appreciate why the award was enhanced.”*
27. The court, in Terrastone case (supra) actually warned against awarding damages with elements of punishment to the employer and set aside an award of damages that was equivalent to the salary the Respondent earned the whole period he had worked for the Appellant. Instead, the Court awarded him the minimum statutory compensation in Section 63 (5) of the Employment Act of two weeks’ pay for each year of service. Taking into account of Section 63 (4), the Court did not increase the award because the Respondent was found to have contributed to his own dismissal.

28. On page 6 of the judgment, the Court held which I find to be illustrative:
“Section 63(4) is not a blank cheque for the court to decide any amount to be payable. It needs to be read into Section 63(5) whenever compensation is awarded. In our view, it is a guideline on how a court may give an award under subsection 5, and should not be read in isolation. This section provides for a minimum award, but the court can award more than this minimum depending on the circumstances of the case as provided in Section 63(4) of the Act.
29. As we have seen in *Graciam Kalengo* case (supra), these guiding principles on assessment of compensation were earlier applied in the case of *Standard Bank vs Mtukula* (supra).
30. In that case, Mtukula, who had worked for the bank for 19 complete years and therefore entitled to the statutory minimum award of one month’s salary for each year of complete service, was awarded compensation at the rate of three months’ pay for each year of completed service upon the court taking into account the peculiar facts of the matter. This award was upheld by the Supreme Court of appeal.
31. These principles as outlined in Mtukula case were similarly applied in *National Bank of Malawi vs Benjamin Khoswe and First Merchant Bank Ltd vs Eisenhower Mkaka and Others*, Civil Appeal No1 of 2016, being IRC matter number 137 of 2012.
32. In fact, in the case of *First Merchant Bank Ltd vs Eisenhower Mkaka and Others* (supra), which is relatively the recent Supreme Court of Appeal decision, it was well articulated that employment is not a lifetime commitment and that it would not be in the spirit of Section 63(4) and (5) of the Employment Act to award the Applicant up to retirement age. The Court actually stated as follows which we also find quite illuminating, instructive and illustrative:
33. *“In assessing compensation, the IRC had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of the compensation that must fall due, not the loss of salary, increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation. In the same manner, future losses do not matter at all. Therefore, one cannot talk of loss of earnings up to the time the former employee should have retired. Certainly, that is not the spirit of the*

- Employment Act. As already observed, Section 63(5) sets down the minimum compensation. The court may go up depending on its evaluation of the matter. The court enjoys the wide discretion to settle for either the minimum prescribed or for any higher amounts of compensation as would fit the description of “just and equitable” after weighing the considerations in Section 63(4) of the Act”.*
34. In the ***National Bank of Malawi vs Benjamin Khoswe*** (supra), Chipeta J, as he then was stated the following on award of compensation for unfair dismissal and salary increments on page 25 and 26 of the judgment:
35. *“In this case, however, instead of the Respondent seeking just and equitable compensation that is in accordance with Section 63(5) as might or might not be increased in the court’s discretion, he wants full salary and increments for each day he was out of employment to date of assessment of damages. Subject to discretion the law gives me about whether to stick with the minimum or to increase it, my opinion is to follow the guidance offered by Section 63(5) of the Employment Act. At the minimum, therefore, regardless of whether it will come to more than or less than what the Deputy Registrar had awarded him, I hold the view that the Respondent would be entitled to a just and equitable award of a month’s pay for each of the 21 years he had served the Bank. Considering, however, that this case is virtually at all fours with the ***Stanbic Bank vs Mtukula*** case, where the Supreme Court of Appeal upheld an award at the rate of three months’ pay for each of the completed years of service, I see no reason why the Respondent should be treated differently in this case. I accordingly set aside the award he got of full salary for the whole period between dismissal and assessment of damages. Instead, I award him three months’ salary per year for each of the 21 years he served the Appellant ...which is what I would consider granting him as his due compensation under the current legal formula as legislated by the Employment Act.”*
36. In the case of ***Kachinjika vs Potland Cement Company*** [2008] MLLR 161, the court refused to award loss of salary from the date of termination to the date of judgment on the ground that ‘such an award would be flawed as it would proceed on the assumption that the plaintiff was never terminated which was not true; that he continued being an employee of the defendant company which was not true; and that the plaintiff in his pleadings prayed a declaration that he should be regarded as having continued in his

position from the date of termination until that of judgment which was also not the case’.

37. The above cited and discussed cases were considered and applied in the cases of *Douglas Mbilima vs Macsteel Malawi Limited*, Matter No IRC. LL 645 of 2011, *Vision Zikhole vs Blantyre Water Board*, MZ IRC 319 of 2011 *and Loveness Chalera and Davie Maseko vs Reserve Bank of Malawi*, Matter No IRC 32 of 2015; and almost in all of these cases, the contracts of employment were for unspecified period of time. Guided by the above outlined principles on assessment of compensation for unfair dismissal, my court will now proceed to analyze the facts in light of these applicable principles.
38. Section 39 of the Employment Act provides the law of overtime pay and the provision states:
1. Overtime shall be subject to the limitations set out in sections 36 (4) and 37.
 2. There shall be three classes of overtime known respectively as
 - a). ordinary overtime, which shall be time worked on a working day in excess of the hours normally worked by the employee in the undertaking concerned;
 - b). day of overtime, which shall be time worked by the employee on a day on which he would otherwise be off duty; and
 - c). holiday overtime, which shall be time worked on a public holiday.
 3. An employee shall for each hour of ordinary overtime be paid at the hourly rate of not less than one and one-half his wage for one hour.
 4. An employee shall for each hour of duty-off overtime be paid at the hourly rate of not less than twice his wage for one hour
 5. An employee shall for each hour of holiday overtime be paid at a rate of not less than twice the normal hourly rate.
39. An assessment is a trial. Accordingly, during the assessment in this case, the Court will have to bear the foregoing principle in mind. The Court will have to analyze the evidence and see whether the applicants have discharged the burden placed on them by law. The duty on the applicants is to prove their compensation on a balance of probabilities and nothing more.

Evidence

40. For the applicants, they all filed their written witness statements which were tendered and adopted in court. Mr. Hastings Kaukuti and Mr. Victor Samson Makandanje testified and cross examined on behalf of others. The evidence of the 8 applicants were almost similar except on few instances which will be considered and factored in this judgement.
41. Likewise, the respondent through Mr. Wisk Chimasula testified on behalf of the company. He confirmed that all the applicants were employees of the respondent. He told the court that at the time of dismissal of the applicants, none had worked for the company beyond 1 year and 5 months. He confirmed that the judgement of the Hon. Chairperson ordered compensation for unfair dismissal, overtime pay and severance pay and subtraction of what was already paid.
42. He however said, all overtime hours earned were paid as shown on the pay slip. He also said notice pay and severance pay was paid to the applicants. He tendered the document which was used to pay the applicants. He said at the time of termination of their contract their salaries were MK32,000.00 for the 8 applicants and MK22, 000 for Mr. Chaka Nazombe.
43. During cross examination he confirmed that it was the finding of the court that compensation for unfair dismissal, overtime pay and severance pay have to be assessed and paid to the applicants and subtract the money which were already paid to the applicants.
44. My duty at this particular time on point is not to open whether the applicants were fully paid their severance and overtime pay. The Hon Chairperson's court had already found and held that the applicants were not paid in fully their severance and overtime pay. The court further directed the Assistant Registrar to assess the said compensation for unfair dismissal, unpaid severance pay and overtime pay. These assessment proceedings only comply with the directions of the Hon Chairperson's court Judgement.
45. Counsel for the applicants submitted the following as what ought to be assessed and paid to the applicants as follows:

HASTINGS KAUKUTI

46. Born on 5th May 1985, at the time of the dismissal he was 28 years. This means he had 32 years to go before reaching mandatory retirement age. Counsel submitted that the just and equitable number of years should be 30.
47. Counsel for the respondent have submitted that the applicant was employed on 26th June, 2012. He worked for 17 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK16,000.00 according to counsel for the respondent.
48. Considering that employment is not long life commitment, I am of the firm believe that 10 years would be fair and equitable for Mr. Kaukutu. $153,194.00 * 10 * 12 = \text{MK}18,383,280$
49. It is in the evidence that overtime, from July 2012 to 02nd day of December 2013 meant the applicant had worked about 277 hours per month as overtime from the 19 months that he worked with the Respondent. And from the period that 5,263 hours was due as overtime pay from the Respondent. Per the contract the Applicants were to work 6 days per week and 8 hrs. per day
50. The mathematical calculations would show that per day he was entitled to MK5,784 and MK723 per hour.
51. The overtime due is hence $\text{MK}723 * 5,263 = \text{MK}3,805,047$.
52. The applicant is also entitled to severance pay being 2 weeks' pay less MK15 345.96 that was already paid =MK59, 845.

PATRICK TEPANI

53. Born on 23rd August 1982, at the time of the dismissal he was 31 years. This means he had 29 years to go before reaching mandatory retirement age. Counsel submitted that the fair and equitable number of years should be 27.
54. Counsel for the respondent have submitted that the applicant was employed on 16th July, 2012. He worked for 17 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK16,000.00 accordingly.
55. Total compensation payable is $\text{K}153,194.00 * 8 * 12 = \text{MK}14,706,624.00$

56. On overtime, from 13th August 2012 to 02nd day of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the Respondent. And from the period that 4,432 hours was due as overtime pay from the Respondent. Per the contract the Applicants were to work 6 days per week and 8hrs per day.
57. The mathematical calculations show that per day they were entitled to MK5,784 and MK723 per hour.
58. The overtime due is hence $MK\ 723 \times 5263 = MK3,204,336$
59. The Applicant is also entitled to severance pay being 2 weeks' pay less MK15,345.96 that was paid = MK59,845

STANLEY NKHOMA

60. Born on 12th July 1984, at the time of the dismissal he was 29 years. This means he had 31 years to go before reaching mandatory retirement age. The fair and equitable number of years should be 29 years.
61. Counsel for the respondent have submitted that the applicant was employed on 21st March, 2012. He worked for 17 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK16,000.00 accordingly.
62. Total compensation payable is $K153,194.00 \times 9 \times 12 = MK16,544,952.00$
63. On overtime, from March 2012 to 02nd day of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the respondent. And from the period that 5,817 hours was due as overtime pay from the respondent. Per the contract the applicants were to work 6 days per week and 8hrs per day.
64. The mathematical calculations show that per day were entitled to MK5,784 and MK723 per hour.
65. The overtime due is hence $MK\ 723 \times 5817 = MK4,205,691$.
66. The Applicant is also entitled to severance pay being 2 weeks' pay less MK15,345.96 that was paid = MK59,845.

CHAKA NAZOMBE

67. Born on 12th July 1984, at the time of the dismissal he was 28 years. This means he had 31 years to go before reaching mandatory retirement age. Fair and equitable number of years will be 29 years.
68. Counsel for the respondent have submitted that the applicant was employed on 18th April, 2013. He worked for 7 months with salary of MK22,000.00. According to counsel for the respondent, one week pay is the sum of MK5,500.00. He is therefore entitled to receive MK5,500.00 accordingly.
69. Total compensation payable is $K153, 194.00 \times 9 \times 12 = MK16, 544,952.00$
70. On overtime, from April 2012 to 02nd day of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the Respondent. And from the period that 5, 540 hours was due as overtime pay from the Respondent. Per the contract the applicants were to work 6 days per week and 8 hrs per day.
71. The mathematical calculations show that per day they were entitled to MK5, 784 and MK723 per hour.
72. The overtime due is hence $MK 723 \times 5540 = MK4, 005, 420$.
73. The applicant is also entitled to severance pay being 2 weeks' pay less MK15, 345.96 that was paid = MK59,845.

WIKISONI SAUKANI

74. Born on 14th January 1971, at the time of the dismissal he was 42 years. This means he had 18 years to go before reaching mandatory retirement age. The fair and equitable number of years ought to be 16 years.
75. Counsel for the respondent have submitted that the applicant was employed on 12th March, 2013. He worked for 8 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK8,000.00 accordingly.
76. Total compensation payable is $K153, 194.00 \times 6 \times 12 = MK11, 029,968.00$
77. On overtime, from April 2012 to 02nd of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the Respondent. And from the period that 5540 hours was due as overtime pay from the Respondent. Per the contract the Applicants were to work 6 days per week and 8 hrs per day.

78. The mathematical calculations show that per day they were entitled to MK5, 784 and MK723 per hour.
79. The overtime due is hence $MK 723 \times 5540 = MK4, 005, 420$.
80. The applicant is also entitled to severance pay being 2 weeks' pay less MK15, 345.96 that was paid = MK59,845.

CHIKONDI KALOLOKESHA

81. Born on 3rd October 1984, at the time of the dismissal he was 29 years. This means he had 31 years to go before reaching mandatory retirement age. Fair and equitable compensation should be 29 years.
82. Counsel for the respondent have submitted that the applicant was employed on 16th July, 2012. He worked for 17 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK16,000.00 accordingly.
83. Total compensation payable is $K153, 194.00 \times 9 \times 12 = MK16, 544,952.00$.
84. On overtime, from July 2012 to 02nd of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the Respondent. And from the period that 4709 hours was due as overtime pay from the Respondent. Per the contract the Applicants were to work 6 days per week and 8 hrs per day.
85. The mathematical calculations show that per day they were entitled to MK5, 784 and MK723 per hour.
86. The overtime due is hence $MK 723 \times 5540 = MK3, 404, 607$.
87. The applicant is also entitled to severance pay being 2 weeks' pay less MK15, 345.96 that was paid = MK59,845.

ANDREW KUCHELA

88. Born on 11th May 1977, at the time of the dismissal he was 36 years. This means he had 24 years to go before reaching mandatory retirement age. The fair and equitable number of years ought to be 22 years.
89. Counsel for the respondent have submitted that the applicant was employed on 10th January, 2013. He worked for 10 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK8,000.00 accordingly.

90. Total compensation payable is $K153,194.00 \times 7 \times 12 = MK12,868,296.00$.
91. On overtime, from 10th January 2013 to 02nd of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the respondent. And from the period that 3047 hours was due as overtime pay from the respondent. Per the contract the Applicants were to work 6 days per week and 8 hrs per day.
92. The mathematical calculations show that per day they were entitled to MK5,784 and MK723 per hour.
93. The overtime due is hence $MK723 \times 3047 = MK2,202,981$.

MARTIN MPIRA

94. Born on 2nd April 1981, at the time of the dismissal he was 32 years. This means he had 28 years to go before reaching mandatory retirement age. The fair and equitable compensation ought to be 26 years.
95. Counsel for the respondent have submitted that the applicant was employed on 26th June, 2012. He worked for 16 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK16,000.00 accordingly.
96. Total compensation payable is $K153,194.00 \times 8 \times 12 = MK14,706,624.00$.
97. On overtime, from June 2012 to 02nd of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the Respondent. And from the period that 4263 hours was due as overtime pay from the Respondent. Per the contract the Applicants were to work 6 days per week and 8 hrs. per day.
98. The mathematical calculations show that per day they were entitled to MK5,784 and MK723 per hour.
99. The overtime due is hence $MK723 \times 4263 = MK3,082,149.00$.
100. The Applicant is also entitled to severance pay being 2 weeks' pay less MK15,345.96 that was paid = MK59,845.00.

VICTOR MAKANDANJE

101. Born on 2nd October 1966, at the time of the dismissal he was 45 years. This means he had 15 years to go before reaching mandatory retirement age. The fair and equitable number of years ought to be 13 years.

102. Counsel for the respondent have submitted that the applicant was employed on 18th April, 2012. He worked for 8 months with salary of MK32,000.00. According to counsel for the respondent, one week pay is the sum of MK8,000.00. He is therefore entitled to receive MK8,000.00 accordingly.
103. Total compensation payable is $K153, 194.00 \times 5 \times 12 = MK9, 191,640.00$.
104. On overtime, from January 2013 to 02nd of December 2013. He was working about 277 hrs per month as overtime from the months that he worked with the respondent. And from the period that 3047 hours was due as overtime pay from the respondent. Per the contract the Applicants were to work 6 days per week and 8 hrs. per day.
105. The mathematical calculations show that per day they were entitled to MK5, 784 and MK723 per hour.
106. The overtime due is hence $MK 723 \times 3047 = MK2, 202, 981.00$.

107. Resolution

Compensation for unfair dismissal

108. Firstly, I have to remind myself that the matter before us was tried by the court of the Hon Chairperson. The court entered Judgement in favour of the applicants. In the said Judgement, the court directed and ordered that the applicants must be paid damages for unfair dismissal, overtime pay and severance pay.
109. My simple duty in this matter is only to assess how much must be paid to the applicant's as held by the Court of the Hon Chairperson based on the evidence adduced in this court. Counsel for the applicants have suggested that the court should award compensation for unfair dismissal up to retirement age. Counsel for the respondent have opposed the position taken by counsel for the applicants to pay the applicants up the retirement age.
110. My court is fully alive and aware to the fact that Employment can come to an end anytime for whatever reasons. It is not a lifetime commitment. Employees ought to be alive to this fact and always to be thinking of plan B.
111. Bearing in mind the afore mentioned principle, the court will consider that when assessing compensation for unfair dismissal, the court have to award damages which are fair and equitable.

112. Unlike, the position taken by counsel for the applicants, I am of the considered view that the applicants shall not be compensated up to their fully retirement period despite, showing the court evidence that they tried to mitigate the loss, but due to the reference letters from the respondent, they had failed to secure another jobs.

Overtime

113. Turning to the claim for working overtime, during public holidays and day offs. The applicants testified that they were working without a period of rest and during public holidays, they did not go on leave for the entire period of their employment.

114. Section 36 of the Employment Act *inter alia* provides that any worker must have one day of rest in a week. Section 44 of the Act also provides that a worker who works 6 days a week shall have 18 days of annual leave in a year. Further, the law provides for holiday overtime for working during public holidays. Section 39 of the Act provides for a rate of twice the hourly rate for working during public holidays.

115. The respondent did not refute the fact the applicants were working overtime. But they claim that the applicants were fully paid. They exhibited the pay slips. The applicants have objected that they were paid fully. They admit they were paid partially as held by the Court of the Honorable Chairperson.

116. The court is fully alive to the fact that indeed the applicants were partly paid their overtime. This court is concerned with the unpaid overtime pay allowances which when assessed the total awards shall subtract the overtime pay allowance already paid based what is on the pays lips equally the severance pays.

Severance Pay

117. Turning to the claim of severance pay

118. Section 35(1) of the Employment (Amendment) Act, 2010 allows an employee whose services have been unfairly terminated to be awarded severance allowance. However, it is only payable to those employees that have worked for at least a year and to those whose employment contract are terminated for reasons not related to bad conduct.

119. The said allowance is calculated as follows:

Not less than one year but exceeding five years at two weeks' wage for each completed year

Exceeding five years but not exceeding ten years at two weeks' wages for each completed year for the first five years plus three weeks' wages for each completed year of service from the sixth year up to the and including the tenth year

Exceeding ten years at two weeks' wages for each completed year for the first five years plus three weeks' wages for each completed year of service from the sixth year up to the and including the tenth year, plus four weeks' wages for each completed year of service from eleventh year onwards.

120. Having considered the evidence by the applicants which was not controverted either by contrary evidence or evidence solicited in cross-examination. The Court is inclined to believe and indeed believes the evidence of applicants and their calculations. This Court therefore proceeds to award the applicants the sums as claimed under the heads of claims.

Conclusion

121. In conclusion, the Court has awarded the applicants the following:

1. HASTINGS KAUKUTI

- i. Unfair Dismissal MK18, 383, 280. 00
- ii. Overt Time pay MK3, 805, 047. 00
- iii. Severance Pay MK59, 845. 00
- iv. **Total: MK22, 248, 172.00**

2. PATRICK TEPANI

- i. Unfair Dismissal MK14,706,624. 00
- ii. Overt Time pay MK3, 204, 336. 00
- iii. Severance Pay MK59,845. 00
- iv. **Total: MK17, 970, 804. 00**

3. STANLEY NKHOMA

- I. Unfair Dismissal MK16,544,952.00
- II. Overt Time pay MK4, 205, 691. 00
- III. Severance Pay MK59,845. 00
- IV. **Total: MK20, 810, 488.00**

4. **CHAKA NAZOMBE**
- I. Unfair Dismissal MK16, 544,952.00
- II. Overt Time pay MK4, 005, 420. 00
- III. Severance Pay MK59,845. 00
- IV. Total: MK20, 610, 216. 00**
5. **WIKISONI SAUKANI**
- I. Unfair Dismissal MK11, 029,968.00
- II. Overt Time pay MK4, 005, 420. 00
- III. Severance Pay MK59,845. 00
- IV. Total: MK15, 095, 233.00**
6. **CHIKONDI KALOLOKESHA**
- I. Unfair Dismissal MK16, 544,952.00.
- II. Overt Time pay MK3, 404, 607. 00
- III. Severance Pay MK59,845.00
- IV. Total: MK20, 009, 404.00**
7. **ANDREW KUCHELA**
- I. Unfair Dismissal MK12, 868,296.00.
- II. Overt Time pay MK2, 202, 981. 00
- III. Total MK15, 071, 277.00**
8. **MARTIN MPIRA**
- I. Unfair Dismissal MK14, 706,624.00.
- II. Overt Time pay MK3, 082, 149.00.
- III. Severance Pay MK59,845.00.00
- IV. Total: MK17, 848, 616.00**
9. **VICTOR MAKANDANJE**
- I. Unfair Dismissal MK9, 191,640.00.
- II. Overt Time pay MK2, 202, 981.00.
- III. Total: MK11, 394, 621.00**

Payment to be effected within 14 days from the date of service of this order.

Delivered in chambers this 19th day of April, 2022 at Blantyre.

A handwritten signature in purple ink, appearing to read 'Peter M.E. Kandulu'.

PETER M.E KANDULU
ASSISTANT REGISTRAR

