JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 55 OF 2015

BETWEEN:

CHRISTOPHER MAKILENI .....APPLICANT

AND

THE ATTORNEY GENERAL (THE OFFICE OF THE PRESIDENT AND CABINET).....RESPONDENT

CORAM:	Howard Pemba	Deputy Chairperson
	Paul Maulidi,	Counsel for the Applicant
	Thabo Chakaka Nyirenda,	The Attorney General representing the OPC
	Mrs Nthunde,	Court Clerk & Official interpreter

ORDER ON ASSESSMENT

1. Brief Background

This is the Court's order on assessment of the Applicant's compensation for unfair labour practice. The assessment was made pursuant to the order by this Court dated 28th September 2021, which order came by way of agreement by the parties, admitting liability by the Respondent on an unfair labour practice and setting aside the consent orders dated 22nd July 2020 and 4th August 2021 in which the parties agreed that the Respondent should pay the Applicant a total sum of K754,835,824.14 representing his pension, loss of use of a motor vehicle, salary before tax and fuel.

The matter has a rich factual background. The brevity of it is that the Applicant was and is still employed by the Malawi Government since 2nd July 2002. He was initially employed as District Commissioner (DC) (Grade F) and was stationed at Kasungu. He has risen through the ranks to the Director of Finance and Administration and finally to the Principal Secretary (PS) (Grade C) responsible for special duties as at 18th April 2020. The genesis of the Applicant's action emanates from the 3rd June 2014 when the Respondent posted him from Ministry of Local Government to the Office of the President and Cabinet (OPC). According to the Applicant, when his transfer at the OPC was effected, he was never given a vehicle and an office there and this necessitated him to stay at home.

Dissatisfied with the treatment he was getting at OPC, the Applicant commenced the matter herein on 26th January 2015 by way of IRC Form 1 alleging constructive dismissal and unfair labour practices and consequently claiming damages for constructive dismissal, damages for unfair labour practice and reinstatement. The Respondent filed their response on 3rd February 2015 denying any liability on constructive dismissal and unfair labour practice and counterclaiming a refund of all the remuneration that the Applicant had been receiving without rendering any services to Government.

Later, the Applicant amended his IRC Form 1 and dropped the claim for constructive dismissal and remained with only the claim of unfair labour practice and added redeployment as one of the reliefs sought. The matter underwent pre-trial conference which did not yield any tangible results. Parties at some point also tried an out of Court settlement on their own but this did not produce any intended purpose either.

Whilst waiting for trial, the parties then continued out of Court discussions which resulted into consent orders dated 22nd July 2020 and 4th August 2020. The first consent order contained only the terms agreed by the parties which terms principally included an agreement by the parties that the Applicant should be allowed to formally retire as if he had reached retirement age of 60 and be paid all his retirement package. The 2nd

consent order then had the quantum of K754,835,824.14 payable to the Applicant representing his retirement package.

Dissatisfied with the amount of K754,835,824.14, allegedly on the ground that though the consent order was purported to have been signed by the Attorney General it was signed by one Frank Matola who had no instructions from the OPC to sign such a consent order binding the Government to pay such a colossal sum, the Respondent applied for and was granted an order for stay of execution of the said consent order pending an application to set it aside.

Prior to the hearing of an application to set aside the consent orders, parties had also a number of out of Court negotiations on the quantum which still did not yield any tangible results. When the parties appeared before this Court on 27th September 2021 for a hearing on an application to set aside the consent orders, they informed this Court that they had agreed that the matter should be subjected to assessment by the Court which effectively meant that the consent orders would have to be set aside. Pursuant to this agreement, the matter came before me for the hearing of the assessment on 8th November 2021 and both parties were available.

2. The Applicant's case

During the assessment hearing, the Applicant gave evidence under oath and tendered his witness statement and other documents attached thereto. He also tendered a reply to an affidavit in opposition for Ms Ireen Chikapa. In his witness statement, the Applicant is basically showing what he allegedly lost by reason of the unfair labour practice admitted by the Respondent. Taking into consideration all what he alleges to have been lost, the Applicant claims the following:

a. Salaries for the remainder of the service period from 18th April 2020 amounting to **MK280,262,000.00**
b. Gratuity as per the calculation using IFMIS totaling to **MK310,000,000.00**
c. Agreed loss of use of a motor vehicle from 2014 to May 2020 totaling to **K187,510,000.00**

d. Agreed fuel at the rate of K998.00 per litre covering 31,850 litres totaling to **MK36,277,300.00**
e. Duty allowances totaling to **MK11,570,000.00**
f. Electricity allowances totaling to **MK2,262,000.00**
g. Airtime allowances totaling to **MK3,650,000.00**
h. Water allowances totaling to **MK2,844,000.00**
i. Indemnity of legal fees agreed at **MK90,000,000.00**

In total, the Applicant now claims the sum of **MK923,863,300.00** as compensation for unfair labour practice plus legal fees.

In support of his claims, the Applicant has attached a number of documents to his witness statement labelled from **Schedule 1** to **Schedule 17.** These include the Applicant's pay slip dated 21/03/2021, posting instructions, minutes of the 9th April 2020 meeting, car hire charges from Wise Wheels Rent a Car, another document of car hire charges from Plant & Vehicle Hire and Engineering Services (PVHES), a letter from the Attorney General to the OPC dated 15/5/19, an application to retire from employment dated 16th April 2020, allocation of official vehicle dated 15th June 2020 and calculation of gratuity up to July 2027.

During cross examination, the Applicant told this Court that his claim for unfair labour practice emanates from the fact that when he was posted from the Local Government to the OPC, he was not provided with an office and a vehicle. He confirmed that before he was posted to the OPC, he was using an official vehicle which he took it to the OPC. However, before he used it for long, it was due for service and was taken to the garage by the Applicant himself for service and minor maintenance before the Ministry of Local Government took it back. He said it was taken by the Local Government because it was their vehicle. He further informed this Court that he was aware that it would take some time for Government to procure new vehicles and it would depend on availability of funds.

The Applicant also confirmed that at some point at OPC, a vehicle registration number **MG899AF VX** was given to him in or around 2020 before it broke down at Nsundwe and towed to the garage by the OPC. After that, he also confirmed that another vehicle registration number **MG547 Prado TX** was given to him though at the time of assessment it was four weeks after he had also taken it for service. He said that when the vehicle was withdrawn, government was not giving him a vehicle for official use. He said the vehicle he was to be given was for both official as well as personal use. He said he was employed for 24 hours though from 2014 to 2020, he was and is still not reporting for duties as he was told that he will be informed on when to report for duties after the office is identified. He further confirmed that despite not rendering any services to government, he is still being paid his salary by the OPC and all the benefits including duty, water and electricity allowances commensurate with his position. He also confirmed again that recently the OPC wrote him to be sent to Government Stores to be Controller of Stores (Grade C) but he declined as he thought it was not in good faith since the case was still in court.

3. The Respondent's case

Respondent called two witnesses. The first to testify was **Mr Stuwart Sambo**, a civil servant at OPC working together with the Applicant. He told this Court that the Applicant is his boss since 2014 when he (the Applicant) was posted from Local Government to OPC as Principal Secretary for special duties. He said in 2014, instantly after the Applicant was posted from Local Government to OPC, he got a communication that he was using a project vehicle and the OPC was requested to find a replacement for his official duties. He said at the time he had reported for duties at the OPC, he was still using the Local Government project vehicle but he did not use it for long before the Applicant took it to the Andrews Garage for repairs. After that, the Applicant kept on pushing for an urgent replacement of his vehicle.

Then around end of 2019, the Applicant was allocated a vehicle registration number **MG 899 VX**. After receiving this vehicle, Mr Sambo said, it was the OPC that was responsible for services and fuel and he (Mr Sambo himself) was the one handling issues of services

and processing of fuel. He said whenever it was due for service, the Applicant would report to them and an arrangement would be made for it to be serviced. Mr Sambo said that the Applicant used this vehicle for some time despite having challenges with it. Later, the Applicant reported that the vehicle had broken down at Nsundwe and they towed it to office before it was taken for repairs.

He added on to say that at all times whenever the Applicant had no vehicle for use, the OPC would arrange to send a driver for him to have a vehicle when he had crucial programs such as medical checkups, funerals and sending kinds to school. He said this was done several times whenever he had reported it to them for a period after he had handed over the project vehicle to Local Government and when he had no vehicle. He said he even recalled at some point in time when the Applicant requested for a coffin and he was assisted with one on loan deducted from his salary. He said after **MG 899 VX** was taken to the garage, it was learnt that the repairs would cost them K10million and they agreed that it was costly for repairing it and that is when they decided to look for **MG 457 AJ**, Prado TX which was at the time of assessment at Toyota Malawi waiting payment for the repairing services it had gone for. About fuel allocations, Mr Sambo said that the OPC has been giving the Applicant fuel every month since 2014.

In cross examination, Mr Sambo informed this Court that he is aware that the Applicant has not been in office since 2014 due to unavailability of office space. He said it was not his responsibility to look for and allocate offices for senior officers. He said he cannot directly tell why the Applicant has not been allocated office space until now but it could be because there was no space at OPC.

The second witness for the Respondent was **MS Ireen Chikapa**, Director of legal services at the OPC. Her evidence is in a form of an affidavit in opposition to the Applicant's witness statement in support of the assessment herein and a supplementary affidavit in opposition. Much of her evidence is that the Applicant is still an employee for the OPC and is still receiving full salary and other benefits such as a vehicle, MASM and government guaranteed loans. She says that the Applicant was provided with a motor

vehicle whenever he needed it and, considering that he has also not been working from 2014, he cannot claim use of motor vehicle for official purpose.

She further says that the Applicant has not retired and cannot claim retirement benefits based on the minutes of a meeting of 9th April 2020. That the Applicant has been redeployed to the Government Stores but has not yet taken the post. Attached to the supplementary affidavit of MS Ireen Chikapa are a number of documents which she says are forming part of her evidence. These include a letter of redeployment marked as **IMC3**, a letter from the Applicant challenging the redeployment marked as **IMC4** and loose minute indicating the allocation of motor vehicles to the Applicant marked as **IMC5.**

Having closed their cases, both parties filed their written submissions in support of the assessment herein. I have gone through these submissions and I register my gratitude to the industry of the parties. That said, I am very mindful that submissions are not evidence and cannot take its place. Despite that, I am however not oblivious of the significant role the same plays in enlightening the Court so as for it to arrive at an informed decision and I must state such was the case herein. The parties should be assured that whether it is mentioned, referred to, or not, the submissions have been thoroughly read and informed the views of this Court in arriving at the final decision.

4. Issues for determination

Generally, this court has been called upon to make a determination on what is the appropriate quantum of damages for unfair labour practice payable to the Applicant.

5. The applicable law

The matter before me is a civil matter and just like any other matter of similar nature, it is generally incumbent upon a party that alleges to prove his or her allegation on the balance of probabilities.

In **Kumalakwaanthu t/a Accurate Tile and Building Centre vs Manica Malawi Limited** Appeal number MSCA 57/2014 the court stated as follows:

> *"The standard of proof for the matters in the IRC is the same as that which applies in all court cases in that the facts must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say 'we think it is more probable than not' the burden is discharged but if the probabilities are equal, it is not. A well settled principle of ancient application is* ***'ei incumbit probation qui dicot not qui negat'****. This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter of fact must prove it. In contested actions, a party succeeds whose evidence establishes a preponderance of probability or a balance of probability in his favour".*

This position was cited with approval in **Mwakaonga vs Electricity Supply Corporation of Malawi Limited, IRC Matter Number 13 of 2013** where the court opined that the balance of probability standard means that a court is satisfied that an event occurred if the court considered that on the evidence, the occurrence of the event was more likely than not.

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**, and although this could be with respect to damages for personal injuries, the basis still applies to damages for unfair dismissal or unfair labour practice.

According to lord Scarman in **Lim vs Camden & Islington Area Health Authority (1980) AC 174**, compensation should be as nearly as possible put the party who has suffered in the same position he would have been in as if he had not suffered the wrong.

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).*

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"*

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.'*

As promulgated by the provision of **Section 63(4)** of the Employment Act, the fundamental principle in making the award of compensation is that it should be **just and equitable** in the circumstances. 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.

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, an 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 (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.

Proceeding further, 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"*

The above quote clearly indicates that the court is not allowed to dream up a figure without showing how it was arrived at. This approach was also reflected in the judgment

of this court in ***Kachingwe vs Group Commodity Brokers Limited***, **IRC Matter No.117 of 2000.**

Furthermore, in the case of **Terrastone Construction Ltd vs Solomon Chathuntha, MSCA Civil Appeal No 60 of 2011**, the Supreme Court of Appeal had to determine 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. 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.*

The court, in *Terrastone case*, 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.

6. <u>Reasoned analysis</u>

The present case before me is peculiar. Unlike in all of the above cited cases, in which the Applicants were dismissed from their employment and were seeking compensations for unfair dismissal and/or unfair labour practice, the Applicant herein is not dismissed and has not left the Respondent's employment. He is still receiving his full salary plus all other benefits a Government employee at the level of a PS is receiving. His claim is

for unfair labour practice by the Respondent which the latter accepted. Perhaps before delving much into the main issue, it is worth to point out something regarding the Applicant's pleadings herein.

In his pleadings, the Applicant was initially claiming constructive dismissal and an unfair labour practice. Later, through his legal practitioners, he amended his pleadings and dropped the claim for constructive dismissal admittedly because he had not resigned from his employment. Thus, the only claim the Applicant had against the Respondent was for unfair labour practice. The Applicant argued that the Respondent herein is guilty of unfair labour practice because he was not allocated an office and a motor vehicle when he was posted from the Ministry of Local Government to the OPC.

The importance of pleadings cannot be overemphasized. It is trite principle of law that parties to a case are bound by their own pleadings for the sake of certainty and finality. A court is called upon to give its determination only on the issues that are pleaded by the parties. This was emphasized by the Malawi Supreme Court of Appeal in **Wawanya vs Malawi Housing Corporation, MSCA Civil Appeal No. 40 of 2007**(unreported) in which the court stated as follows:

> *"The importance of pleadings has been emphasized again and again in our courts and the often cited page is by Sir Jack Jacob in his essay 'The Present Importance of Pleadings' Current Legal Problems (1960) where he said this: As parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon an enquiry into the case before it other than to adjudicate upon the specific matter in dispute which the parties themselves have raised by their pleadings."*

This position has equally been well articulated in **Charles Chikumba Banda vs Malawi Housing Corporation, Matter No IRC (LL) 233 of 2015** cited with the authority of **P.T.K Nyasulu vs Malawi Railways Ltd [1998] MLR 195 (MSCA)** as follows:

"Cases must be decided on the issues on record. If it is desired to raise other issues, they must be placed on record by amendment... It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what the case which they will have to meet is... 'Material' means necessary for the purpose of formulating a complete cause of action; and if anyone material statement is omitted, the statement of claim is bad... Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. Where the evidence at trial establishes facts different from those pleaded ... which are not just a variation, modification or development of what has been alleged but what constitute a radical departure from the case as pleaded, the action will be dismissed... Moreover, if the plaintiff succeeded on findings of fact not pleaded by him, the judgment will not be allowed to stand, and the Court of Appeal will either dismiss the action... or in a proper case will if necessary order a new trial ..."

Reverting to the case at hand, in as far as the Applicant's amended statement of claim (IRC Form 1) is concerned, the only complaint by the Applicant against the Respondent, as we have observed, was unfair labour practice whereby he said that he was treated unfairly by the Respondent by not providing him with an office space and a vehicle when he was posted to the OPC. Consequently, as his reliefs, he sought compensation for unfair labour practice and redeployment. In the same vein, the assessment herein was only with regard to compensation for unfair labour practice which practice emanates from the fact that when he was posted to the OPC, the Applicant was not provided with an office and a vehicle.

However, in both his witness statement and skeletal arguments in support of this assessment, it is noted surprisingly that the Applicant has brought in a number of claims and issues that were never part of his pleadings such as claims for salaries for the remainder of the contract period, gratuity, pension, legal fees, leave grant and all allowances that he is entitled to. None of these, we note, was pleaded by the Applicant. They did not constitute the agenda for the Court.

The Applicant seems to place much reliance on the Minutes of the meeting he had with the Respondent's representatives in the OPC conference room on 9th April 2020 which minutes led to the execution of consent orders by the parties. He argued, based on the same agreement, that he believes he has retired from the Civil Service despite the fact that he is still on government payroll and receives salary every month. In his skeletal arguments, the Applicant even submitted that this court should order that all the offers the Respondent made to the Applicant under the agreement dated 9th April 2020 in numbers 8 and 9 must be complied with in full.

As it has turned out, however, the above mentioned minutes of the said meeting was part of the out of court negotiations that the Applicant had with the Respondent in a bid to settle the matter amicably. It is noted that the consent order dated 22nd day of July 2020 was one of the resultant positive effects of this meeting. This consent order was to the effect that the Applicant should be allowed to formally retire from employment as PS as if he had reached retirement age of 60 years and be paid salaries for the remainder of his years to reach retirement age plus all retirement benefits and loss of use of the vehicle between 2014 and 2020.

The agreement went on further to say that the Applicant should withdraw and discontinue his claim upon receipt of all his dues under this consent order. This consent order was then followed by another consent order dated 4th August 2020 which order now contained the total sum of K754, 835,824.14 that the Applicant was to be paid in all heads of the benefits that the parties agreed.

This court, first and foremost, observes that the issue that the Applicant should be retired as if he reached mandatory retirement age of 60 years was not among the pleaded issues in the IRC Form 1. Secondly, the evidence of the Applicant on this point is worth repeating. To start with, he confirmed in cross examination that he never received any letter approving his retirement from the Department of Human Resources Management and Development (DHRMD). He also stated that whatever the parties agreed at the said meeting was never meant to override the legally sanctioned

procedure of retirement. The Applicant further confirmed that he has at all material times received and is still receiving his salary and all the allowances such as water allowance, duty allowance, electricity allowance, fuel allowance and any other allowances he is entitled to. The Applicant's pay slip in **Schedule 1** dated 21/09/2021 is evident of this fact.

This court understands that the Applicant claims all these benefits some of which he is still receiving on the premise that he is retired. However, it is my finding, the evidence is pretty rife that the Applicant has not retired from his employment as PS and that is why even the case herein has not been discontinued. I do not want to delve much into the nitty gritties of what happened since that is not my task now. Suffice to say that all whatever process the parties agreed was never concluded and the Applicant is still in the employment of the Respondent as PS and is still enjoying full salary and all the benefits he is entitled to at the grade of a PS. The evidence also shows that the Applicant has been obtaining loans from Government and has also been accessing other government guaranteed loans. All these cannot happen to an employee who has retired.

Carefully considering these facts, it is my stern view that this Court does not have any business deciding on the minutes of the meeting between the Applicant and the Respondent, something that was not pleaded. Precisely, the Applicant cannot claim and be entitled to salaries for the remainder of the contract period, gratuity, pension, legal fees, leave grant and the mentioned allowances since they were not pleaded in his IRC Form 1 and are being claimed on the assumption that he has retired from the Civil Service which is not true.

Further to that, the Applicant cannot dare rely on the minutes of 9th April 2020 since they were but an out of court discussion by the parties which eventually never materialized. It is something that parties failed to agree further more especially on the quantum and the consent orders that were borne from the said minutes of 9th April 2020 were consequently set aside by consent of the parties, through their legal

representatives, to allow this court assess what can be appropriate, fair and just award of compensation for the only claim of the Applicant which is unfair labour practice.

To crown it all, the finding of this court, and from its own record, is that neither the IRC Form 1 nor the minutes for the pre-hearing conference does contain, as an issue or question, how much the Applicant should be paid as salaries for the remainder of the contract period, gratuity, pension, legal fees, leave grant and such allowances as water, duty, electricity and fuel allowances. Mindful of the principles of pleadings as enunciated in the case of **P.T.K Nyasulu vs Malawi Railways Ltd (supra)** and other authorities that I have laid my hands on regarding pleadings, all these newly introduced and not pleaded issues cannot and will therefore not be part of the issues of determination in the present case.

Turning to the issue under consideration, this court is being called upon to determine on how much quantum of damages should be payable to the Applicant for the unfair labour practice. **Section 31(1)** of the Constitution provides that every person shall have the right to fair and safe labour practices and to a fair remuneration. The above constitutional provision however does not provide the definition of fair labour practice nor does it provide any instances that could be deemed to constitute unfair labour practices. Case law, however, has interpreted fair labour practices to mean practices that are even handed, reasonable, acceptable and expected from the standpoint of employer, employee and all fair minded persons looking at the unique relationship between employee and employer and good industrial and labour relations (see **Kalinda vs Limbe Leaf Tobacco Ltd, civil cause No 542 of 1995**).

Basically, what amounts to unfair labour practices will invariably depend on circumstances of the case. In **Chilala and others vs Petroleum Services (Mw)Ltd [2008]MLLR 152**, the Court gave examples of unfair labour practices which include unfair conduct of employer relating to promotion, demotion, training, provision of benefits as well as failure by an employer to be transparent. It is however trite that courts have the discretion, upon appreciating the facts at hand, to determine whether

or not a particular set of circumstances amounts to unfair labour practices. Unfair labour practices may include unfair dismissal or any other conduct which in the eyes of the Court amounts to unfair conduct. The burden to prove existence of the unfair labour practices is on the Applicant and the standard of proof is the same 'on the balance probabilities'.

In the case before me, judgment on liability for unfair labour practice was entered against the Respondent and the assessment proceeded on that basis. In his evidence, the Applicant alleges that he suffered unfair labour practice at the hands of the Respondent and the said unfair labour practice is the omission by the Respondent in failing to provide him with an official motor vehicle and an office space. Evidence has revealed that it is because of not being provided with an office space that the Applicant has up to now not been reporting for duties since 2014.

In as far as an award of compensation is concerned, my starting point of reference are the cases of **Livingstone vs Rawyards Coal Company (supra)** and **Lim vs Camden & Islington Area Health Authority (supra)** which outline the rationale for an award of compensation which is to make good of the damage or loss suffered by the affected party. It is trite that compensation should be as nearly as possible put the party that has suffered in the same position he would have been in as if he had not suffered the wrong. Furthermore, I also take cognizance of the guidance of **Section 63(4)** that an award should 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 unfair labour practice or dismissal.

In the case under consideration, and according to the adduced evidence, the loss suffered by the Applicant is the use of a motor vehicle and an office space. Admittedly, this loss is attributable to the omission by the Respondent in failing to provide an office and a motor vehicle to the Applicant. I must admit, I had difficulties to understand how lack of office space by employees could be a loss to them. Corollary to that, it was stated in evidence by the Applicant that due to the said lack of his office space, he was

and is still never reporting for duties as he was told that he would duly be informed once an office was identified. In my view, an office cannot be regarded as a benefit per se but just a safe working environment for an employee. And perhaps the situation in the present case acted to the advantage of the Applicant who has not been rendering any services to the employer despite receiving his salaries and all other benefits since 2014?

In the meantime, the loss suffered by the Applicant due to the Respondent's unfair labour practice, in my view, is only the use of a motor vehicle as this was and is still an entitlement to the employees of the Applicant's calibre. As PS, and according to the available evidence, the Applicant is entitled to a motor vehicle for both official as well as private use. Nevertheless, the evidence is also abundantly clear that there were a number of times when he was provided with a motor vehicle. At first, he took with him a Local Government vehicle to the OPC before it was taken back to Local Government. Then in or around the year 2019, the Applicant admitted that he was allocated a vehicle registration number **MG 899, Prado VX**. This later broke down at Nsundwe and was taken for repairs. In replacement for this, he was also given another vehicle registration number **MG 457 AJ, Prado TX** which was at the time of assessment still in his custody but at Toyota Malawi premises for repairs.

As if that is not enough, there is also evidence that during the whole period the Applicant had no vehicle for use, the OPC would arrange to send a driver for him to have a vehicle when he had crucial programs such as medical checkups, funerals and sending kinds to school. According to the Respondent's witness (Mr Sambo), this happened several times whenever the Applicant had reported to them. As for the fuel allocations, it is also the Respondent's evidence that the OPC has been giving the Applicant fuel every month since 2014. Certainly from this evidence, which has not been disputed and remains firm, coupled with the fact that the Applicant has not been reporting for duties since 2014, this Court believes that the loss of use of a motor vehicle suffered by the Applicant is minimal.

For the foregoing reasons, and considering that the Applicant has not been rendering any services to the Respondent since 2014, I am convinced, on the preponderance of probabilities, that his said loss of use of a motor vehicle was only with regard to personal use. The Applicant also did not suffer loss of motor vehicle for the whole period from 2014 to 2020. Taking into consideration that for several unspecified times, the Applicant would still access a motor vehicle for personal use whenever he needed it, this Court will take the loss being for approximately an average of one year and only from 4:30 pm to 7:30 am making it a total of 15 hours of loss of use of a motor vehicle for personal purposes. However, out of the 15 hours, the court takes judicial notice of the fact that the Applicant would sleep for 8 hours which is the Ministry of Health recommended sleeping hours remaining with 7 hours. Therefore 7 hours, in my view, only qualify for payment.

According to his evidence, through the PVHES vehicle proposed hiring rates as of 2020 (**Schedule 5**), the rate of hiring a 4x4 Prado TX was K85,000 per day of 12 hours. Thus, on average, the Applicant would have used the vehicle for personal purposes 7 out of the 12 hours chargeable. The Applicant is therefore entitled to K85,000 x 365 days x $^{7}/_{12}$ = **K18,097,916.70**. This is what is payable to the Applicant as just and equitable compensation for the unfair labour practice he has suffered in the hands of the Respondent.

In addition to compensation for unfair labour practice, the Applicant also sought, in his amended IRC Form 1, redeployed in view of the fact that he was not allocated an office at the OPC. During the assessment, however, he seemed to retract from his pleadings and said he has lost trust with the Respondent and is no longer interested in redeployment. He therefore pleaded with the court that it should direct, in line with his interest, that he should retire as per the agreement.

I have already found that the claim that he should be retired was not pleaded and this Court cannot act based on the agreement that was not completed. As things have turned out, the Applicant is still employed by the OPC and has already been re-deployed to

the Department of Central Government Stores, OPC as Controller of Stores. This court cannot dictate that he should retire from employment. The Applicant is a senior officer who knows the process for one to retire in the Civil Service.

7. Conclusion

In summary, considering that the Applicant has not been rendering any services to the Respondent since 2014, this court has found that the only loss suffered by the Applicant is one relating to the personal or private use of a motor vehicle. Evidence is profound that this has not been within the whole period of 2014 to 2020. There was a time he took the Local Government vehicle with him to OPC and although it was taken back by Local Government, he used it for some part of his stay at OPC. There is also considerable evidence that he was given a motor vehicle (MG 899 AF) in or around 2019 which he enjoyed for some time before it broke down. Later he was also provided with another vehicle (MG 547 AJ) which he also used for some time of his stay at OPC. Evidence is also rife that on several occasions at some unspecified times, the Applicant was still provided with a motor vehicle for personal use whenever he needed it. In view of all these, this court believes that an award of **K18,097,916.70** which represents his loss for one year will be fair and equitable as compensation for unfair labour practice. This should be paid to the Applicant within 14 days from the date of this order.

Any aggrieved party has the right of appeal to the High Court in accordance with **Section 65(2)** of the Labour Relations Act.

Made in Chambers, this 24th day of February, 2022 at Industrial Relations Court, Lilongwe Registry.

Howard Pemba
DEPUTY CHAIRPERSON