Allan Hans Muhome was born in 1980 at Queen Elizabeth Central Hospital in Blantyre, Malawi. He holds a Bachelor of Laws Honours Degree and an MBA, both from the University of Malawi. He is a legal practitioner and Commercial Law Consultant. He lectures in law courses in various schools including the University of Malawi and the Malawi Institute of Legal Education. He is the author of Company Law in Malawi 2016 and currently writing a book on Malawi Insolvency Law. He is married to Patricia. They are blessed with two daughters Francisca-Naphiri and Gabriella-Okota and a son Eugene-Ekari.
LABOUR LAW
IN
MALAWI

ALLAN HANS MUHOME
PREFACE

I was persuaded to publish this Book as a result of encouragement that I received from colleagues in the legal profession, after sharing with them my manuscript. Labour Law has grown from strength to strength since the promulgation of the 1994 Constitution and the enactment of various legislation, the most recent being the Pension Act in 2011. That notwithstanding, there are just a few publications on this important field of the law. This Book aims at filling that gap by exposing Labour Law in Malawi through relevant legislation and Court decisions, with special emphasis on cases emanating from the Industrial Relations Court. This discourse begins with an introduction to Labour Law and moves on to the Employment Act 2000, The Labour Relations Act 1996 and finishes with the Pension Act 2010.

It is my sincere hope that this Book shall offer a bulk of worth that every lawyer, the employer and the employee alike shall resort to for referencing in labour matters and further research in this exciting field of Labour Law. It is my desire that this Book shall stimulate debate and research for the enhancement of labour rights in Malawi.

ACKNOWLEDGEMENT

This being my first Book, it is necessary that I acknowledge the vital role many people have played in realizing this dream. It was in 2004 that I developed an interest in Labour Law guided by my lecturer in Labour Law Shepher Mumba at Chancellor College, University of Malawi. I wish to thank him for introducing me to Labour Law. I am further indebted to all my classmates and colleagues in the noble profession for their professional advice. I also learnt a lot from the discipline and work ethic of Shahir Latif SC under whose tutelage I was inspired to develop this work further. I also wish to thank Rachel Sikwese, Jack N'riva, Khumbo Soko and Sunduzwayo Madise, for their invaluable insights into this work. Last but not least, I wish to thank my parents Hans and Martha and my sisters for their love and care.

DEDICATION

To my wife, Patricia, my daughter Francisca and my son Eugene-Ekari.
Allan Hans Muhome

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30th September 2012
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Chapter One: INTRODUCTION

I. SOURCES OF LABOUR LAW

Labour Law in Malawi has grown from strength to strength since the adoption of the 1994 Constitution of Malawi. This is evidenced by the growing number of applicable sources of Labour Law in Malawi. The prominent sources are listed below and discussed in detail throughout this Book.

1. The Constitution of Malawi (1994);1
2. The Employment Act;2
3. The Labour Relations Act;3
4. The Pension Act (2010);
5. Workers' Compensation Act;4
7. Technical, Entrepreneurial and Vocational Education and Training Act;6
8. Companies Act;7
9. Public Service Act;8
10. International Labour Organisation Conventions (ILOC), the most relevant ones being the ones listed below:-9

(a) Termination of Employment Convention (1983) No. 158;
(b) Tripartite Consultation (International Labour Standards) Convention (1977);
(c) Right to Organize and Collective Bargaining Convention (1949) No. 98;
(d) Right of Association (Agriculture) Convention (1921) No.11 and

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1Examples of Sections touching on labour law include Sections 29, 31, 32 and 43.


3Cap 54:01 of the Laws of Malawi, which repealed and superseded the Trade Union Act, Cap54:01 and the Trade Disputes (Arbitration and Settlement) Act, Cap 54:02.


5Cap 55:07 of the Laws of Malawi.

6Cap 55:06 of the Laws of Malawi, which provides for the promotion and co-ordination of technical, entrepreneurial and vocational education and training; the establishment of the Technical, Entrepreneurial and Vocational Education and Training Authority of Malawi (TEVETA); Establishment of Technical, Entrepreneurial and Vocational Education and Training Fund, and the payment into the fund of periodical contributions levied on employers and the application of the fund towards the defraying various costs and expenses relating to technical education and training and further to provide for matters incidental to or connected with the foregoing. See Preamble to the Act.

7Cap 46:03 of the Laws of Malawi, as far as rights of employers and employees are concerned in liquidation and takeovers (See Commercial Industry and Allied Workers Union v Receiver and Manager-Import and Export IRC Matter No. 304 of 2002 and Chilulo and Others v Petroleum Services Ltd IRC Matter No. 158 of 2000).

8Cap 1:03 of the Laws of Malawi, this Act regulates conditions of service of public workers and parts of the Act on termination of employment in the public service were discussed by the MSCA in Chawani v AG [2008] MLJR 1. It would appear that the IRC does not have jurisdiction under this Act since it was passed before the IRC came into being and there is no law currently conferring jurisdiction on the IRC on matters touching on the Public Service Act. For a discussion of this Act see Chilumpa C, Unfair Dismissal; Underlying Principles and Remedies, Monfort (2007) p. 77ff.

9See the judgment of the then Chairperson of the IRC Hon. Mkandawire in Ng'wegwe and Others v Automotive Products Ltd IRC Matter No. 180 of 2000.
(e) Freedom of Association and Protection of the Right to Organize (1948) No. 87.

The international labour rights movement begun in 1919 with the founding of the ILO in 1919 through the ILO's Constitution adopted immediately after the First World War and enshrined in the Treaty of Versailles proclaiming, inter alia that freedom of association is of 'special and urgent importance.'

In our own case, the applicability of ILOC No. 158 had originally attracted conflicting decisions in the High Court. For instance, in *Guwende v AON Malawi Ltd*, 10 Chipeta J. was of the opinion that the ILOC No. 158 was inapplicable because neither the ratifying document nor an enabling Act of Parliament was furnished to the Court for authenticity. On the other hand in *Kalinda v Limbe Leaf Tobacco Ltd*, 11 Mwauingulu J. held that the ILOC No. 158 is applicable in labour matters through Section 211 of the Constitution.

The IRC on the other hand consistently applied the ILOC No. 158. In fact, Section 2(2) of the LRA specifically binds Courts to give effect to international labour standards of the ILO when interpreting the Act. 13

The aforesaid discrepancies have since been rectified by the MSCA judgment of *Malawi Telecommunications Ltd v Makande and Another*. 14 Overruling the Guwende case (above), Justice Tembo held that ILOC No. 158 should be considered as being applicable to Malawi under Section 211(2) of the Constitution. 15 The Court observed that there is no Act of Parliament, at the meantime, which has provided to the contrary. The Court went further to state that foreign decisions based on foreign statutory provisions may be considered in the determination of a matter as long as the Judge is aware of the fact that the foreign decision did not have any binding force but expressly observes that the decision merely had persuasive force or authority.

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10 Civil Cause No. 25 of 2000.
11 Civil Cause No. 542 of 1995.
12 Which provides that 'Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement. (2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses. (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.' The applicability of ILOC No. 158 was also confirmed in *Banda v Dimon (Maj)* Ltd [2008] MLLR 92.
14 [2008] MLLR 35
15 Above.
II. DEVELOPMENT OF EMPLOYMENT LAW

The 1964 decision in Ridge v Baldwin\textsuperscript{16} was to the effect that an employer could hire and fire without giving the employee an opportunity to be heard. Lord Reid stipulated three classes of dismissal cases:

1) Master and servant relationship where an employer could hire and fire;
2) Office held at pleasure, for instance that of a cabinet minister where an employer could hire and fire as well;
3) Dismissal from an office where there must be something against an employee to warrant his dismissal, for instance contracts governed by statute.\textsuperscript{17}

The decision in Ridge v Baldwin left the employee unprotected. The law was thus used in favour of the employer. Through this decision the employer could, for instance, dismiss an employee without following principles of natural justice. The Court treated the contract as validly terminated and the employee's remedy constituted damages only.\textsuperscript{18}

In Mwalwanda v Press Holdings Ltd\textsuperscript{19} a similar position was arrived at when Justice Villiera had this to say at page 329:-

"...In ordinary circumstances, by giving the appropriate notice, a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so."\textsuperscript{20}

This position was categorically stated in Chanamuna v OIcom (Mw) Ltd.\textsuperscript{21} The High Court said that the law was to the effect that an employer could terminate the contract of employment at any time and for any reason or for none and there was no need for a hearing. The remedy of the employee was in damages only.

\textsuperscript{16} [1964] A.C. 40. See also Chanamuna v OIcom (Mw) Ltd HC Civil Cause No. 2001 of 1996 and R v East Berkshire Health Authority, Ex parte Walsh (1984) 3 All ER 429.
\textsuperscript{17} See for instance Chibana v Council of the University of Malawi HC Civil Cause No. 20 of 2000.
\textsuperscript{18} See Chanamuna v OIcom (Mw) Ltd HC Civil Cause No. 2001 of 1996.
\textsuperscript{19} 10 MLR 321.
\textsuperscript{20} He was in fact quoting from the judgment of Barry, J in Barber v Manchester Hospital Board [1958] 1 All ER 322 p. 329. See also the edifying dictum of Sir George Donaldson M.R. in R v East Berkshire Health Authority, Ex parte Walsh (1984) 3 All ER 429.
\textsuperscript{21} Civil Cause No. 2001 of 1996.
This state of affairs was partially rectified by the 1994 Constitution. In fact the High Court began to make a purposive interpretation of Section 31 of the Constitution. Further development of Labour Law took place through the adoption of the LRA in 1996 providing for collective bargaining and a specialized Court to determine labour related disputes, both expeditiously and inexpensively. Nevertheless, it was not until the enactment of the EA in the year 2000 that the law satisfactorily addressed the vulnerable position of an individual employee and consolidated several statutes touching on employment. A discussion of Section 31 of the Constitution is worthwhile. Section 31(1) provides that:

"Every person shall have the right to fair and safe labour practices and fair remuneration." 24

Clearly Section 31(1) introduces the public law concept of natural justice into what has traditionally been a private law domain. Wilcox CJ of the IRC of Australia states in *Nicolson v Heaven and Earth Gallery Pty Ltd* 25 that:

"The relevant principle is that a person should not exercise legal power over another, to that other person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case."

Similarly and more pointedly, Lord Reid made the following remarks in the famous case of Ridge v Baldwin:-

"The essential requirement of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations...which he has to meet." 26

Commenting on Section 31 of the Constitution, Justice Chikopa had the following edifying sentiments in *Kachinjika v Portland Cement Company Ltd*: 27

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22 Which provides that 'Every person shall have the right to fair and safe labour practices and fair remuneration.' Examples are *Nkhwazi v Commercial Bank of Malawi Ltd* HC Civil Cause No. 233 of 1999, *Magola v Press Corporation* HC Civil Cause No. 3719 of 1998 and *Kalinda v Limbo Leaf Tobacco Ltd* HC Civil Cause No. 542 of 1995.

23 See footnote no. 2 above.

24 The Constitution, the EA and the LRA do not, however, define the phrase 'fair labour practice' but it includes 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. See article by Hon. Dhaya Pillay titled The Constitutionalism of Labour Law (Comparative Analysis) in Nyirenda A. and Zibela-Banda R. Protection & Promotion of Labour Rights, A Judge's Perspective, Montfort (2006) p. 39.


"Looking at Section 31 we are of the firm view that the framers of our Constitution were aware of the common law practice where the employer could terminate an employee's employment by merely giving notice (or making payment in lieu thereof) without, unless the employer wanted to, giving any reason for such termination... it was fair labour practice at common law if the termination followed the letter of the employment contract in so far as notice was concerned...the common law position was capable of and had actually been abused...it is to counter such abuse (actual or potential), in our view, that the framers of our Constitution introduced the concept of 'fair labour practices. The objective was not to make the employees' position unduly entrenched ... but to introduce an aspect to the contract of employment that would ameliorate the harshness of the common law..."

The MSCA discussed Section 31 of the Constitution in Blantyre Netting Company Ltd v Chidzulo. The Court held that a contractual term providing that the appellant could terminate the contract by pay in lieu of notice whilst the respondent employee could not terminate the employment by pay in lieu of notice breached Section 31 of the Constitution. The Court observed that there is no end to man's ingenuity and that what had happened in the Chidzulo Case was a good example. The Court observed further at page 7 that the term in question amounted to unfair labour practice because:-

"the appellant knew that if an employee wanted to leave employment, he would, for lack of money, have no choice but to serve the three months period of notice and this would give the appellant sufficient time to find a replacement. But, when it suited the appellant, conveniently the appellant would go for the option of one month's pay in lieu of notice."

Thus even before the EA came into force, the judiciary, after the adoption of the 1994 Constitution was keen to see to it that justice was not only done but also seen to be done.

However, the unfortunate part concerns the stringent interpretation of Section 43 of the Constitution by the MSCA. The Section provides as follows:-

"Every person shall have the right to-
(a) lawful and procedurally fair administrative action, which is justifiable

in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected."

The MSCA, through the decision in Chawani v AG,20 has held that Section 43 of the Constitution only entrenches principles of natural justice, stretching the principles to include the furnishing of reasons to an employee for administrative action. This decision has the rather dubious effect that unless an employee is in the public service, he or she cannot rely on Section 43 of the Constitution to assert the rights provided therein. We agree with Chirwa30 that the Chawani Decision underestimates the significance of Section 43.

This particular holding was initially propounded by Kapanda, J. in the High Court decision of Saukila v National Insurance Company Ltd.31 The learned Judge said at page 16 of the Case that:-

"It is clear, in my judgment…that Section 43 applies to situations where there is an abuse of executive arm of government and no more. Further, it is my understanding that the said Section 43 of the Constitution is intended to provide protection to persons from potential arbitrary executive action."

On page 17 the learned Judge concluded by pronouncing that:-

"…this matter before me is a case dealing with a contract of employment between private persons in which case there is no element of public employment or service."32

However, it must be noted that there is conflicting dicta from a different High Court decision33 in response to the Chawani and Saukila Cases. Mwaungulu, J. articulated his views as follows:-

"[The Judge] stresses that Section 43 of the Constitution entrenches principles of natural justice. Certainly a right to natural justice does not

22 HC Civil Cause No. 117 of 1997.
23 See also the Judgment of Chikopa J. where a similar conclusion was reached in Kachinga v Portland Cement Company Ltd [2008] MLR 161 p. 171.
24 Kalinda v Limbe Leaf Tobacco Ltd HC Civil Cause No. 542 of 1995.
only apply, as suggested, against persons responsible for executive or administrative action. Principles of natural justice apply widely in public and private law. If...Section 43 of the Constitution entrenches principles of natural justice, the right under Section 43 cannot be constricted in the manner suggested."

He intimated that he had left the argument for future consideration. He however was content that the trend is to incorporate natural justice in employment situations. With due respect to the MSCA, the views of Mwaungulu, J. seem more plausible than those of the MSCA.

The IRC also concurs with Justice Mwaungulu, that the MSCA current stand on Section 43 is wrong in law. In fact the IRC had previously held, in Nyasulu v Southern Bottlers Ltd, among other cases, that the termination of a contract by the respondent was unfair on the basis of Section 43 of the Constitution in that the applicant was not accorded a chance to be heard before his contract was terminated. The IRC reached this decision regardless of the fact that the respondent herein was not a public body.

It must be appreciated that the contention on the applicability of Section 43 to private contracts made a lot of sense at that time because the EA had not yet come into force. The Courts were left with the daunting task of searching for constitutional provisions which promoted fair labour practices taking into consideration that the rest of the disjointed labour legislation then in place, fell short of promoting the much sought after fair labour practices in tandem with the newly assumed constitutional order. Currently, the EA itself provides similar requirements to those under Section 43 of the Constitution in Section 57.

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35Views of Hon Mkindawire, the then Chairperson of the IRC in Ngwenya and Gondwe v Automotive Products Ltd IRC Matter No. 180 of 2000 commenting on the Sakuila Case.
36IRC Matter No. 48 of 2000.
37Historically, the marriage between labour law and administrative law was one of convenience. Where labour law was lacking, administrative law filled the void. Now the right to fair labour practices has been constitutionally entrenched and underpinned by legislation- per Hon. Dhaya Pillay, The Constitutionalism of Labour Law (Comparative Analysis) in Nyirenda A. and Zibelu-Banda R. Protection & Promotion of Labour Rights, A Judge's Perspective, Montfort (2006) p. 40.
38See footnote no. 2 above.
39This Section is discussed in detail under Chapter Two on Discipline and Dismissal.
III. DEFINITION OF AN EMPLOYEE

The EA\textsuperscript{40} and the LRA\textsuperscript{41} define an employee as a person who offers his services under a contract of employment or any person who performs work or services for another person for remuneration or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence, and under an obligation to perform duties for that person more closely resembling the relationship of employee than of an independent contractor.

Take note that the definition makes no distinction between a permanent employee and one on probation\textsuperscript{43} or a casual worker or a seasonal worker. In \textit{Gama and Others v Dimon (Mw) Ltd}\textsuperscript{45} the Court took judicial notice of the fact that the tobacco industry uses seasonal labour. It observed that seasonal employment belongs to the category of contracts for a specific task. To that, we add a rider, that Section 43 of the EA provides that where an employee is engaged in an undertaking in which it is customary to employ some employees only at certain seasons of the year and an employee is employed for successive seasons, the employee shall be deemed to have been continuously employed for the aggregate of all the time he has actually performed work for the same employer for continuous seasons.

This discussion illustrates that both the EA and the LRA envisage a distinction between an employee and an independent contractor. In fact employment law as dealt with in the statutes and in this Book concerns the employee and not an independent contractor.

The distinction between an employee and an independent contractor is an inquiry of common-law. The distinction is the same as that encountered in the law of torts.

The worker who has a contract of employment is called an employee. In rather obdurate terms this relationship between the employer and the employee is referred to as the contract of master and servant. This is a contract of service as distinguished from a contract for services under which a self-employed person works i.e. an independent contractor.\textsuperscript{46}

At common law, there are at least three tests, which are used to determine employee status.\textsuperscript{47} These tests were considered by the IRC in \textit{Simango v Blantyre News Papers Ltd}\textsuperscript{48} where the Court determined that the applicant was an employee rather than a consultant as argued by the respondent.

\textsuperscript{40}Section 3.
\textsuperscript{41}Section 2(1).
\textsuperscript{42}For a fuller discussion of who an employee is see the following judgments: \textit{Chiwembe and Others v Dairibord Malawi Ltd} [2008] MLLR 145, \textit{Chiwembe v Ibrahim Cash n’ Carry} [2008] MLLR 385, \textit{Kondjoe v Malawi Housing Corporation} [2008] MLLR 433 and \textit{Masango v Field Publishing of South Malawi Field of the Seventh Day Adventist Church} IRC Matter No. TO 25 of 2009 where the IRC held that the applicant was a volunteer rather than an employee.
\textsuperscript{43}See \textit{Stoba v Malawi Revenue Authority} IRC Matter No. 113 of 2002.
\textsuperscript{44}A casual worker is not defined in the EA but is understood as a worker who is free to decide whether or not to work and the person he works for can decide whether or not to hire him. See Silwewe R, \textit{Labour Law in Malawi}, Lexis Nexis (2010) p. 67.
\textsuperscript{45}Matter No. IRC 2 of 2001.
\textsuperscript{48}[2008] MLLR 145.
A) Control Test

Since it was in the context of vicarious liability that the Courts first considered who was an employee, it was natural that they saw its touchstone as whether the master controlled or had the right to control not only what the worker did but also the manner in which he did it. The control test was applied by the High Court in *Chiwemba & Others v Dairibond Malawi Ltd.* In that case, the plaintiffs were employed as bicycle vendors selling the defendant's products. They were seeking the Court's determination on whether under Sections 3 and 43 of the EA they were employees of the defendant and so entitled to rights under Section 31 of the Constitution. The Court held that the fact that their wage was called a commission did not make them independent contractors. The Court considered that the plaintiffs were in a position of economic dependence and under an obligation to perform duties for the defendant under the defendant's control.

B) Integration Test

In *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans*, Denning LJ considered that the decisive question was whether the person under consideration was fully integrated into the employer's organisation. This came to be called the Integration Test.

C) Economic Reality Test

The Courts have now recognized that no one test or series of criteria can be decisive. Instead they have adopted something like the American notion of the 'Economic Reality' composite test. For a clearest illustration of this test, see the judgment of McKenna J. in *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance*.

In that case McKenna J. identified three conditions for a contract of service:

1. The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in performing some service for his master;

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50 [2008] MLR 145.
52 See also *Bank Voor Handel en Schepenzaal NV v Stafford* [1953] 1 Q.B. 248 and *Bellef v Prestrom Limited* [1973] 1 All ER 241.
53 See *USA v SUIK* (1946) 331 US 704.
(2) He agrees that in performance of that service he will be subject to the other's control in a sufficient degree to make that other master;
(3) The other provisions of the contract are consistent with it being a contract of service.

On the facts of that case, his Lordship decided that the workers were independent contractors, most particularly because the third test was not satisfied since most of the terms pointed to a contract for services - rather than a contract of service.

In conclusion therefore, it has been observed that the term 'employee' is not as simple as it appears at first sight; it has no workable statutory definition. Its practical definition therefore depends on circumstances of each case taking into consideration the three common law tests.

**IV. DEFINITION OF AN EMPLOYER**

The **EA**\(^55\) and the **LRA**\(^56\) define an employer as any person, body corporate, undertaking, public authority or body of persons who or which employs an employee and includes heirs, successors and assignees of the employer; or where appropriate, a former employer. The definition is more encompassing in order to protect employees in situations such as transfer of an undertaking.\(^57\)

Situations may arise where the identity of an employer is in dispute; for example, where a purported employer is 'an empty legal shell stripped of its assets' while the real power of decision-making and the ability to pay wages rests with another company or person. Under such circumstances it has been argued, 'the company or other person or persons who have control of the undertaking in which the worker is employed' should be regarded as the employer.\(^58\)

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\(^{55}\) Section 3.

\(^{56}\) Section 2(1).

\(^{57}\) See Section 32 of the EA below.

\(^{58}\) Hepple, The Crisis in EEC Labour Law (1987) ILJ (UK) 77. This is comparable with lifting the veil of incorporation under Company Law. See also the South African Labour Appeal Court decision in *Camdons Realty (Pty) Ltd v Hart* (1993) 14 ILJ 1008 (LAC),
V. JURISDICTION OF THE COURTS

The Black's Law Dictionary defines jurisdiction as:-

"The power of the Court to decide a matter in controversy and presupposes the existence of a duly constituted Court with control over the subject matter and parties. Jurisdiction defines the powers of Courts to inquire into facts, apply the law, make decisions, and declare Judgment. The legal right by which judges exercise their authority. It exists when a Court has cognizance of the class of cases involved, proper parties present, and the point to be decided is within the powers of the Court. Power and authority of a Court to hear and determine a judicial proceeding; power to render particular judgment in question. The right and power of a Court to adjudicate concerning the subject matter in a given case."

According to Jowitz Dictionary of English Law

"Jurisdiction may be limited either locally, as that of a County Court, or personally, as where a Court has a quorum, or as to amount, or as to the character of the questions to be determined... a Court is said to have original jurisdiction in a particular matter when that matter can be initiated before it; while a Court is said to have appellate jurisdiction when it can only go into the matter on appeal after it has been adjudicated on by a Court of first instance."

A. The High Court and the IRC

There has been an apparent jurisdictional struggle as regards labour matters between the High Court system and the IRC. The question is whether the IRC has 'exclusive' jurisdiction over labour matters such that all labour related matters ought to be commenced in the IRC and if this is not so whether there should be a deliberate policy to let all labour matters begin in the IRC.

It is indisputable that the High Court has 'unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.' Again that the IRC is subordinate to the High Court is incontrovertible. Section 110(2) of the Constitution says that:-

"There shall be an Industrial Relations Court, subordinate to the High Court, which shall have original jurisdiction over labour disputes and such other issues relating to employment... (Emphasis supplied)"

59 See also the article by Kalekeni Kaphale entitled On the Jurisdiction Bifurcation in Labour Disputes in Malawi at page 56 of Zibelu-Banda R. Sources and Institutions of Labour Law in Malawi, Montfort (2008).
60 Abridged, Sixth Edition.
62 According to Section 108(1) of the Constitution.
The High Court does not have a uniform approach regarding the question of jurisdiction over labour disputes between the High Court and the IRC.\(^63\) The first approach is where the issue on jurisdiction is not raised or considered and matters have been heard and disposed of.\(^64\) The second is where the High Court has dismissed Originating Summons and directed that such matters should start afresh in the IRC.\(^65\) The last approach condemns the outright dismissal of such matters, but suggests, where no complications will arise, mere transfer of such matters to the IRC.\(^66\)

Out of this there have emerged two conspicuous schools of thought in the High Court system. The first will be referred to as the 'Kapanda School of thought,'\(^67\) which propounds that labour matters ought to be commenced in the IRC. Justice Kapanda cites several reasons why this should be so. They range from jurisprudential, evidential as well as economic reasons and the creation of an environment that helps in the development of a specialized Court.\(^68\) It goes without saying that the IRC itself supports this view.\(^69\)

The second is the 'Mwaungulu school of thought', which argues that a person should have the liberty of commencing a labour matter in any Court of his or her choice.\(^70\) Nevertheless this school avers that the High Court may transfer the matter to a subordinate Court either of its own motion or on the application of any of the parties.

Some of the reasons for this view are that the phrase that the IRC has 'original jurisdiction'\(^71\) should be interpreted to mean no more than that the IRC has no appellate jurisdiction and not that it has 'exclusive' jurisdiction over labour

\(^65\) For instance Kamphoni v Malawi Telecommunication Ltd HC Civil Cause No. 684 of 2001.
\(^66\) For instance Malawi Telecommunication Ltd v Malawi Posts and Telecommunication Corporation Workers' Union HC Civil Cause No. 2721 of 2001.
\(^68\) See Kapanda J. Of Soreness Allowance and Jurisdictional Issues (Unpublished). See also Thompson v Leopold Def Malawi Ltd [2008] MLR 291 where Hon. Kapanda having decided the case advised that the matter ought to have been commenced in the IRC and since the IRC does not award costs (per Section 72 of the LRA) he declined to award costs.
\(^69\) See Pietros v Standen Aviation Services IRC Matter No. 11 of 2001.
\(^70\) See Section 41 of the Constitution about access to justice and legal remedies.
\(^71\) See HC Civil Cause No. 84 of 2011 p. 5 of the transcript.
\(^72\) See Hon. Mwaungulu’s judgment of Malawi Telecommunication Ltd v Malawi Posts and Telecommunication Corporation Workers’ Union HC Civil Cause No. 2721 of 2001 and Hon. Kamwambwa’s judgment in Mambila v Sugar Corporation of Mau HC Civil Cause No. 1701 of 2001 where he said he does not know of any law that prevents a labour matter from going to the High Court as a Court of first instance. In the recent South African case of Boxer Superstores Mlathu v Nhlapa (2007) ZASCA 79 it was held that the South African LRA remedies against conduct that may constitute an unfair labour practice are not exhaustive of the remedies that may be available to employees in the course of the employment relationship. Thus where one formulates their pre dismissal hearing claim as a common law wrongful or unlawful termination claim, the same ought to be heard in the High Court as it is not couched as a strict unfair dismissal claim. We think this approach is pedantic and unnecessarily rigorous and we urge our Courts not to follow it.
\(^73\) This appears rather incorrect since the IRC has jurisdiction over contractual issues in labour matters—See generally Part V of the EA. Section 35 of the Constitution.
matters. Further, Labour Law actions involve contractual rights over which the IRC has no jurisdiction but the High Court and the Magistrates' Courts. The IRC may also encounter jurisdictional constraints where constitutional rights such as the right to academic freedom and freedom of conscience and the right to education are in issue as was the case in *Council of the University of Malawi v Kabwila-Kapasula and Others.*

Another reason is that the IRC has no jurisdiction over torts such as that a man may not induce another to terminate a contract. Again subordinate Courts in Malawi do not exercise equitable jurisdiction and the IRC being a subordinate Court cannot grant equitable remedies. Lastly the employer is not given congruent rights under the EA and the LRA to sue in the IRC, for instance for wrongful termination but can properly do so in the High Court and the Magistrates' Courts.

Similar issues were raised in the Canadian case of *Calgary Health Region v Alberta (Human Rights and Citizenship Commission).* It was reasoned that where the choice of forum is between two competing statutory regimes, the intent of the legislature remains the paramount consideration, and depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction. The case further holds that there is no legal presumption of exclusivity in abstracto. Rather the question in each case is whether the relevant legislation applied to the factual context in the dispute at issue establishes that either tribunal has exclusive jurisdiction over that dispute.

Applying the above interpretation, Kaphale concludes that the IRC has not been given exclusive jurisdiction in labour and employment matters either by the Constitution itself or the EA or LRA. Indeed as observed in *Khawela and Others v Standard Bank Ltd* the provisions of the EA as well as the LRA that grant the IRC jurisdiction in labour matters state that the matter 'may' and not 'shall' be referred to the IRC. The exclusivity of jurisdiction cannot be discerned in vacuo. The MSCA observed in *Kaundama v AG* that the

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72 Section 33 of the Constitution.
73 Section 25 of the Constitution.
74 See HC Civil Cause No. 84 of 2011 p. 5 of the transcript.
75 This was pointed out in *Liquidator, Import and Export (Mw) Ltd v Kankhunganwa and Others* [2008] MLLR 219 p. 234, however in *Mwela v Shire Bau Limes Ltd* IRC Matter No. 274 of 2004 the IRC indicated that it has inherent jurisdiction to entertain an application of stay of proceedings as it is a Court of equity: a view we agree with.
76 2000 ABCA 120.
77 On the Jurisdiction Bifurcation in Labour Disputes in Malawi at page 76 of Zibelu-Banda R. *Sources and Institutions of Labour Law in Malawi, Montfort* (2008).
80 [2008] MLLR 195.
exclusive jurisdiction of the National Compensation Tribunal granted to it under Section 138(1) of the Constitution is an exception to the general rule under Section 108(1) of the Constitution. We suggest that no such express exclusivity provision exists in either the Constitution or the EA or LRA relating to the IRC. This clearly means that the IRC and the High Court have concurrent jurisdiction over labour matters.

During the 2005 Constitutional Review, the MCTU and the IRC itself made a proposal that the IRC's status should match that of the High Court. The argument was that cases take too long once an appeal has been made by the employer from the IRC to the High Court thereby inconveniencing the poor worker. The IRC and MCTU therefore saw that the solution to these problems is by providing that no appeals should lie from the IRC to the High Court but directly to the Supreme Court.

The Law Commission has rejected these arguments and has concluded that a solution may lie in the creation of a division of the High Court specializing in labour matters.

The Commission's position is similar to that advanced by the High Court in *The State and Malawi Development Cooperation Ex parte Nathan Mpinganjira*. In that decision the Court opined that allowing all employment cases to commence in the High Court would deny litigants a tier of appeal. It was concluded that to deny a litigant a tier of appeal in the Court system amounts to a denial of access to justice - a breach of Section 41 of the Constitution.

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81. MSCA Civil Appeal No. 43 of 2000.
82. The concurrence of jurisdiction in labour matters is not a new phenomenon. It exists between the Labour Court and the High Court in South Africa though both Courts are of equal status. See *Langenholt v Vryburg Traditional Local Council* (2001) ZALC 11. It exists in Canada as well. See the landmark decision of the Supreme Court of Appeal of South Africa in *Pedlile Assurance Ltd v Wolfaardt* [2001] 12 BCLR 1301 and *Calgary Health Region v Alberta (Human Rights and Citizenship Commission)* 2000 ABCA 120. In the USA, State Courts and Federal Courts have shared some concurrent jurisdiction in labour disputes. See *Mac Carroll v Los Angeles County District Council of Carpenters*, AFC, 315, P. 2d 322 (Cal. 1957).
83. Zibelu-Banda argues that studies have shown that many countries in the SADC region have their Labour Courts at High Court level.
84. According to an interview between a Nation Newspaper reporter and Mr Austin Kalimanjira, the Secretary General of MCTU in the Nation of 10th January 2006, page 1 of the Political Index pull out.
87. Similar sentiments were expressed by Justice Manyungwa in *Chimbha v Malawi Housing Corporation* [2008] MLR 136 where an application by the defendant to transfer the matter to the IRC was granted on two grounds; first that the IRC does not award costs save in very limited circumstances and second that the parties would have more avenues to pursue the matter in the event that there is an appeal. The judge was of the further opinion that the application to transfer the matter would be made at any time even during the hearing of the matter.
Lower Courts have implored both the legislature\textsuperscript{88} and the MSCA\textsuperscript{89} to make a final pronouncement on this tussle for jurisdiction; unfortunately neither of them has come out clear, therefore suffice it to say that the controversy remains with us for the moment till such authoritative statement.\textsuperscript{90} In \textit{Mkandawire v Council of University of Malawi}\textsuperscript{91} the 'Constitutional Court'\textsuperscript{92} ruled in favour of commencement of labour related disputes in the IRC. Transferring the matter to the IRC, the learned Justice Mkandawire, delivering a unanimous decision, had the following imperative remarks at page 67:-

"Much as we do appreciate that we have unlimited original jurisdiction, but such jurisdiction is not limitless especially where the Constitution has deliberately put in place an institution such as the IRC to determine employment related matters as a Court of first instance. As a High Court, we feel that we should come in as an appellate Court…"

The foregoing dictum is quiet elucidating despite that the 'Constitutional Court' is a part and parcel of the High Court; this is the more reason why the MSCA needs to make a final pronouncement on the current jurisdictional tussle.

It is good to know that, the 'Mwaungulu school of thought', though technically correct, is in a minority and very few decisions on the issue of jurisdiction seem to follow this school. The 'Kapanda school of thought' has held sway in a majority of cases and this appears more plausible to us. However, we concur with Banda,\textsuperscript{93} that it still remains a dangerous terrain to leave matters as they are. The inconsistencies are bad for the development of Labour Law; they confuse litigants and create unnecessary anxiety in litigants regarding whether their matter will be thrown out of the High Court or it will be entertained with costs or without costs and similar other concerns. From the author's litigation experience, this has more often than not led to 'judge or forum shopping'.\textsuperscript{94} We need not emphasize that the practice of judge or forum shopping is unethical and harmful to the development of the law and

\textsuperscript{88} For instance see Stancom Aviation Services v Pieterse HC Civil Appeal No. 28 of 2002.

\textsuperscript{89} For instance see Chimunya v Old Mutual Life Assurance Co. Ltd HC Civil Cause No. 2559 of 2002.

\textsuperscript{90} See also sentiments of Unyolo J in Mungomo v Mungomo and Others [1997] 1 MLR 474 p. 479 suggesting that the Constitution envisages that the High Court will defer original jurisdiction of certain designated matters to other specialised Courts as assigned by the same Constitution and other laws.

\textsuperscript{91}[2008] MLR 63.

\textsuperscript{92} Section 9(2) of the Courts Act Cap 3:02 of the Laws of Malawi states that 'Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.' This is loosely referred to as the 'Constitutional Court' and this arrangement was recommended by the Law Commission against setting up a separate Court all together as is the case in South Africa and other jurisdictions. See the Report of the Law Commission on the Review of the Constitution No. 18 of August 2007 p. 112.

\textsuperscript{93}Sources and Institutions of Labour Law in Malawi, Montfort (2008) 54.

\textsuperscript{94} According to David C. Steelman, [see http://www.nesconline.org/wc/publications/KIS_JudAgnMemoPub.pdf] "judge shopping" is an effort by a lawyer or litigant to influence a Court's assignment of a case so that it will be directed to a particular judge or away from a particular judicature. The adversary usually does this to gain partisan advantage in a case (e.g. to steer it to a judge who is likely to impose a more lenient sentence in a criminal case, or who is seen to be more oriented toward plaintiffs or defendants on certain issues in a civil case). It may also be done to assure that a case is assigned to a judge who is seen to have the knowledge, skills and ability to deal with a particular kind of case, regardless of how he or she may ultimately decide it.
dispensation of justice in general.95

B. Magistrates’ Courts

Magistrates’ Courts do not generally have jurisdiction over labour matters. However the Chief Resident Magistrate Court is given jurisdiction over worker's compensation issues.

The Workers' Compensation Act (WCA)96 provides for compensation for injuries suffered or diseases contracted by workers in the course of their employment or for death resulting from such injuries or diseases. It provides for the establishment and administration of a Workers' Compensation Fund and for matters connected therewith or incidental thereto.

The Act establishes the office of the Commissioner for Workers' Compensation97 who is empowered to make orders, decisions and final determinations on any question or disputes brought to him under the WCA.

Under the WCA the Chief Resident Magistrate Court is given appellate jurisdiction to hear appeals in disputes involving occupational injuries and diseases.98 The appeal lies from a decision of the Commissioner for Workers' Compensation. This shows that the Magistrate Courts do not have original jurisdiction to hear labour matters under the WCA. Elsewhere, it has been argued that Magistrates' Courts may entertain labour matters under the EA since the IRC does not have 'exclusive' or 'unlimited' jurisdiction.99 We, unreservedly disagree with this view considering that a specialised Court, the IRC, was established with the function of settling labour disputes.

C. The Office of the Ombudsman and the Courts

The office of the ombudsman100 has at times dealt with labour issues. It must be observed that the office of the Ombudsman does not have the jurisdiction to handle labour disputes as illustrated below.

Section 5 of the Ombudsman Act101 embraces the traditional role of the Ombudsman in dealing with matters of maladministration occasioned by public bodies or officers in the employ of such bodies. Further, the MSCA in Air Malawi Ltd v Office of the Ombudsman102 emphasized the traditional role of the Ombudsman and concluded that the Act aptly defines the jurisdiction of the Ombudsman.

95 These practices are punishable under Chapter One and Nineteen of the Malawi Law Society Code of Ethics, adopted by the Malawi Law Society General Meeting on 4th March 2006.
96 Cap 55:04 of the Laws of Malawi.
97 Section 35.
98 Section 44.
99 The role of the Magistrates’ Courts in labour matters was discussed by Justice Mwaungulu in Malawi Telecommunications Ltd v Malawi Posts and Telecommunications Workers Union HC Civil Cause No. 2721 of 2001 and Justice Manyungwa in Chilemba v Malawi Housing Corporation [2008] MLLR 136.
100 Created by Section 120 of the Constitution.
101 Cap 34:07 of the Laws of Malawi.
102 MSCA Civil Appeal No. 1 of 2000.
In Trustee of Malawi against Physical Disabilities v State and the Office of the Ombudsman, Mwaungulu J. summed up the role of the Ombudsman and other Human Rights bodies as follows:-

"There are constitutional limitation to the spheres of Human Rights Commission and the Ombudsman power. The Constitution sets the parameters within which the Ombudsman will operate and restricts the remedies the Ombudsman can offer. The Ombudsman must bear these considerations when assuming jurisdiction. This is more important because under the Constitution the citizen is entitled to an effective remedy. The citizen's decision or choice to go to the Ombudsman never abrogates the right."

In conclusion and among other determinations, the Court held that the matter was not res judicata and the Ombudsman's determination never ousted the jurisdiction of the Courts. The complainant, Mr Chiutsi had complained to the Ombudsman that he had been unfairly dismissed. The Ombudsman heard the matter and ordered reinstatement. The employer sought judicial review of the Ombudsman's determination that under Section 123(2) of the Constitution, the Ombudsman had no jurisdiction to handle the matter. The Court held in favour of the employer. The complainant then lodged his case with the IRC where, in a twist of events, it was held that the complainant had been fairly dismissed for absenteeism.

According to Zibelu-Banda, this is a clear manifestation of inconsistencies between one institution's finding and another determination, which the law tries to avoid by demarcating powers of institutions, to encourage specialization and professionalism.

That notwithstanding, we appreciate that the IRC will assist an employee who has been to the Ombudsman but without a remedy. Thus in Saukila and Another v Malawi Telecommunications Ltd the applicant had a Determination from the Ombudsman for re-instatement but the respondent refused to reinstate him. The IRC ordered compensation.

103 HC Misc. Civil Cause No. 22 of 2001 at pages 12-13 of the transcript.
104 It is argued that the Ombudsman's decisions are not res judicata before Courts because the Ombudsman is not a competent Court of law- See Zibelu-Banda R, Sources and Institutions of Labour Law in Malawi, Montfort (2008) 20.
107 IRC Matter No. PR 486 of 2010.
108 Issues of whether the IRC had jurisdiction in the circumstances were not addressed as it would appear in our view that the IRC could only assume jurisdiction upon a direction of the Ombudsman to adjudicate on an issue or on the quantum of compensation in terms of Section 126(c) of the Constitution or reference to the AG under Section 8(1)(b)(3) of the Ombudsman Act Cap 3:07 of the Laws of Malawi, who would in turn take up the matter with the IRC. We however suggest that this aspect needs further investigation.
D. The Malawi Human Rights Commission

The Human Rights Commission is established under Section 129 of the Constitution with the primary function of protecting and investigating violations of human rights. The Commission has powers of investigating and making recommendations as are reasonably necessary for the effective promotion of human rights. However, the Commission is specifically prohibited from exercising judicial or legislative functions.

This means that the Commission and indeed the many other human rights organisations, in form of non-governmental organisations, may only protect human rights, carry out investigations and make recommendations and no more. Thus a party who opts to file their labour case with such institutions does so at their own peril should they not get an effective result.

That said, the Commission and other human rights organisations do play an important role in fulfilling the agenda of access to labour and employment justice especially in the field of Alternative Dispute Resolution.

V. LIMITATION PERIOD

Labour matters must be brought before the Courts before the expiry of 6 years. This is the general limitation period provided for contracts under the Limitation Act. There is though a contention that labour matters ought to have had a tighter limitation period, say 90 days, as is the case in England and Wales. This would in turn facilitate fair disposal of labour matters. Under the current regime best evidence is lost through poor record keeping and death of material witnesses leaving the Court with hearsay evidence. It has also been accepted that:-

"Employment is fluid; it may be here today and gone tomorrow because of several factors including winding up, death and bankruptcy." 114

109 Section 130 of the Constitution and the Human Rights Commission Act Cap 3:08 of the Laws of Malawi, which provides in Section 12 that 'the Commission shall be competent in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.'

110 Banda v Malawi Motors Ltd IRC Matter No. 33 of 2004.


112 Cap 6:02 of the Laws of Malawi Section 4(1)(a), see also Chikwemhunya v CFM Malawi Ltd IRC Matter No. 571 of 2009 and Mazengola v Malawi Cargo IRC Matter No. 48 of 2003 where the claims were dismissed for being statute barred.


In *Lupenga v Illovo Sugar (Malawi) Ltd*\(^{115}\) the applicant was dismissed in 2004 but took legal action in 2007. The applicant could not explain the delay and so the matter was dismissed for inordinate delay. The structure and time limits for filing appeals and labour claims in Malawi is as follows; first- the MSCA- 6 weeks;\(^{116}\) second- the High Court- 30 days;\(^{117}\) third- IRC-14 days;\(^{118}\) fourth- Chief Resident Magistrate Court-30 days;\(^{119}\) lastly- Labour Office- 90 days.\(^{120}\) It has been correctly said that:-

"Statutes of limitation are conservators without which society cannot wholly govern. They are founded on grounds of public policy and give effect to two maxims: first - *reipublicae ut sit finis litium* (the interests of the State requires that there should be a limit to litigation). Second- *vigilantibus non dormientis jura subveniunt* (the laws aid the vigilant and not those who slumber). They exist to prevent oppression; to protect individuals from having to defend themselves against claims when basic facts have become obscure with the passage of time.\(^{121}\)

The Courts will therefore see to it that matters are commenced on time, depending on the type of dispute and the Court ordinarily seized of that matter.

\(^{115}\) IRC Matter No. 88 of 2007.

\(^{116}\) Section 23(1)(b) of the Supreme Court of Appeal Act Cap 3:01 of the Laws of Malawi.

\(^{117}\) Section 65(2) LRA, Section 51(c) of the WCA.

\(^{118}\) Section 76(2), 44(4) of the LRA.

\(^{119}\) Sections 35(8);56(7);62(3) of the EA.

\(^{120}\) Section 35(8) of the EA.

\(^{121}\) Per Stambolie v Commissioner of Police 1989 (3) ZLR (S) per Gubbay J.A.
Chapter Two: INDIVIDUAL LABOUR RIGHTS

I. INTRODUCTION

The Employment Act 2000 (EA)\textsuperscript{122} aims at establishing, reinforcing and regulating minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice and matters connected therewith and incidental thereto. The EA domesticates some of the provisions of the ILO Convention 158 Concerning Termination of Employment at the Initiative of the Employer.\textsuperscript{124} The majority of labour and employment cases both in the High Court and the IRC involve the application of this Act.\textsuperscript{125} This Chapter examines some of the provisions of the EA.

II. APPLICATION OF THE ACT

According to Section 2 of the Act, the Act applies to the private sector and the Government, including any public authority \textsuperscript{126} or enterprise. However the Act does not apply to members of the armed forces, the prison service or the police, save those employed in their civilian capacity.\textsuperscript{127}

III. FUNDAMENTAL PRINCIPLES OF EMPLOYMENT LAW

A) Prohibition of forced labour \textsuperscript{128}

Forced labour is defined in Section 3 of the Act as any work or service that is exacted from any person under the threat of any penalty and is not offered voluntarily.

\textsuperscript{122} Cap 55:02 of the Laws of Malawi.
\textsuperscript{123} Preamble to the Act.
\textsuperscript{125} Ibid p. 19.
\textsuperscript{126} For example in *Mkundawire v Council of the University of Malawi* [2008] MLLR 63 the respondent was a public (statutory) body therefore the Act was applicable.
\textsuperscript{127} The armed forces are governed by the Defence Force Act Cap 12:01 of the Laws of Malawi, the Prison service is governed by the Prisons Act Cap 9:02 of the Laws of Malawi and the police is governed by the Police Act Cap 13:01 of the Laws of Malawi.
\textsuperscript{128} This prohibition has historic resonance in Malawi; before colonization, Malawi occupied the supply front of the slave market; during colonization, local people were frequently subjected to forced labour by colonial administrators, especially on commercial farms through a system known as ‘Thangata’. During the one party regime, forced labour was often deployed to support the activities of the then ruling MCP. See Chirwa D, *Human Rights under the Malawian Constitution*, Junta & Co. (2011) p. 301.
A person guilty of forced labour is liable to a fine of K10,000\textsuperscript{129} and 2 years imprisonment. It must be made abundantly clear however that forced labour does not include any compulsory military service; normal communal work and work exacted from a person as a consequence of a conviction by any Court.

Further, the following circumstances do not constitute forced labour under the Act: any work or service exacted in emergency situations; consensual minor communal services; work in mines, manufacturing plants and similar undertakings.\textsuperscript{130}

B) Anti-discrimination\textsuperscript{131}

Section 5 of the Act imports Section 20 of the Constitution into the Act on anti-discrimination. The Section prohibits discrimination of an employee or a prospective employee on the grounds of race,\textsuperscript{132} colour, sex,\textsuperscript{133} language, religion,\textsuperscript{134} political or other opinion, nationality, ethnic or social origin, disability,\textsuperscript{135} property, birth, marital\textsuperscript{136} or other status. Other status is broad and may include discrimination based on various orientations and 'forced' medical and psychological tests which are generally prohibited under Section 19 of the Constitution as they undermine human dignity and personal freedom of choice.

\textsuperscript{129}Note that the Fines (Conversion) Act Cap 08:06 of the Laws of Malawi provides for the conversion of amounts of existing fines for offences expressed in Kwacha or in pounds to penalty values so as to take into account the depreciation of the value of the Malawi currency.

\textsuperscript{130}See generally Section 3 of the EA.

\textsuperscript{131}See also the ILO Convention Concerning Discrimination in Respect of Employment or Occupation 1958 No. 111 and the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) (1989) and cases of \textit{Juma v AC} [2008] MLR 391, \textit{Nkicha v Continental Discount House Ltd} [2008] MLR 472 on issues of sexual harassment, \textit{Mphiri v Small Holder Coffee Farmers Trust} [2008] MLR 482 and \textit{Kamubwa v Office of the Ombudsman} [2008] MLR 418 where the Court observed that both the ILO and CEDAW consider acts to constitute sexual harassment when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruitment, promotion, or when it creates a hostile working environment.

\textsuperscript{132}See \textit{Banda v Demon (Mur)} Ltd [2008] MLR 92.

\textsuperscript{133}See \textit{Kamwenda v Mulombe Girls Secondary School} [2008] MLR 446 where the applicant was dismissed due to her husband’s resignation where both were working for the respondent. The IRC held that the effect of the respondent’s decision was to prevent married women from seeking and sustaining employment in their own right. See also Article 11 of the CEDAW (1989) to which Malawi is a signatory.

\textsuperscript{134}In \textit{Mndena v Continental Discount House Ltd} IRC Matter No. PR 03 of 2005 the IRC rejected the applicant’s claims that she was discriminated against on the ground of her religion when she was dismissed from employment having failed to report for work on a Saturday. The Court observed at page 6 that the applicant would have proved discrimination if other members were allowed to attend their churches while she was not.

\textsuperscript{135}See \textit{Mlaho v Automotive Products Ltd} [2008] MLR 452. The Disability Act of 2012 takes into account the provisions of the United Nations Convention on People with Disabilities ratified by Malawi on 27th August 2009. This Convention goes at length in obliging parties to uphold and realise the rights of people with disabilities. In particular Article 27 on work and employment provides as follows; “1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to \textit{inter alia} (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions...” see \url{http://www.ozida.govt.sz/ozisalima/convention.pdf} and \url{http://www.un.org/disabilities/countries/} (last accessed 24/08/12).

\textsuperscript{136}See \textit{Mwanamanga v Malamulo Mission Hospital} [2008] MLR 457 where the applicant was dismissed for entering into a polygamous marriage and the Court awarded him compensation and \textit{Matipwiri v National Initiative for Civic Education} IRC Matter No. 150 of 2008 where the Court said that having sexual relationships in itself cannot be a valid ground for dismissal unless the employer was able to show that it negatively affected the operations of the organisation. ‘...it is acceptable that a man may marry more than one wife. Most marriages begin with a love affair and therefore it would be a violation of an individual’s right to marry and found a family under Sections 22 (3) and (5) of the Constitution 1994 if he was denied a right to have a love relationship’. It is thought that this dilemma applies to love relationships between employees. Some employment contracts however require that such a relationship be disclosed to the employer and others may legally and reasonably so prohibit such relationships, a good example being the military serve, as the work morale may be compromised.

\textsuperscript{137}Such as HIV/AIDS status as was the case in \textit{Banda v Lokha} [2008] MLR 338 where the applicant was dismissed, having gone for HIV Voluntary Counseling and Testing and having tested positive. The dismissal was held to be unfair and discriminatory. The reader must note that the Law Commission has since come up with the HIV/AIDS (Prevention & Management) Bill. See also Zibela-Banda R. HIV/AIDS Discrimination in the World of Work: Legal Instruments for Judicial Use, Montfort (2009).
A person guilty of discrimination is liable to a fine of K10,000\textsuperscript{138} and 2 years imprisonment.

Considering past instances of discrimination world-over, anti-discrimination laws tend to apply internationally through various treaties such as the African Charter and ILO Convention 111 on Discrimination in Respect of Employment and Occupation.\textsuperscript{139}

Thomas Kibling\textsuperscript{140} comments on three forms of discrimination:-

1. \textit{Direct Discrimination} whereby an employee is treated differently from another because of his or her race, sex or marital status, among others. Here the question is 'had this employee been of a different race or sex, would the employer have treated him or her the same way?' There is generally no defence to direct discrimination.

2. \textit{Indirect Discrimination} is occasioned where an apparently neutral requirement or condition is applied, but employees of a certain race or sex are less able to meet the requirement. An example is where an employer requires all employees to be over six feet tall. Women would be disproportionately less able to meet this requirement. Indirect Discrimination may be justified and its justification is usually a question of fact. For instance, the military reasonably requires persons of a certain minimum height in its service.

3. \textit{Victimization} \textsuperscript{141} occurs where an employee is treated differently because he or she has previously complained of discrimination, given evidence for another employee in a discrimination case or done any other 'protected act'.

Discrimination on the basis of sexual orientation i.e. whether one is a homosexual or not, is not explicitly prohibited in many western jurisdictions. However the pace has been set through \textit{Smith and Others v UK}.\textsuperscript{142} In that case, the European Court of Human Rights declared that the armed forces' ban on homosexuals violates the European Convention on Human Rights. In the

\textsuperscript{138} See foot note 129.
\textsuperscript{140} See Section 64. \textit{Employment Law}; Legal Action Group (2000) p. 188 - See also \textit{Mpangoi v Malawi Development Corporation} HC Misc. Civil Cause No. 63 of 2003.
\textsuperscript{141} See also Section 12 of the EA, which also prohibits victimization.
\textsuperscript{142} [1999] IRLR 734; 88 EOR 49, ECHR.
United States of America, a policy referred to as 'Don't Ask, Don't Tell' (DADT) prohibited United States military personnel from discriminating against or harassing homosexual or bisexual service members or applicants, while barring openly gay, lesbian, or bisexual persons from military service. Under the Obama administration this policy has been repealed and a permanent injunction has been granted against the DADT meaning that gay persons can now openly serve in the military.\textsuperscript{143}

Issues surrounding minority rights are yet to be contextualized in Malawi. Currently the law criminalises 'carnal knowledge of any person against the order of nature'\textsuperscript{144} which is thought to aim at gays and a 2010 amendment has criminalized lesbian activities too. That said there seems to be a strong wind blowing in favour of minority rights in general, which we support.\textsuperscript{145}

On a rather different note, it is of importance to note that in England\textsuperscript{146} and few other jurisdictions\textsuperscript{147} there is special enactment against sex discrimination. Malawi ought to follow such positive moves to ease sex discrimination at workplaces and more so HIV-related discrimination\textsuperscript{148} against employees and prospective employees, which cannot be ruled out in workplaces across Malawi.\textsuperscript{150}

General issues touching on discrimination were discussed by the IRC in the \textit{University Workers Trade Union v The Council of the University of Malawi}.\textsuperscript{150} The matter largely concerned issues of fair remuneration, discrimination in remuneration and unfair labour practices in the University of Malawi. The University categorized its workforce into: Management, Academics, Administration and Clerical and Technical Staff (CTS). In contention was a salary restructuring for all employees that took place in 2002. The applicants alleged that the restructuring was discriminatory.

\textsuperscript{143} See the Order of Judge Virginia A. Phillips of 12th October 2010 in \textit{Log Cabin Republicans v United States of America and Robert Gates Secretary of Defense} Case no. CV 04-08425-VAP (Ex).

\textsuperscript{144} Section 153(a) of the Penal Code - Laws of Malawi Cap 7:01. See \textit{R v Monger Soke and Chimbalanga Kasope} Criminal Case No. 359 of 2009 where the accused were convicted for practicing homosexual activities and sentenced to 14 years imprisonment with hard labour.

\textsuperscript{145} After all Section 20(2) of the Constitution provides that 'Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.'

\textsuperscript{146} See Sex Discrimination Act (1975).

\textsuperscript{147} South Africa has the Employment Equity Act 55 of 1998 which generally addresses issues of unfair discrimination.

\textsuperscript{148} HIV-related discrimination in the employment settings falls into three general categories (1) discrimination while seeking employment (2) limited opportunities while employed and (3) dismissal from employment - See Southern Africa Litigation Centre Series, \textit{Equal Rights for All: Litigating Cases of HIV-Related Discrimination}, September 2011 p. 10-\textit{www.manuals.southernafriclitigationcentre.org} (last accessed 30/09/12).

\textsuperscript{149} So far it is only the National HIV/AIDS Policy that is at work and in fact it is not legally binding, this means that there is more that the Government can do to arrest the problem of discrimination.

\textsuperscript{150} IRC Matter No. 46 of 2003.
The Court held as follows:-

1. Designation of categories in a work force is not discriminatory unless one is put in a wrong category;
2. Fair and equal remuneration provided for under Section 31 of the Constitution and Section 6 of the EA stresses on equal remuneration for work of equal value;
3. Not all differences in treatment constitute discrimination. Those who have higher ranks may have more privileges than others;
4. There is need for consultation in determining remuneration for those in low-income bracket. The trade union should have been involved more. The Court therefore ordered that the restructuring should be redone.

C) Equal pay

An employer is legally bound to pay employees equal remuneration for work of equal value without discrimination. As to the meaning of remuneration see generally Section 3 of the Act and the elucidating interpretation by the MSCA in *Blantyre Netting Company v Chidzulo* and *Stanbic Bank Ltd v Mtukula*. The authorities are discussed under 'Wages' below.

English law has taken a step further through the Equal Pay Act of 1970. The aim of this piece of legislation is to prevent discrimination as regards terms and conditions of employment between men and women. It is mainly intended to eliminate the clearly lower pay which has been given to women for centuries. An adoption of similar legislation in Malawi would enhance women employment rights and would be in line with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Malawi is a signatory.

D) Prohibition of child labour

Child rights are constitutionally protected under Section 23 of the Constitution. For our purposes Section 23(4) provides as follows:-

"Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to

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151 Section 54 of the Act on minimum wages was discussed.
152 Section 6 of the EA.
154 [2008] MLR 54.
157 Malawi ratified the CEDAW on 12th March 1987. Malawi is also a signatory to various SADC Protocols on Women Rights.
(a) be hazardous
(b) interfere with their education
(c) be harmful to their health or to their physical, mental or spiritual or social development."

Section 21 of the EA on the other hand prohibits employment of persons who are under the age of 14 \(^{158}\) unless it is work done at home or at a vocational school. The law views child labour as a serious offence thus a person contravening this Section is liable to a stiffer punishment of K20,000 fine \(^{159}\) and 5 years imprisonment. It will shortly become clear that the rate at which the rhetoric in the law is translated into significant and tangible realization of the rights of the child, for the Malawian child is disappointingly slow. \(^{160}\)

Admittedly, in practice, a lot of employers do have in their employment young persons, more especially in tea and tobacco estates across Malawi. \(^{161}\) Much as good law is there, the ministry responsible for labour and all stakeholders have a daunting task of seeing to it that it takes its course.

Recently the Labour Services Department, through the implementation of the ILO Child Labour Country Programme for Malawi, has managed to withdraw about 5,000 children from paid work in the tea district of Thyolo alone. \(^{162}\) The Malawi Child Labour Survey of 2002 \(^{163}\) shows that there are not less than 1.4 million child labourers in Malawi working in various sectors. This figure is pretty scaring and if no mechanisms are put in place to curb child labour the number will increase to uncontrollable levels. We observe that the law alone may not solve the problem of child labour; there is need for concerted action including civic education on the side effects of child labour to complement the existing laws.

\(^{158}\) For the purposes of Section 23 of the Constitution, a child is a person below the age of 16 years - see Section 23 (5). The Child Care, Protection and Justice Act No. 22 of 2010 also defines a child as a person below the age of 16. On the other hand, the Convention on the Rights of the Child defines a child as person below the age of 18. It is suggested that the law ought to have prescribed a uniform age for the definition of a child as the present situation presents unnecessary confusion. See also Odala V, Childhood Denied: Examining Age in Malawi's Child Law, as the Constitution 'Becomes of Age' Unpublished. A paper presented at the Malawi Constitution at 18: Constitutionalism, Diversity and Social-Economic Justice 25-28 July 2012, Blantyre.

\(^{159}\) See foot note 129.

\(^{160}\) That said, Parliament must be commended for enacting the Child Care, Protection and Justice Act No. 22 of 2010 which will go a long way in consolidating the law relating to children by making provision for child care and protection and for child justice and for matters of social development of the child and for connected matters.

\(^{161}\) This is confirmed by the National Statistics Office findings such as the Welfare Monitoring Survey 2009 which can be accessed at www.nso.malawi.net.

\(^{162}\) The Sunday Times 22nd January, 2006 p. 6.

\(^{163}\) Issued by the National Statistical Office, Zomba and dated February 2004.
IV. ADMINISTRATION OF THE ACT

One of the Principles of National Policy in the Constitution is for the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving peaceful settlement of disputes by adopting mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.164

The Ministry of Labour has a crucial role to play to ensure harmony at the work place. Harmonious labour relations in turn lead to high productivity that result in socio-economic development. To ensure this, the ministry is mandated to inspect work places, compensate injured workers and handle labour disputes.165

Section 8 of the EA requires the appointment of a Labour Commissioner and other public officers subordinate to him. These are responsible for the effective administration and application of the Act.

Among their functions are the inspection of places of work; supply of relevant technical information and advice to both employees and employers; making proposals for the review of the Act and reporting to the Minister responsible on anything appropriate.166 This is in line with the vision of the ILO. The ILO recognizes the need for member states to collect, compile and publish basic labour statistics including population; employment and unemployment; earnings and hours of work; wage structure and distribution; labour cost; consumer price indices, household expenditure; occupational injuries; occupational diseases; and industrial disputes.167

164 Section 13(1)(b) of the Constitution. Mediation ’is a process in which a neutral person helps the parties to isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs,’ conciliation means ’to reconcile or bring together, especially opposing sides in an industrial dispute’ and arbitration ’is a process in which a neutral person makes a decision on a specified range of disputed issues’. See Du Toit D, et al, Labour Relations Law, LexisNexis (2006) p. 112, 110 and 117 respectively.
165 See generally the EA, the WCA, the Occupational Safety, Health and Welfare Act Cap 55:07 of the Laws of Malawi and the LRA, respectively. See also Zibelu-Banda R. Sources and Institutions of Labour Law in Malawi, Montfort (2008) 24 ff.
166 Note that labour officers do not generally have authority to prosecute criminal offences established by the labour Acts of Parliament however the Director of Public Prosecution (DPP) has power to delegate his/her functions to them - this is proposed at page 38 and 39 of Zibelu-Banda R. Sources and Institutions of Labour Law in Malawi, Montfort (2008).
167 Convention No. 160 Concerning Labour Statistics, Article 1. It is observed that Malawi is yet to ratify this Convention nonetheless its worth need not be overemphasized! - See also www.ilo.org. Currently the National Statistics Office created under the Statistics Act Cap 27:01 of the Laws of Malawi is engaged in the collection, compilation, analysis, abstraction and publication of statistical information, which includes labour matters. See www:nso.malawi.net.
The labour officers also have an important task of receiving labour complaints and resolving them where they can or alternatively referring them to the IRC. In this way the law is deliberately promoting Alternative Dispute Resolution (ADR).

There are at least two problems faced by labour officers in performing this task of dispute resolution. First the law does not provide any procedure to be followed in conciliation and secondly the officers do not have power to impose any sanctions for non-attendance, neither are any of their decisions binding on the parties. For that reason, some labour officers have resorted to referring every dispute to the IRC, without attempting to resolve the same through conciliation. This has the effect of rendering the whole conciliation process nugatory.

The EA does not distinguish the dispute resolution mechanism between public servants and other private workers. Under the LRA a dispute involving government, public authority or a commercial enterprise in which government has a controlling interest must be referred to a conciliator other than a labour officer. This is aimed at avoiding conflict as labour officers are government employees.

In the interest of the promotion of ADR, it would be ideal to empower labour officers in labour mediation and arbitrations that people can resolve some of their cases outside Court settings. This would reduce congestion in the Courts and would provide a system a little similar to the Republic of South Africa’s Commission for Conciliation Mediation and Arbitration and the United Kingdom’s Central Arbitration Committee. We are alive to the fact that the LRA IRC (Procedure) Rules 1999 provides for pre-hearing conference and conciliation, however the effect of pre-hearing conferences has been mainly to streamline issues because rules of conciliation are not developed and further parties go to Court for adjudication and not negotiation.

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170 Labour officers have nonetheless established a 5 step procedure for dispute resolution. The first step is to interview the complainant and obtain a signed statement. The second is submission of the allegation to the employer for comments and the employer is requested to report for a joint discussion/mediation. The third step is where the employer does not comply with step two, three more letters are sent to him before the matter is referred to the IRC. Step four, where parties present themselves for mediation, a settlement may be reached failing which the matter is also referred to the IRC. Lastly the referral of the matter to the IRC marks the closure of the mediation efforts.
172 See Chapter Three on Dispute Settlement.
175 The Malawi Gazette supplement dated 30th April, 1999 - Government Notice No. 16.
V CONTRACTS OF EMPLOYMENT

A. Types of Contracts

There are three types of contracts provided for under Section 25(2) of the EA. They are a contract for unspecified period of time, a contract for specified period of time and a contract for specific task. Laymen usually understand a contract for unspecified period of time, as a contract for life but the position at law is different. In fact contracts for life are the rarest. If the Court is to entertain a claim arising from a contract of employment, the contract itself must be legal. Thus, for example, a Court will not enforce a contract of employment involving an illegal immigrant.

In the discussion of types of employment contracts, Section 28(3) must be borne in mind. It provides that:

"where the purpose or effect of a contract of employment that is purported to be for a specified period of time or a specific task is the filling on a lasting basis of a post connected with the normal and permanent activity of an undertaking, it shall be deemed to be a contract of employment for an unspecified period of time."

In KaloweKamo v Malawi Environmental Endowment Trust the applicant was employed by the respondent as an operations director and upon expiry of his contract of employment the respondent refused to renew the contract. The IRC held that the post of operations director was a core office within the respondents' organisation, without which the Trust would not operate effectively. The purpose or effect of the employment contract was a filling on a lasting basis of the post. Section 28(3) was applied in favour of the applicant. It is believed that the rationale for Section 28(3) is prevention of employers from using unconstitutional and invalid reasons to choose which employees to maintain and which ones to dispose of. In Musukwa v Smallholder Farmer’s Fertilizer Revolving Fund of Malawi the IRC made a pertinent observation that the law intended to protect the employee from being subjected to short term fixed contracts whose cumulative effect was nonetheless the creation of continuous or permanent employment. This law is not unique to Malawi. In England, for instance, fixed term contracts that run for four or more renewals automatically convert into permanent employment.

177 Note that an argument that contracts with provisions on retirement age are fixed term contracts was rejected in Bakasi v Sugar Corporation of Malawi [2008] MLLR 112 and in Musukwa v Smallholder Farmer’s Fertilizer Revolving Fund of Malawi IRC Matter No. 281 of 2010, the IRC observed that several short term fixed contracts may be construed as a contract of unspecified period of time in terms of section 28(3) of the EA.
178 For the Malawian position see the MSCA decision of Malawi Railways Ltd v Nyasulu MSCA Civil Appeal No. 13 of 1992 and for the English position see McCelland v Northern General Health Services Board [1957] 1 WLR. 594.
181 See also Heiner v Giant Clothing Ltd IRC Matter No. 292 of 2003 and Musukwa v Smallholder Farmer’s Fertilizer Revolving Fund of Malawi IRC Matter No. 281 of 2010 (above).
183 IRC Matter No. 281 of 2010.
Some commentators have argued that Section 28(3) needs to be revisited by Parliament. Others have gone further to propose that subsection (3) needs to be repealed all together. They argue that the subsection puts the employer in a fix as he is forced by the law to keep in employment an employee he wished to have for a specified time. Much as judicial activism must be promoted, the application of Section 28(3) by the IRC in the Kalowekamo Case appears to contravene the intention of Parliament. Another query is that much as the IRC is not bound by rules of procedure, breach of Section 28(3) was not specifically pleaded in the Kalowekamo Case.

It is critical to note that the foregoing concerns have, to some extent, been addressed through the appellate decision of the MSCA in **Kalowekamo v Malawi Environmental Endowment Trust** where the Court dismissed the appeal, reversing the IRC decision and the High Court decision and holding that the contract was for a specified period of time and that therefore the failure to renew it did not amount to unfair dismissal. The Court observed that Section 28(3) does not give licence to a Court to reject clear terms of a contract, rewrite it and in the process suppress the clear intentions of the parties to the contract. The Court further made a pertinent observation that fixed contracts of employment cannot be the subject of an action for unfair dismissal under the EA, especially after the expiry of the period of the contract or after the completion of the task envisaged by the contract.

The foregoing is the current authoritative position of the law. That notwithstanding criticisms keep trickling. Nielsen observes that the effect of the precedent set by the highest Court of record in Malawi defeats the intention of Parliament which created a mechanism that would protect powerful employers from using fixed term contracts to carry out unfair dismissals because according to the MSCA, any employer is entitled to give fixed term contracts of employment to avoid Section 57(1) and (2) of the EA. A further effect of that decision is that the IRC, which is a specialized Labour Court, cannot form a legal interpretation based on facts before it where none of the parties has raised a particular legal argument. This constitutes a handicap on the part of the IRC considering that most parties before it are unrepresented, illiterate and even those with legal representation may miss out on certain legal provisions.

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18 For further insights see M’mata M, *Section 28(3) - Employees’ Sunrise and Employers’ Sunset?* 2004 (Unpublished). A paper presented at a farewell symposium for Mrs (Now Dr) Ngoyi Kanyongolo at Chancellor College. *Malawi Environmental Endowment Trust v Kalowekamo* [2008] MLLR 237 is also instructive.

19 In the recent judgement of *Wamunya v Malawi Housing Corporation* MSCA Civil Appeal No. 40 of 2007 the MSCA emphasised the importance of pleadings even in the IRC at page 5 of the transcript.


21 To alleviate this harsh reality, under the South African Employment Equity Act (55 of 1998) failure to renew a fixed term contract on the same or similar terms where the employee ‘reasonably expected’ the employer to do so constitutes unfair dismissal. This approach can be seen in Malawi in the cases of the majority decision in *Chironde v AG* IRC Matter No. PR 281 of 2004 (discussed below) and *Valera v Catholic University of Malawi* IRC Matter No. 591 of 2009 where the applicant’s three year employment contract came to an end upon which he was verbally advised to work month to month pending a decision of the Council for the University. The Council reversed in 3 months with a decision not to renew his contract and the IRC ruled that this constituted an unfair dismissal and the applicant was awarded benefits for the remaining 2 years and 9 months on the new contract. According to the dictum in *Kainji v Malawi Broadcasting Corporation* IRC Matter No. PR 113 of 2011, the University might have intended to renew the contract and this created some expectation from the applicant that the contract was tacitly renewed. Had the University severed the contract at its end, there would have been no issue of unfair dismissal. [Note that at the time of publication, the University had lodged an appeal against the IRC decision.]


23 These Sections incorporate rules of natural justice also enshrined in Section 43 of the Constitution and various ILO Conventions and are discussed ahead.
Nielsen finishes by arguing that a more fundamental effect that may require research, scrutiny and debate is that the MSCA’s decision renders Section 28(3) of the EA nugatory.

**B. Probationary Period**

In a contract of employment in respect of a skilled worker,191 the parties may agree on the duration of the probationary period provided that the period shall not exceed twelve months. According to *Mbwana v Blantyre Sports Club* 192 where parties have agreed on a specific probationary period, either of them may not extend the period without the consent of the other. In the absence of communication to the contrary, it is implied that the probationer is confirmed in his employment once the probationary period elapses.

During the probationary period either party to the contract may terminate the contract without notice. However this does not curtail the other rights of the parties, for instance the right of the employee to be heard. In *Sheba v Malawi Revenue Authority*,193 the IRC ruled that the general procedure on termination of employment as provided in the Act (save for the notice) applies with equal force to employees on probation. This is buttressed by the fact that the Act does not provide a different definition of an employee on probation. Take note that some eminent commentators194 hold a dissenting view, as they theorize that an employee who is dismissed during his probationary period is not entitled to bring any action against his employer for unfair dismissal. We do not subscribe to this view. We are steadfast in the reasoning advanced in the *Sheba case* above.

**C. Particulars of Employment**

Where an employer has at least five employees, he is required by Section 27 to give to each of his employees a written statement of particulars of employment. It is crystal clear from our reading of Section 27 that the duty of drawing up the particulars lies with the employer and so he cannot put up a defence that the employee did not have a written statement of particulars of employment.195

As regards the contents of such a written statement, they are provided for under Section 27(3) and they include names of the parties, date of commencement of contract, the rate and intervals of remuneration and the nature of work. However the legal position is that the employer is under no legal duty to set out each and every term of the contract.196 The IRC has said that breach of Section 27 amounts to unfair labour practice.197 Again it must be kept in mind that the general punishment for breach of any provisions of the Act is a fine of K5,000198 and imprisonment for one year.199

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191 A skilled worker is defined in Section 26(3) of the EA as ‘an employee in an undertaking who has special ability to do something, which ability is gained through acquisition, programmed or otherwise, of knowledge, attitude and behaviour.’
192 HC Civil Cause No. 1133 of 2009.
193 IRC Matter No. 113 of 2002.
198 See footnote 129.
199 See Section 66 of the EA.
On a rather different note, it is vitally important that these particulars and any other information to do with an employee be protected by the employer. This in turn protects the employee's right to privacy under Section 21 of the Constitution. In England, Parliament passed the Data Protection Act in 1998. The purpose of the Act is to regulate when and how information concerning workers may be obtained, held and disclosed.200 Looking at the immense importance of this legislation, it would be most desirable that our Parliament passes similar legislation. This is pertinent in this electronic age where private information can easily be leaked.

D. Termination of Contracts and Certificate of Termination

Either party to a contract may terminate a contract of employment for an unspecified period by giving notice. If the termination is at the initiative of the employer, the termination must be accompanied with valid reasons connected with the capacity or conduct of the employee or operational requirements. 201 This means that in reality, the right to terminate a contract by mere notice is only available to the employee since the employer must in addition to the notice provide valid reasons for such termination.202

Section 30 of the EA provides that either party may waive his or her right to notice by accepting payment in lieu of notice. The arrangement must however comply with fair labour practices i.e. Section 31 of the Constitution.203

A contract of employment for a specified period of time automatically terminates on the date specified for its termination. In such circumstances, no notice is required unless it is expressly or tacitly renewed or prolonged.204 However, the IRC has held, by a majority of 2 to 1, that where the contract is for a specified period of time but subject to renewal based on an appraisal system, which the employer does not put in place, the employee may successfully lodge a claim for unfair termination even if the contract runs its course.205 The Court put it as follows on page 8 of the judgment:-

"In our view, the respondent engaged the applicant on a fixed term contract. The contract was therefore bound to terminate at the end of the specified time. The respondent was under no obligation to renew the contract. However, this obligation was subject to Article III of the contract on whether to renew the contract or not. One such a requirement was presence of an appraisal system. However, the system was not put in place. In our view, the interests and expectations of the contract employees would have been influenced by such an appraisal system. The absence of the system, therefore, caused a problem in this case to the contract employees. In the absence of the appraisal system, the applicant had no knowledge as to what the renewal of the contract would be based on. On that score alone, the respondent acted in an unfair manner and breached the contract."

200Kibling, Op. Cit. p. 188.
201See Section 57 of the EA.
205See the majority decision in Chilamba v AG IRC Matter No. PR 281 of 2004 and note also the dissenting judgment which we do not agree with based on reasons advanced in the majority opinion. [Caution: the author argued the case on behalf of the applicant]. See also Vadema v Catholic University of Malawi IRC Matter No. 591 of 2009.
A contract of employment to perform a specific task terminates on the completion of the task and no notice of termination is required. Upon termination, if so requested by the employee, an employer is obliged to provide the employee with a certificate indicating (a) the name and address of the employer; (b) the nature of the employer's business; (c) the length of the employee's continuous employment with the employer; (d) the capacity in which the employee was employed prior to the termination; (e) the wages and the remuneration payable at the date of termination of the contract; and (f) where the employee so requests, the reason for the termination of employment. Such a certificate should not contain any evaluation of the employee's work unless the employee requests the evaluation.

E. Transfer of Contract

Under the common law, the sale of a business in general meant termination of the contracts of employment of existing employees and left to the purchaser to decide whether or not to offer them re-employment. The EA recognizes the need to protect employees under these circumstances through Section 32 which provides for transfer of a business as a going concern.

The provision prohibits the transfer of a contract of employment from one employer to another without the consent of the employee. That notwithstanding, where an undertaking or a part thereof is sold, transferred or otherwise disposed of, the contract of employment of an employee in employment at the date of the disporion is automatically transferred to the transferee and all the rights and obligations between the employee and the transferor at the date of the disporion continue to apply as if they had been rights and obligations between the employee and the transferee and anything done before the disporion by or in relation to the transferor in respect of the employee shall be deemed to have been done by or in relation to the transferee.

F. Death and Insolvency of the Employer

Notice must be taken of the fact that the death of an employer terminates the employment contract a month after the death, if the employer's personal or legal position formed the basis of the contract. So does insolvency. The issue of insolvency was analyzed in Chatata v Import and Export Malawi Ltd (In liquidation) where the IRC stated that the natural and ordinary meaning of Section 34 is that a company's state of insolvency or winding up entitles the employer to terminate the contract of any of its employees by giving them one month notice. The effect of Section 34 is that it overrides any contractual agreements pertaining to notice period and it supersedes Section 29 of the EA that provides for notice period. Hence where a company shows that it is in a

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207 Section 31 of the EA.
209 In the South African case of Schurte v Powerplus performance (Pty) Ltd (1999) 20 ILJ 655 (LC), the Labour court accepted that 'transfer' includes a merger, takeover, acquisition or part of a broader process of restructuring within a company or group of companies. Transfer may also take place by virtue of an exchange of assets or a donation.
210 In Chikwembya v CF/AO Malawi Ltd IRC Matter No. PR 571 of 2009 the Deputy Chairperson of the IRC declined to delve into a discussion of Section 32 as the same presented factual issues requiring a full Court. At the time of publication, the full Court's decision had not yet been released. It will be interesting though to find out how the Court will deal with issues surrounding Section 32 in the light of frequent transfer of contracts whilst the employer 211 is a going concern.
212 IRC Matter No. 44 of 2004.
state of insolvency or has obtained a Winding up Order from a Court, that
company may terminate the services of its employees by giving them one
months notice. The only exception to Section 34(1) is provided in Section
34(2) where notwithstanding the insolvency or winding up the undertaking
continues to operate or has been transferred.

G. Severance Allowance

1. The Concept of Severance Allowance

Since the EA itself does not define severance allowance we shall adopt the
High Court's definition in Chibempi and others v Chibuku Products Ltd that it is
money paid by an employer to an employee beyond the employee's wages on
termination of his employment through no fault of his own. Such pay
represents a form of compensation for the termination of the employment,
for reasons other than the displaced employee's misconduct, primarily to
alleviate the consequent need for economic re-adjustment but also to
recompense the employee for certain losses attributable to the dismissal.

The amended Section 35(1) provides as follows:-

"On the termination of a contract as a result of redundancy or
retrenchment, or due to economic difficulties, technical, structural or
operational requirements of the employer, or on the unfair dismissal of
an employee by the employer, and not in any other circumstance, an
employee shall be entitled to be paid by the employer, at the time of
termination, a severance allowance to be calculated in accordance with the First Schedule."

This amended Section has deliberately reduced instances in which an
employee used to be entitled to severance allowance before the amendment.
Thus there are now basically three situations in which an employee will be
entitled to severance allowance namely:-

i. On termination of contract as a result of redundancy or
   retrenchment, or due to economic difficulties, or technical, structural
   or operational requirements of the employer;

ii. As a result of an unfair dismissal; and

iii. In terms of Section 48(3) where a female employee returning from
    maternity leave refuses the offer of a suitable alternative job.

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213 For a fuller discussion of severance allowance recourse should be had to a dissertation by Frank Zambesi entitled Application of Severance Allowance in Malawi: A Need for Balancing of the Interests of Employers and Employees (2005) (Unpublished).
214 1HC Civil Cause No. 3225 of 2002.
216 3Mave v Combe' News Publications Inc, 155 Conn 680, 237 A.2D 360 p. 361. In the absence of social security laws in Malawi, this provision provides a form
   of 'minimum social security provision' and shall now be seen as supplemented by the PA.
217 4The amendment was effected by the Employment (Amendment) Act No.27 of 2010. The original Section 35(1) read 'On termination of contract, by
   mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a
   severance allowance to be calculated in accordance with the First Schedule.'
218 5Before the amendment an employee would further be entitled to severance allowance where the employment contract was terminated by mutual agreement
   [See National Bank of Malawi Ltd v Phongu and others HC Civil Appeal No.23 of 2009 and Malusa v Agama Meters IBC Matter No. PR 375 of 2011 where the
   employment contract was terminated by mutual agreement after the amendment hence the applicant was not entitled to severance allowance], on the death
   of the employee [under the original Section 35(7) which has since been repealed by Section 2(b) of the Employment (Amendment) Act 2010. See: Zamulue v
   Suuma Sugar Corporation IBC Matter No. 157 of 2001, Kamwe and Another v EMT General Dealers IBC Matter No. 277 of 2003 and Masula v Masule Construction
   Co. IBC Matter No. 80 of 2001 and on retirement see: Bukhali v Sugar Corporation of Malawi [2008] MLR 112, National Bank of Malawi Ltd v Phongu and Others
   HC Civil Appeal No. 23 of 2009 and Phongu and others v Council of the University of Malawi IBC Matter No. PR 332 of 2010.
This has generally resulted from the fact that before the amendment, pension schemes were contractual rather than statutory. This meant that the employer who decided to put his employees under a pension scheme would suffer double payment in terms of the contribution to the pension scheme and severance allowance. This was an unhappy situation to the employer resulting into aggressive advocacy culminating into the 2010 amendment. The double payments may also have been perceived as an unfair labour practice as against the employer in terms of Section 31(1) of the Constitution.

Commenting on the original Section 35(1), Justice Nyirenda had this to say in Japan International Corporation Agency v Jere which is still apt:-

"Section 35(1) in effect compels employers to recognize the commitment and the valuable contribution which employees make to the work they do. Clearly the provision protects employees from being told to go with one month's pay after working for an employer for a considerable number of years. In the spirit of Section 31(1) of the Constitution, Section 35(1) of the EA is meant to protect employees who have long served their masters and puts a stop to exploitation."

The meaning of wage for the purposes of calculation of severance allowance under Section 35 (1) includes the following:- basic salary; housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind; car allowance or provision of a car, except to the extent that the car is provided to enable the employee to work; transport allowance to enable the employee to travel to and from work; any cash payments made to an employee, except those excluded under Section 35(2) and discussed below; any other payment in kind received by an employee, except those excluded in the same Section.

Under Section 35(2) 'wage', unless otherwise provided in a contract of employment or collective agreement, does not include any cash payment or payment in kind provided to enable the employee to work, including an equipment, tool or similar allowance, a relocation allowance, tips received from customers and gifts from the employer, share incentive schemes, discretionary payments not related to an employee's hours of work or performance, including a discretionary profit-sharing scheme, employer's contributions to medical aid, pension, provident fund or similar schemes, employer's contributions to funeral or death benefit schemes, an entertainment allowance, an education or schooling allowance.

It has been difficult in some cases to ascertain the value of payments in kind. To deal with this problem, Section 35(2)(d) provides that the value of such payments in kind shall be determined either through a contract of employment or collective agreement, provided the agreed value is not less than the cost to the employer of providing the payment in kind; or the cost to the employer of providing the payment in kind.

According to Section 35(7), severance allowance is not payable in the following circumstances:

i. Where the employee is on probation;

ii. The employee has been fairly dismissed;

iii. The employee has refused to accept an offer of re-employment under no less favourable terms.

The new Section 35(3) provides that the Minister may, in consultation with organisations of employers and organisations of employees, by notice in the Gazette, amend Part I of the First Schedule.

In the past, the amendment of the old Section resulted into important litigation. The Minister exercised his powers under that Section on 1st January 2002 and on 3rd February 2004. The amendment was to the effect that an employee was not entitled to severance allowance where his pension exceeded his severance pay.

The 2002 amendment was challenged in The State v AG (Minister of Labour and Vocation Training) Ex Parte Mary Khawela and Others. The applicants were former employees of Stanbic Bank Ltd and were laid off on grounds of redundancy and in accordance with the 2002 amendment they were not entitled to severance allowance. The matter was heard by the High Court.

Justice Potani held that the amendment was invalid, as the Minister could not amend Section 35(1). In fact Section 35(1) dealt with eligibility of an employee to severance pay and subsection 2, as it stood then, provided for the mechanism for calculation of the severance pay and the Minister could only amend the calculation mechanism i.e. the First Schedule.

The Court applied its decision in Alufandika v Encore Products that severance

220Previously Section 35(6).
221See Section 26 of the EA on probation which states, inter alia, that the probationary period shall not exceed 12 months and the First Schedule to the EA which states that entitlement to severance allowance shall apply to an employee who has worked for not less than one year. This shows that the law regards a period of 12 months as a reasonably long period to entitle an employee to such benefits as permanency in employment and severance allowance on termination.
222See Green v Southern Bottlers Ltd 1RC Matter No. 46 of 2002 where even though the applicant was dismissed on the ground that he had stolen from his employer, he was still more entitled to his wages and leave grants that had accumulated before the dismissal but not to a bonus, as this is granted at the employer's discretion, neither was he entitled to severance allowance.
223The Section read 'The minister may, in consultation with organisations of employers and organisations of employees, by notice in the Gazette, amend the First Schedule.' In fact the schedule then was not split into two parts as the current one.
226Some commentators (See Kapanda F, Some Thoughts on Severance Allowance in Zibela-Banda R et al eds. Access to Labour Justice, LexisNexis (2007) p. p. 90) argued that after all the intention of Parliament was that severance allowance should indeed not be paid where the employee is also entitled to pension and or gratuity. Such commentators were fortiori in their view through the reading of the old Section 35 (5) of the EA [Which is now Section 35(6)] which categorically mentions terminal benefits that will not affect payment of severance allowance. Pension and or gratuity are conspicuously absent. These commentators have largely been vindicated following the passing into law of the Employment (Amendment) Act 2010 which in essence reduces instances where both severance allowance and pension is paid by the employer.
allowance is a different phenomenon from pension and other benefits and so an employee may be entitled to both severance allowance and pension benefits upon termination of his or her employment. As earlier on alluded to, this position has since been modified by the Employment (Amendment) Act 2010.229

In *Zamaele v Sucoma Sugar Corporation Ltd,* 230 the IRC stated as follows:-

"Severance allowance is payable to any employee who qualifies. If one is also on pension scheme, that is his or her luck. I do not think that payment of severance allowance is only intended [for] those who are not on pension arrangements. If the law wanted that to be the case, it could have specifically provided for that."

Similarly, in *Banda v Blantyre Sports Club* 231 the applicant was not given his severance pay because his pension benefits exceeded the severance pay. The calculation was based on the 2002 amendment of the First Schedule. The IRC held that the applicant was entitled to both severance allowance and the pension benefits.232

Employers had always complained that the decision in *Khawela* left them in an awkward position.233 They claimed that they were suffering a double cost burden in paying out both severance allowance as well as their own voluntary terminal benefits such as pension. The Malawi Chamber of Commerce and Industry (MCCI) indicated that in the SADC region it was only Malawi that required such double payment.234 This represented a threat to potential investors, as labour was seen to be expensive. In response to these concerns, government has enacted the Employment (Amendment) Act 2010 and the PA. It is believed that these pieces of legislation will go a long way in the promotion of fair labour practices in Malawi.

2. **Calculation of Severance Allowance**

Calculation of severance allowance is another area of Labour Law in Malawi that has been muddled in controversy. The calculation is done in accordance with the First Schedule to the EA. The original First Schedule provided that an employee was entitled to severance pay after working for at least a year and where an employee had worked for a year but not exceeding 10 years, she was entitled to 2 weeks' wages for each completed year of continuous service. Where the employee had worked for more than ten years she was entitled to 4 weeks' wages for each completed year of continuous service. In practice though, the IRC has been using the 2004 amended schedule

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229 HC Civil Cause No. 3828 of 2000.


232 See also *Zolowane v Total Moz Ltd* IRC Matter No. 193 of 2003 and *Mphande v FDH Ltd* IRC Matter No. 590 of 2010.

233 For instance Illovo Ltd suspended Sucoma non-contributory fund for its employees in February 2005 due to unresolved wrangle over payment of both severance and pension pay - See Daily Times of Jan. 18, 2006.

whereunder an employee was entitled to severance pay after working for at least a year. Where an employee had worked for a year but not exceeding 5 years, she was entitled to 2 weeks' wages for each completed year of continuous service. Where an employee had worked for 5 years but not exceeding 10 years, she was entitled to 3 weeks' wages for each completed year of continuous service. Where the employee had worked for more than ten years she was entitled to 4 weeks' wages for each completed year of continuous service.

The calculation under the 2004 amended First Schedule has been questioned by commentators. It is thought that the amended First Schedule having been successfully challenged in the Khawela Case, the Courts should have reverted to the position before the amendment. The unfortunate part though is that the position before the amendment is not so clear; is it the less publicized 2002 amendment, which was not brought to the attention of the Court in the Khawela Case, or is it the original First Schedule?

Suffice it to say that we now have a new lease of life following the enactment of the Employment (Amendment Act) 2010. The First Schedule Part I thereto provides that an employee is entitled to severance pay after working for at least a year. Where an employee has worked for a year but not exceeding 5 years, she is entitled to 2 weeks' wages for each completed year of service up to and including the fifth year.

Where an employee has worked for a period exceeding 5 years but not exceeding 10 years, she is entitled to 2 weeks' wages for each completed year of service for the first five years, plus three week's wages for each completed year of service from the sixth year up to and including the tenth year.

Lastly, where the employee has worked for more than ten years she is entitled to 2 weeks' wages for each completed year of service for the first five years, plus three week's wages for each completed year of service from the sixth year up to and including the tenth year plus four week's wages for each completed year of service from the eleventh year onwards.

Some of the terms in the original Schedule (which are re-appearing in the 2010 schedule) were interpreted by the IRC in Phiri and Another v Leyland Daf (Mv) Ltd. The then deputy Chairperson of the Court gave the following interpretation:

i. 'Each completed year' implies that an employee must have worked for at least a year;
ii. 'Continuous service' means that the employee must have worked for a number of years without break;
iii. 'Wages for each completed year' means wages for that particular completed year. Further than this wages mean the same as remuneration, salary, pay and other similar terms. This interpretation must now be seen in the light of the 2010 amendment to Section 35 of the EA and the meaning of 'wage' for the purposes of Section 35 of the EA which we have discussed above.

237 See Section 41 of the EA which fully provides for the meaning of 'continuous employment'.
238 See the MSCA judgment of Mubula v Stanbic Bank Ltd [2008] MLR 54.
The Court held that an employee is entitled to receive the aggregate of cumulative wages, which have accumulated over the years during his continuous service by adding up the wages to the point of termination. In other words, calculation of severance allowance was at first thought not to be a simple question of multiplying the salary of an employee by the length of service.

The High Court approved this interpretation in *Thompson v Leyland Daf (Mw) Ltd.* 

Kapanda J. concurred with the IRC decision that the years are not meant to be used as a multiplier. He intimated that 'if one were to base the calculation of severance allowance on last salary and the number of years that would lead to unfair labour practice in that the employees would become instant millionaires at the expense of employers.' It is also thought that some companies would eventually go into liquidation on account of exorbitant labour costs which would inevitably include fairly high severance allowance. The Court in the *Thompson case* was of the view that this being undesirable, the Courts must not adopt such an interpretation.

It is vitally important to note that the law on calculation of severance allowance has since drastically changed in favour of the employee. The change has come about through the celebrated decision of the MSCA in *Leyland Daf (Mw) Ltd v Ndema.* In fact the said MSCA decision has overruled both the *Thompson case and the Phiri Case* (discussed above).

In the MSCA case, Honourable Justice Unyolo, the then Chief Justice, had this to say at page 20:-

"We also take the view that it would be unfair and unreasonable to base the severance allowance on past salaries or wages considering the steep depreciation of the Kwacha over the years."

It is obvious that the employer has not been amused by the foregoing state of affairs. Indeed, the *status quo* has persistently been viewed by employers and investors alike as unbearably putting labour costs high. Employers will now seek relief in the 2010 amendment as the new method of calculation generally reduces the employers' severance allowance burden. This remains so despite the clear statement in the First Schedule Part I that 'wages' refers to the current wage of the employee [rather than the aggregate of cumulative wages]. It is my view that this strikes an excellent compromise between employers' and employees' choices.

Further, it must be noted that according to Section 35(8) of the EA a complaint that severance allowance has not been paid 'may be presented to a District Labour Officer within three months of its being due and if the district Labour Officer fails to settle the matter within one month of its presentation, it 'may' be referred to the IRC.

That notwithstanding, failure to make such a complaint within the stipulated time does not act as a bar from instituting legal proceedings. This situation was
discussed in *Khawela and Others v Stanbic Bank Ltd* 243 wherein the High Court succinctly held that the word 'may' as used in a statutory provision as distinguished from the word 'shall' connotes permissiveness and not a mandatory obligation such that the Section in question by no means bars a disgruntled employee from taking recourse to the Court outright.244

Severance allowance, like any other income sourced within Malawi, is taxable under the Taxation Act.245

3. **Statutory Gratuity**

The Employment (Amendment) Act 2010 introduces a new Section 35 (A). The Section introduces statutory gratuity. It provides that where, pursuant to the PA, 2010, an employer has been exempted from providing pension benefits to employees, the employer shall, on the retirement, termination of employment or death of an employee, pay the employee gratuity in accordance with Part II of the First Schedule.

An employee qualifies for payment of gratuity if that employee has been employed by the employer for a minimum continuous period of three months in any given year. The Minister is empowered to amend Part II of the Schedule, without consulting organisations of employers and organisations of employee, as is the case with an amendment of Part I of the schedule.

Part II of the First Schedule itself provides that where an employer has been exempted under the PA, that employer shall arrange to pay to the employees, on retirement, termination of employment, or death, a gratuity equal to five percent of the monthly salary of the employee for each completed month of service. The gratuity is calculated based on the final month's salary received by the employee, multiplied by the number of months served.

The statutory gratuity is an attempt to provide social security to employees whose salaries are below K10,000.00246 and their employers have been exempted from arranging a pension scheme under the PA.

Transitional issues are covered in Section 5 of the Employment (Amendment Act) 2010. Key among them is the fact that employers are mandated to recognize as part of an employee’s pension dues, each employee’s severance due entitlement accrued from the date of employment of that employee to the date of commencement of the 2010 Act. There are however different calculations of such severance due entitlement depending on whether the employee was already on pension or gratuity or not.247 Lastly, where the employer is exempted from providing pension benefits to employees, the employer is obliged to recognize the severance due entitlement as gratuity due to the employees.

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244 The Courts have at times insisted, in our view wrongly, that such preliminary procedures should be followed before the matter proceeds to Court - See the High Court decisions of *Sakalamkwezi v Sugar Corporation of Malawi Ltd* HC Civil Cause No. 3204 of 2003 and *Lambayo v Coda Partners and Media Companhia SA* HC Civil Cause No. 2891 of 2002 and the IRC decisions of *George and Another v Confor Placements* Matter No. IRC 15 of 2005 and *Kamphoni v Malawi Telecommunications Ltd* [2008] MLR 429 where the Court said that although it is not mandatory that the matter first goes to the Labour Officer, such procedure does however serve to deal with and settle minor matters and therefore should be complied with in order to reduce congestion at the Courts. The contrary view that the limitation period in labour Acts is not mandatory is further supported by Dr Ngeyi Kanyongolo in *Handbook on Employment Law* (Unpublished), Kapanda F. *Some Thoughts on Severance Allowance* in Zibelu-Banda R et al eds. *Access to Labour Justice*, LexisNexis (2007) p. 87 and 88 and the author.
245 Cap. 41 of the Laws of Malawi. This view was advanced by the author and confirmed by the IRC in *Kansambu v Mahandi Tea and Coffee Estates Ltd* IRC Matter No. 420 of 2008.
246 Which is the current threshold below which an employee is exempted from complying with the provisions of the PA, see Section 3 of Part II of the First Schedule to the Employment (Amendment) Act 2010.
VI. HOURS OF WORK

A. Hours of Work

Section 36(1) provides that normal working hours shall be set out in the employment contract provided that the hours do not exceed 48 in a week without overtime.

Sections 36 and 37 provide for normal working hours and certain prohibitions as regards working hours, for instance that the employer shall not require or permit a guard or shift worker to work for more than 8 hours on any day without overtime.248

Section 38 empowers the Minister to order temporary exemption from any or all provisions of part VI of the Act in cases of accidents requiring urgent work or in an event of abnormal pressure of work or to prevent loss of perishable goods.

B. Overtime

Overtime is provided for under Section 39 of the EA249 There are in fact three classes of overtime as follows:

1. Ordinary overtime which is time worked on a working day in excess of the hours normally worked. For each hour of ordinary overtime an employee is paid at an hourly rate of not less than one and one half of his wage for one hour.

2. Day off overtime is time worked on a day on which the employee would otherwise be off duty. The payment is twice the normal pay.

3. Holiday overtime is time worked on a public holiday. The payment is not less than twice the normal pay.

Where a claim for overtime arises in Court, it will need to be specifically pleaded and proven, otherwise the court will throw it out where the specific units of time over-worked are not clear.250

C. Continuous Employment

Continuous employment according to Section 41 of the EA begins from and includes the first day on which an employee begins to work for an employer and continues up to and includes the date of termination of employment.

There is a presumption that employment is continuous whether or not the employee remains in the same job. An employee's employment shall not be treated as interrupted if he or she is absent from work for a period of less than six months due to the following reasons:

1) Taking annual, sick or any other lawful leave;
2) Suspension in accordance with the EA or by agreement;
3) Termination of employment prior to being reinstated or re-engaged;
4) Having been temporarily laid-off;
5) Due to action in pursuance of a strike in which he participated;
6) Due to a lockout;
7) With the leave of the employer.

248 See Tebulo v Electricity Supply Commission of Malawi IRC matter No. 611 of 2011 where the applicant guard was overworked without overtime pay and the Court ordered payment of the same.
D. Seasonal Employment

Section 43 provides that where an employer is engaged in an undertaking in which it is customary to employ some employees only at certain seasons of the year and an employee is employed for successive seasons, the employee shall be deemed to have been continuously employed for the aggregate of all the time he has actually performed work for the same employer for continuous seasons. The IRC discussed the concept of seasonal employment in Gama and Others v Dimon (Malawi) Ltd\(^{251}\) as such types of employment, which are for a specific task. In particular, in as far as the tobacco industry is concerned, the specific task is for the sale of tobacco and this season usually runs from April to November, of every year. The Court took judicial notice of such events, which are so common in Malawi as tobacco is the backbone of the country's economy and no reasonable Malawian can claim that he or she is not aware of this seasonal practice. Such contracts automatically terminate after the specified period or after the specific task is accomplished.

Under English law casual workers are defined as those who are free to decide whether or not to work, and those whom they work for can decide whether or not to hire them. This lack of mutual obligations means that most casual workers will not be employees. Where however, the work was regular and permanent and the worker had no choice whether or not to report and perform that work and where there are mutual obligations between the worker and those providing work that the worker shall consistently report and perform certain work and the work provider shall consistently make available work for the worker at a remuneration then that mutuality of obligations gives rise to a contract of employment.\(^{252}\)

As seen earlier on, we can safely argue that by making no distinction between a permanent employee and one on probation\(^{253}\) or a casual worker or a seasonal worker, the intention of Parliament was to provide an inclusive and progressive definition rather than one that excludes other categories as was the case under English common law.

E. Annual Leave

According to Section 44 of the EA, every employee is entitled to annual leave with pay. An employee who works six days a week is entitled to not less than eighteen working days as annual leave while an employee who works five days a week is entitled to not less than fifteen working days.

Section 45(a) provides that the leave referred to in section 44 'shall be granted by the employer, in consultation with the employee, as from a date determined by the employer, but not later than six months after the end of the year in respect of which the leave entitlement arose.' In interpreting this Section the IRC has held in Kapyola and Others v Nation Publications Ltd\(^{254}\) that the responsibility to take leave days lies with the employee; the duty to grant leave lies with the employer. Interestingly, the Court denied granting payment in lieu of leave days which the applicants never asked for from the employer. The Court concluded that 'it would be unfair to order payment of leave days by plucking the leave days from the air.' We feel this approach is retrogressive considering that the majority of workers in Malawi are illiterate and would therefore face challenges to appreciate their legal duty to ask for leave days. The Court must therefore come to their assistance rather than being legalistic. In fact section 45(2) clearly provides that 'upon termination of an employee’s employment, the employer shall pay him the remuneration in respect of any leave which accrued to the employee but was not granted before the date of termination of

\(^{251}\)IRC Matter No. 2 of 2001.

\(^{252}\)See the House of Lords decision in Carmichael and Another v National Power Plc [1999] 1 WLR 2042. In Kapyola and Others v Nation Publications Ltd IRC Matter No. 40 of 2009, the IRC held that although the applicants started work as casual workers on a concept locally referred to as ‘Ganyu,’ they later on became full time employees.

\(^{253}\)See Shoba v Malawi Revenue Authority IRC Matter No. 113 of 2002 - See also Section 3 of the EA.

\(^{254}\)IRC Matter No. 40 of 2009. See also Chinangwa J in Dist v RBM HC Civil Cause No. 234 of 1999.
employment. "We are pleased though that a majority of cases hold that remuneration is payable in respect of a leave which is not granted but has accrued before termination. In Kandoje v Malawi Housing Corporation, the applicant was entitled, inter alia, to a leave grant for the leave she was entitled to but was not granted during her employment. Similarly, in Kachale v Malawi Industrial Research and Technological Development Centre the applicant was awarded a sum representing accrued leave days which the respondent unsuccessfully argued were forfeited when the applicant was put on a fixed term contract. The Court, however denied to make an order of interest on the sums awarded holding that case law suggests that interest is not admissible in scenarios of employer-employee relationships. That as it may be, our view is that employers may tend to trample upon the rights of employees if Courts maintain the view that interest is generally not admissible in employment claims.

The leave may be deferred and accumulated by mutual agreement. However it must be noted that annual leave is different from other types of leave such as sick leave or maternity leave. The annual leave must not therefore be simultaneous with other types of leave. The leave is extended by one working day with full pay for each public holiday falling within the leave period.

F. Sick Leave

An employee is entitled to sick leave after completing a year of continuous service. The minimum period of leave is four weeks with full pay and eight weeks sick leave on half pay during each year.

An employer is not bound to grant the sick leave unless the employee produces a certificate from a registered medical practitioner stating the nature of the employee's incapacity.

According to Phiri v Sunbird Lifuka Lodge ill-health is not a valid reason for termination of employment unless the employer can show that the employee was so incapacitated that he could not perform any duties. In the wake of chronic illnesses caused by HIV and AIDS, the law must move to fairly balance the interests of both employer and employee.

In Banda v Lekha the applicant was dismissed, having gone for HIV Voluntary Counseling and Testing and having tested positive. The dismissal was held to be unfair and discriminatory.

In the Botswana Industrial Court case of Lemo v Northern Air Maintenance (Pvt) Ltd, the employee had exhausted all his sick and annual leave but remained ill and went on unpaid leave. He was dismissed for 'continual poor attendance,' which was deemed 'detrimental to the productivity and efficiency of the company.' The Court however noted that at the date of the dismissal, there was no evidence that the employee was incapacitated on account of ill-health to perform his duties. The court held that the employer by not taking action against the employee's previous conduct for the last

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255 IRC Matter No. 31 of 2002 was decided in the case of Kandoje v Malawi Housing Corporation. The Court found that the applicant was entitled to leave days even if they were not granted.

256 IRC Matter No. 30 of 2003 was decided in the case of Kachale v Malawi Industrial Research and Technological Development Centre. The applicant was awarded a sum representing accrued leave days.

257 IRC Matter No. 31 of 2002 was decided in the case of Kandoje v Malawi Housing Corporation. The Court denied the applicant's argument that interest should be awarded on the sums awarded.

258 IRC Matter No. 32 of 2003 was decided in the case of Kachale v Malawi Industrial Research and Technological Development Centre. The applicant was awarded a sum representing accrued leave days.

259 IRC Matter No. 31 of 2002 was decided in the case of Kandoje v Malawi Housing Corporation. The Court held that the applicant was entitled to leave days even if they were not granted.

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three years, either waived its right to take action or condoned the employee's conduct. Similarly, the Zambian case of *Kingaipe v AG*, the petitioners argued that their employer, the Zambian Air Force, was required to see how they responded to antiretroviral treatment prior to dismissing them based on incapacity.

**G. Maternity Leave**

The EA provides for maternity leave in Section 47(1) as follows:-

"A female employee shall be entitled, within every three years, to at least eight weeks maternity leave on full pay."

The subsection is rather ambiguous as regards the phrase 'within every three years.' The starting point is not given in the Act. Is it within every three years from the date the woman begins work or from one pregnancy to another? However, it would appear that the intention of Parliament was to entrench child spacing such that a three-year period between one pregnancy and another was deemed desirable. In practice though, we consider that most female employees fall pregnant well before the three year spacing period provided for. Perhaps, it is time Parliament considered this reality on the ground! We also propose that the period of eight weeks maternity leave is not enough for a woman to recover and nurse the newly born. It is our recommendation that the minimum maternity leave be adjusted to not less than twelve weeks.

The right to maternity leave was found breached in *Jumbo v Banja La Mtsogolo*. The plaintiff was a temporary employee of the respondent and upon falling pregnant she sought maternity leave but was refused by the respondent and she was subsequently dismissed. The IRC held that the dismissal was unfair and unlawful. Re-instatement was ordered.

During the maternity leave, the employee's normal benefits and entitlements accrue and in an event of further certified illness of the mother or the child arising out of the pregnancy, the employee is entitled to an additional leave as the employer may deem fit. We submit that the discretion should not have been left to the employer since all the employer is interested in is that the employee on maternity leave returns to work as soon as possible and so would be reluctant to offer an additional leave. We think consultation between the employer and the employee would be ideal.

Some quarters of society have argued that a similar right to maternity leave should also be accorded to men whose wives are undergoing maternity leave; paternity leave. They argue that the infant would be better taken care of by both parents during the first days after its birth. However we should believe this would have undesirable consequences on the part of the employer including unnecessary absence of workforce and disbursement of unnecessary leave allowances. This would end up adversely affecting the general development of our country.

Nonetheless, it must be borne in mind that under European Law both parents are entitled to parental leave of 13 weeks per child of five years and below. Reasons for such leave need not be connected with the child’s health. It could cover such events as simple as settling in a child at a new playground. Such leave is however unpaid. South African employees are entitled to a paid family responsibility leave

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26 This right is an international obligation for Malawi under the CEDAW - Article 11(2).
26 In comparison the South African Basic Conditions of Employment Act 2002 provides for sixteen weeks' maternity leave.
27 In *Mutsi and Nawe v Cairo International / a Colony Club Casino* IRC Matter No. PR 391 of 2010 the respondent was ordered to pay withheld benefits due to the second applicant during the time that she was on maternity leave.
28 Section 47(3) of the EA.
which can be taken on the birth of an employee’s child, sickness of an employee’s child and death of a close relation. This is the first time that such leave has been provided for in South African employment law.275 Such a law would make sense in our case rather than the paternity leave.

Section 48 provides for the right of the woman to return to work upon the expiry of the maternity leave. She is entitled to the same job unless the job has ceased to exist or she is incapable of continuing to perform the job. In such events the employer is required by law to take reasonable steps to find her a suitable alternative job within the undertaking.

Where no suitable alternative job is found or the employee unreasonably refuses an offer for alternative job, the employer is entitled to terminate the employment with notice and subject to the requirements of Section 28, on termination of employment contracts, and to providing severance allowance.

Section 49 on the other hand provides that an employer who terminates the employment of an employee because the employee is pregnant or for any reason connected with her pregnancy shall be guilty of an offence. The law treats such an offence seriously such that the burden of proving that the employment was not terminated because of the pregnancy lies on the employer.

In Chisowa v Ibrahim Cash ‘n Carry,276 the IRC found breach of the right of the applicant woman to return to work upon the expiry of her maternity leave. The reason given for her dismissal was that the premises in which she used to work had been broken into and goods were stolen. The Court however did not find this to be reason enough to warrant her dismissal and so it was held that the plaintiff was unfairly dismissed on grounds related to her pregnancy. Compensation was payable to the plaintiff.

In Brown v Stockton-on-Tees Borough Council,277 which was applied in the Chisowa Case, the House of Lords had the following instructive remarks on a Section similar to Section 49:-

"[the Section] must be seen as a part of social legislation passed for the specific protection of women and to put them on an equal footing with men. Although it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman’s job open for her whilst she is absent from work in order to have a baby, that is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the workplace."

As earlier indicated, an employer who breaches Section 49 commits a criminal offence. Such an employee is liable to a K20,000 fine278 and imprisonment for five years. In addition to imposing this penalty, the Court may order re-instatement and an award of compensation. Refusal by an employer to reinstate an employee attracts a fine of K500279 for each day during which the offence continues.280

VII. WAGES

Under Section 3(e) of the EA 'remuneration means the wage or salary and any additional benefits, allowances or emoluments whatsoever payable, directly or

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277 [1988] IRLR 263 HL.
278 See foot note 129.
279 Ibid.
indirectly, whether in cash or in kind, by the employer to the employee and arising out of the employee’s employment."

The same Section provides that 'wage means all earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law, which are payable by virtue of written or unwritten contract of employment by an employer to an employee for work done or to be done or for services rendered or to be rendered."

The MSCA\textsuperscript{281} has held that the terms 'wage,' 'salary,' 'pay' and 'remuneration' are used interchangeably and include allowances, benefits and the basic salary itself. Justice Tambala observed at page 62 that:

"clearly words wage, salary, pay are broad enough to cover payments such as allowances and other benefits made either in cash or kind."\textsuperscript{282}

Invariably contracts of employment, be they written or oral, provide for the rate at which wages are to be calculated. Section 50(1) of the Act presumes this situation by providing that wages are payable to an employee in accordance with the terms of the employment contract. The IRC has further held that an employer cannot withhold payment of wages to an employee due to a labour dispute involving the two.\textsuperscript{283}

There are however certain guidelines provided for in the Act. For instance, wages are payable not less than once a week or fortnight in the case of an employee whose wages are fixed by the hour, day or week or are calculated solely on piecework. In the case of an employee whose wages are fixed on a monthly or yearly basis, the wages are payable not less than once a month.

In \textit{Juma and Others v Corriva Company} \textsuperscript{284} and \textit{Sibale v Informal Business Association} \textsuperscript{285} the plaintiff in the former case was a security guard and in the latter was a debt collector who were not paid their wages. The Court held that this was unconstitutional as it breached the right to fair labour practices as provided for under Section 31 of the Constitution and indeed the EA. The employers were ordered to pay the wages to the applicant employees without further delay.

In \textit{Green v Southern Bottlers Ltd} \textsuperscript{286} even though the applicant was dismissed on the ground that he had stolen from his employer, he was still more entitled to his wages and leave grants that had accumulated before the dismissal but not to a bonus, as this is granted at the employer’s discretion.

Wages are always payable to an employee unless such employee specifies another person in writing to receive his or her wages. The wages must be paid in legal tender and where the employee has consented, by cheque. Payment of wages in form of liquor or noxious drugs is prohibited under the Act. Further prohibitions relating to payment of remuneration are provided for under Section 52.\textsuperscript{287}

\textsuperscript{281}Standard Bank Ltd v Mwineka [2008] MLR 54.
\textsuperscript{282}The reader must note that following the enactment of the Employment (Amendment) Act 2010, the meaning of ‘wage’ in the calculation of severance allowance is somewhat limited as earlier on discussed.
\textsuperscript{283}Makuwina and Others v Council for the University of Malawi IRC Matter No. PR 273 of 2011. This action was commenced following the decision by the respondent not to pay the applicants for not lecturing during the academic freedom struggle. For a fuller background see \textit{Council of the University of Malawi v Kabwila-Kapudula and Others} HC Civil Cause No. 84 of 2011 and Nkhata M, The Chinsinga-Gate Affair: A Not So Subtle Threat to Academic Freedom in Malawi (Unpublished). A Paper presented at the Malawi Constitution at 18: Constitutionalism, Diversity and Social-Economic Justice 25-28 July 2012, Blantyre.
\textsuperscript{284}IRC Matter No. 3 of 2002.
\textsuperscript{285}IRC Matter No. 34 of 2003.
\textsuperscript{286}IRC Matter No. 46 of 2002.
\textsuperscript{287}These include prohibition against payment of wages in the form of promissory notes, vouchers or coupons; prohibition against requiring an employee to pay or repay to him any remuneration payable or paid to the employee in accordance with the EA; prohibition against permitting a direct or indirect payment from the employee or deduction from the employee’s wages for the purpose of obtaining or retaining employment \textit{et cetera}.\textsuperscript{287}
Under Section 51 an employee in the public or private agricultural, industrial or commercial undertaking or any branch thereof is entitled to receive with each payment of wages, an accurate itemized statement setting out his or her gross wages, deductions made, if any, and the net wages. This is, in common parlance, known as a "pay slip," which in these technological times can be electronic. Arguably such requirements do not apply to employees employed by a small business entity and domestic workers.

An employer in the public or private agricultural, industrial or commercial undertaking or any branch thereof has the duty to keep written records showing among other things, wages and remuneration paid to each employee during the previous three years. An aggrieved employee on matters of wages has the right to lodge his or her complaint to the District Labour Officer.288

A lot of claims arise as regards delays in the payment of remuneration on termination of a contract of employment. The old Section 53 provided that wages and other remuneration on termination shall be paid within seven days after termination or completion of work. Pension benefits, on the other hand, were supposed to be paid within six weeks.289 This was justified on the ground that pension benefits may take longer as they are usually managed by a third party. The Employment (Amendment) Act 2010 has since repealed Section 53 and now provides that wages and remuneration, which includes pension, shall be paid to the employee within seven days from the date of termination or completion of such contract of employment. Breach of this time limit constitutes unfair labour practice. According to Mawuya and Others v ADMARC failure to pay pension benefits causes interest at the prevailing bank lending rate to accrue on the sum payable to an applicant from the date the pension became due.291 In Mmame v Standard Bank Ltd the IRC ordered interest on withheld pension and dividends mainly because of the respondent's oppressive conduct towards the applicant when he resigned to join a rival bank. In Nyirongo v Mzuzu University the IRC refused to order interest on pension on the authority of Kankhwanga and Others v Liquidator Import and Export (Mw) Ltd.295 This means that there are two conflicting decisions of the IRC on the issue of interest on pension. We support the view that interest is payable on pension as the pension funds themselves are invested at an interest and so it would be inequitable to deny a pensioner interest thereon in the event of delay.

In the case of Alufandika v Enor Products Ltd the High Court ruled that interest was payable on delayed severance pay. Nonetheless, in the light of the Supreme Court judgment of Kankhwanga and Others v Liquidator Import and Export (Mw) Ltd,297 the reader must consider the Alufandika judgment as bad law to the limited effect herein under discussion. Thus in the Kankhwanga case the Supreme Court held that mere delay in payment of severance allowance does not automatically attract an award of interest at the punitive lending rate of commercial banks.298 The Court then

288See Section 51(2)(3).
289Before the 2010 amendment it was argued that the law did not make meaningful provision for pension much as a good number of employees continued to enjoy pensionable terms. The law viewed pension as contractual and no more. There was therefore need for the law to clarify the issue by making provisions for uniform approach to pension benefits. Zihela-Banda R. Creating a More Conducive Legal Framework for the IRC, Montfort (2005) p. 31. See also Mmame v Standard Bank Ltd IRC Matter No. PR 239 of 2009.
291See also Rule 16 of the IRC (Procedure) Rules, 1999. On this point the following cases are also enlightening Chirambo v MCP IRC Matter No. 41 of 2003, Kumwenda v Le Meridien Ku Chawe IRC Matter No. 5 of 2003 and Chimimba v Christian Health Association of Malawi IRC Matter No. 453 of 2002.
293The applicant was denied opportunity to purchase a motor vehicle which he was entitled to and the respondent withheld several of his benefits including pension and dividends in a South African Bank.
294IRC Matter No. 612 of 2011.
296HC Civil Cause No. 3828 of 2000.
proceeded to succinctly discuss situations where interest is payable as follows; firstly interest is awardable as a matter of law (contractual). Secondly interest may be awarded as a statutory requirement and lastly interest may be awarded in the course of the Court's exercise of equitable jurisdiction. However, as regards tax, severance allowance is taxable under the Taxation Act.

The Minister responsible for labour is given the discretion to fix the minimum wages of any group of wage earners in consultation with relevant workers' and employers' organisations. This is partial fulfillment of the Constitutional right to fair remuneration and it becomes most relevant in situations where a group of unskilled workers are engaged in employment by an employer seeking cheap labour, for instance in tea and tobacco estates. In Chibaya and Another v Kulupando, among other awards, the Court ordered the respondent to pay the applicants the difference between their salaries and minimum wages for the period of their employment.

To provide protection for such vulnerable groups of employees, the law provides for tough penalties. Thus, where the minimum wages are fixed by publication in a gazette, any employer contravening the requirement by paying less, is guilty of an offence and liable to a fine of K50,000 and to imprisonment for ten years.

VIII BONUSES

The EA does not provide for payment of bonuses. However, through a contract of employment or indeed ad hoc arrangements, the employer and the employee may agree on a bonus scheme. Where such is the case, the bonus becomes contractual. Bonuses are usually part and parcel of an incentive scheme aimed at motivating employees to achieve corporate goals. According to De Silveira v Proprietary Manufacturing Co. Ltd where bonuses are subject to conditions to be agreed or subject to approval, the same only accrue on meeting such conditions. In Chiwalo and Others v Continental Discount House the IRC held that the applicants were entitled to bonuses which were provided for in their conditions of service and were declared before they resigned. The Court found that the payment of such bonuses were contingent upon the performance of the respondent company and not on individual performance. Hence they became payable once the board approved them. In Kaira v Blantyre Sports Club the IRC rejected a claim for a 13th cheque where the applicant was retrenched before the end of the year and in Green v Southern Bottlers Ltd the applicant was dismissed on the ground that he had stolen from his employer. The IRC held that he was still more entitled to his wages and leave grants that had accumulated before the dismissal but not to a bonus, as this is granted at the employer's discretion.

298 See Gwembe v Malawi Railways Ltd 9 MLR 369.
299 Ibid.
300 See Wellerstein v Mair [1975] 1 All ER 846.
301 Cap. 41:01 of the Laws of Malawi, see also Kamwana v Makandi Tea and Coffee Estates Ltd IRC Matter No. 420 of 2008.
302 According to Section 54 of the EA. See also University Workers Trade Union v The Council of the University of Malawi IRC Matter No. 46 of 2003.
303 Section 31 of the Constitution.
304 IRC Matter No. ZA 4 of 2008.
305 See foot note 129.
306 The term bonus is used to include any 'contingent pay' which is sometimes used to describe any formal pay scheme that provides for payments on top of the base rate, which are linked to the performance, competency, contribution or skills - See Armstrong M, Armstrong’s Handbook of Human Resource Management Practice Kogan (2009) p. 816.
307 Bonuses are therefore discretionary and dependent on the contract of employment - see Kalino v McConnell and Co. [1997] 2 MLR 28.
308 See Mina v Lover Brothers (Malawi) Ltd [1992] 2 MLR 318 and Banda v UGI IRC Matter No. 672 of 2011.
310 IRC Matter No. PR 63 of 2009.
311 IRC Matter No. 46 of 2002.
IX DISCIPLINE AND DISMISSAL

1. Disciplinary Action

Issues of discipline are vital in employment relationships and so Section 56 of the Act accords an employer with the right to take disciplinary action, other than dismissal, when it is reasonable to do so considering all the circumstances of the case.

For the purposes of the Act, disciplinary action includes a written warning, suspension, and demotion. The Act prohibits the imposition of a fine or other monetary penalty on an employee as disciplinary action. An employer may however deduct an amount of money from an employer's wages as restitution for property damaged by the employee or where the employee has been absent from work without reasonable excuse.

2. Suspension

Suspension may be of two kinds. An employee may be suspended as a 'holding operation' pending a disciplinary hearing or, alternatively, it may be a disciplinary sanction. Suspension pending a disciplinary hearing, which is the most common, must avoid two prevalent abuses namely arbitrariness and inordinate periods of suspension. Unfortunately an inordinate period of suspension has only been decided from case to case and no certain period has been provided for either by the Courts or Parliament. The IRC has, similarly observed that the law does not provide for the modalities of the suspension. For that reason, suspension would be subject to particular conditions of service.

According to Kabambe v Cargomate Ltd, suspension is only allowed where it is

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314 In Kalinde v Illovo Sugar (Mw) Ltd IRC Matter No. PR 181 of 2007 the IRC held that theft by the applicant of sacks which the respondent would dispose of anyway was not serious enough to warrant a dismissal. The respondent should have opted for other disciplinary actions such as a warning given that the applicant had worked for the respondent for over twenty years. The dismissal was therefore held unfair. See also: Mbuya v Population Services International IRC Matter No. 12 of 2000 and Mubomba v Mukandri Tea and Coffee Estates Ltd IRC Matter No. 96 of 2003.

315 Demotion means a reduction or diminution of dignity, importance, responsibility, power or status even if salary, attendant benefits and rank are retained - A-B v SA Breweries Ltd (2001) 22 IJ 495 (CCMA) See also Chinkundu v Malawi Stock Exchange Ltd (2008) MLR 379 and Fernando v BIC Malawi Ltd IRC Matter No. 308 of 2002.

316 There is a suggestion in Kabambe v Cargomate Ltd IRC Matter No. 53 of 2001 that suspension without pay amounts to a monetary penalty therefore a breach of the ERA. We have doubt if the framers of this Section envisaged such interpretation. We think that suspension without pay can be adequately justified as an unfair labour practice under Section 31 of the Constitution.

317 Section 56(4).

318 The Deputy Chairperson of the IRC has demystified the law on suspension in Chau v NBS Bank Ltd IRC Matter No. IRC PR 12 of 2010.

319 Although a formal hearing is not required prior to the suspension, the *audi alteram partem* [hear the other side] principle should be observed - See Kalinde v Action Aid Malawi IRC Matter No. PR 69 of 2004, where the Court stated that 'the respondent did not hear the applicant at suspension, during investigations and when making the decision to dismiss him' and the decision in Chau v NBS Bank Ltd IRC Matter No. IRC PR 12 of 2010 asserts that the employer must have a reasonable apprehension that a legitimate business interest would be harmed by the employer's continued presence in the work place - See also Du Toit D, et al, Labour Relations Law, LexisNexis (2006) p. 498.

320 In Chau v NBS Bank Ltd IRC Matter No. IRC PR 12 of 2010 the Deputy Chairperson, Hon. N'riwa observed that 'the period of suspension, in this matter, is inordinately long and unjustifiable. Why suspension could take all this time [i.e. 9 months] is inconceivable. At most one month would have been sufficient. The court went further to suggest that the suspension period should not in any event exceed 6 months - See Section 41(3)(b). In Mata v Group 4 Securicor Malawi Ltd IRC Matter No. PR 195 of 2012, the IRC held that a 3 year suspension without pay pending a disciplinary hearing was punitive and an unfair labour practice. The Court ordered payment of withheld salary.

321 See Chau v NBS Bank Ltd IRC Matter No. IRC PR 12 of 2010 and Patel v Malawi Posts Corporation IRC Matter No. PR 639 of 2011 where a suspension without pay was held to be an unfair labour practice when the conditions of service had provided for half the pay.

specifically provided for in a contract, especially where the suspension is without pay. However, our view is that suspension without pay is an unfair labour practice against Section 31(1) of the Constitution which provides for the right to fair and safe labour practices. In our view, it would be unfair to suspend an employee, which constitutes a punishment in itself, at the same time deny him food on his table. In suggesting a change to the approach in the Kabambe Case, the IRC has observed that Section 56(3) of the EA proscribes imposition of a fine or a monetary penalty on an employee. Suspension without pay, in the view of the Court, is a monetary penalty, for all practical purposes. On 13th July 2012 the IRC delivered a ruling in Mondiwa v Malawi Housing Corporation finding that suspension without pay, even where the same is provided for in the conditions of employment is an unfair labour practice. In that case the applicant was suspended for having been arrested by the Anti-Corruption Bureau on allegations of corruption. The Court ordered his immediate reinstatement pending the conclusion of the criminal case. We commend this approach and hope that the High Court and indeed the MSCA will approve of it.

The High Court has held that an unreasonable long spell of suspension although with pay constitutes an unfair labour practice and in Chalu v NBS Bank Ltd the IRC held that the respondent's act in suspending the applicant had no iota of fair labour practices. The respondent was ordered to pay the applicant his withheld salary during the period of 10 months on which he was on suspension. In The State and Malawi Development Corporation, ex parte Mpinganjira the High Court stated that 'an employer cannot keep an employee on suspension indefinitely even where there are criminal proceedings pending.'

3. Dismissal

Dismissal though not defined in the EA has the ordinary meaning of termination of services by the employer without the consent of the employee. In the words of Morrison J:-

"As a matter of general principle...before a contract of employment can be terminated there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is indeed at an end."
In all such circumstances, the dismissal must be fair. The Act provides for the test as to whether a dismissal is fair or not. Section 58 says that a dismissal is unfair if it is not in conformity with Section 57 or Section 60.\(^{333}\) It does appear however that in practice unfair dismissal extends to persons whose contracts of employment have been terminated in breach of Section 29 of the EA. So that if one's contract of employment is terminated contrary to the requirements for notices of termination specified in Section 29 one must be taken to have been unfairly dismissed.\(^{334}\) It does also seem that there is good reason to believe that persons who lose their employment in circumstances falling foul of Sections 31 and 43 of the Constitution\(^{335}\) must also be regarded as having been unfairly dismissed and are therefore entitled to protection under Section 63 of the EA which provides for remedies for unfair dismissal.\(^{336}\)

Section 57(1) provides as follows:-

"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."

Section 57(2) provides as follows:-

"The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity."

We shall serially discuss dismissal based on capacity of the employee; dismissal based on conduct of the employee and dismissal based on the operational requirements of the undertaking.

**A. Dismissal Based on Capacity of the Employee**

The term 'capacity' in Section 57 includes qualification, competence and health. It terms of health generally and the HIV/AIDS crisis, it is pertinent to understand that lack of capacity as a result of HIV-related illness (or indeed any other illness) may result in a fair dismissal.\(^{337}\) There are two aspects that can be relevant. First, whether it is justified to dismiss employees for incapacity where their health is such that they are no longer able to perform their duties and second, whether it is justified to dismiss an employee who is living with HIV, on the assumption that his or her current or future health status will lead to incapacity.

\(^{333}\)Section 60 deals with constructive dismissal and is discussed later.

\(^{334}\)See *Mtingwi v Malawi Revenue Authority* HC Civil Cause No. 3389 of 2004 and *Malawi Environmental Endowment Trust v Kalulekano* [2008] MLLR 21.

\(^{335}\)Discussed in Chapter One under Development of Employment Law.

\(^{336}\)See *Magola v Press Corporation Ltd* HC Civil Cause No. 3719 of 1998 *Nkhwazi v Commercial Bank of Malawi Ltd* Civil Cause No. 233 of 1999. These are basically a group of cases decided during the period when the 1994 Constitution had been passed but the EA 2000 had not yet been passed into law or the facts arose before the EA 2000. The Courts, for lack of specific and relevant legislation, used to rely on Section 31 and 43 of the Constitution to arrive at a decision that an employee had been unfairly dismissed.

\(^{337}\)See Phiri v Sunbird Lifupa Lodge IRC Matter No. 232 of 2002 above under Sick Leave.
In most jurisdictions, including Malawi, Labour Law provides that an employee cannot be dismissed for incapacity-related reasons when proper procedures have not been followed to properly assess the employee's level of incapacity and alternatively accommodate the employee where needed.\textsuperscript{338} In \textit{Mlangali v Nico Holdings Ltd} \textsuperscript{339} the applicant who was working as a driver suffered from cancer which prevented him from driving. The respondent dismissed him without a hearing or an examination whether the applicant could be assigned to other duties. The Court held that the dismissal was unfair as the respondent did not act with justice and equity, on the facts presented in Court.

Section 57 was discussed in detail in the IRC decision of \textit{Ngwenya and Gondwe v Automotive Products Ltd.} \textsuperscript{340} Hon. Mkandawire said that Section 57(1) is concerned with substantial justice while Section 57(2) deals with procedural justice. On the facts of the case, it was held that the respondent had breached Section 57. The contention by the respondent that the applicants were laid off in accordance with Section 57(1), the reason for dismissal being operational requirements of the undertaking, was rejected. This was so because immediately after the applicants were dismissed on redundancy, the respondent filled up their positions with new employees.\textsuperscript{341}

\textbf{B. Dismissal Based on Conduct of the Employee}

Apart from dismissal based on capacity of the employee or operational requirements,\textsuperscript{342} an employee may also be dismissed based on misconduct. There cannot be an exhaustive list of acts of misconduct. However, they include dishonesty, fraud, habitual absenteeism and refusal to take lawful orders among many others.\textsuperscript{343}

In terms of Section 57(2) the employment of an employee cannot be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity. This entails a disciplinary hearing. The EA does not however provide for the specific procedures to be followed in conducting a fair disciplinary hearing.\textsuperscript{344} The Courts are now developing rules as to what constitutes a fair procedure.\textsuperscript{345} In a nutshell, the employee must endeavour to follow the following stages:

\textsuperscript{339}IRC Matter No. IRC PR 290 of 2010.
\textsuperscript{340}IRC Matter No. 180 of 2000 and also \textit{Kanjile v Air Malawi Ltd} [2008] MLLR 439.
\textsuperscript{342}Below.
\textsuperscript{344}Unlike Section 27(1) of the Public Service Act which expressly stipulates the steps to be taken by the employer before it can terminate the employment of a public servant for misconduct.
\textsuperscript{345}See Banda R.Z., \textit{Sources and Institutions of Labour Law in Malawi}, Montfort (2008) page 121. To quote Lord Reid in Wiseman v Boardman [1971] A.C. 297 p. 308; ‘for a long time Courts have, without objection from Parliament, supplemented procedures laid down in legislation where they have found that to be necessary…’ And per Lord Bridge in \textit{Lloyd v McMahon} [1987] 1 A.C. 625 pp 702-703; Courts do so because ‘…it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the Courts will not only require the procedure prescribed by the statute to be followed but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.’
(i) **Investigations**; more often than not, the employer will need to conduct an investigation in order to ascertain the seriousness of the alleged offence. At this stage, the employer has the opportunity of establishing details of the employee’s disciplinary record. If there is insufficient evidence of the alleged offence, the matter may have to be dropped to save time and resources. Where a prima facie case is established, the employee will have to be called for a disciplinary hearing.

(ii) **Notice**; the employee must be given reasonable notice of all the factual allegations against him in a form he can reasonably understand, and in sufficient detail to allow him to prepare for his case. In *Matopo v Old Mutual Life Assurance Ltd* 346 the applicant was invited to a disciplinary hearing for attending classes at the Polytechnic without permission. The applicant thought the notice was short. He asked for an extension. The respondent allowed the extension not to the date suggested by the applicant but to an earlier date. When the applicant went to find out if his request had been honoured, he was told the hearing took place and a decision was made. The Court doubted if there was delivery of the letter communicating the new date of the hearing. To that extent, it was found that the respondent had acted unfairly. The Respondent did not accord the applicant an opportunity to defend himself. The Court quoted Chikopa J in *Illovo Sugar Company Ltd v Phiri*:- 347

"... there is no uniform way of hearing a matter or a party. One can be heard orally. They can be heard through reports written or oral. They can be allowed to cross-examine witness or not. ... What matters in our view is whether or not the party to be heard was made sufficiently aware of the charge against him and was given a decent chance to put across their side of the story."

(iii) **Charge**; the employee must be charged but the charge does not have to be framed with the same particularity or with all the formalities of a charge which must be put to an accused person in a criminal trial. All that is required is that the person is aware of the charge or complaint and is in a position to meet it. To quote Lord Morris in *Ridge v Baldwin*:-

"It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet."348

347 HC Civil Appeal No. 60 of 2008.
Likewise, the High Court recently put it as follows in *The State v Council of University of Malawi, Ex parte Msukumwa*:

"If one is to answer any charge, particulars of the same should be given to afford the accused a clear outline of the nature of the charge so that he is able to ably defend himself or herself. I say to ably defend himself to mean to equip oneself with the necessary ammunition. It is not enough to give someone the right to be heard or to defend himself if he or she was deprived of adequate notice to ably defend oneself or the charge was so general that the accused fails to make a meaningful defence. One should not say I understand I have a charge, they will make it clear to me during hearing time. Before the time of hearing the accused must be clear in his mind about the nature of the charge. Just to say come and answer charges ...and no more is so lacking and inadequate since it is devoid of particulars." 

(iv) Criminal Proceedings; a number of issues arise if the employer alleges that the conduct of an employee amounts to a criminal offence. Parallel processes may take place where the employee faces disciplinary and criminal proceedings arising from the same facts. The guiding principle is that such proceedings are separate and independent of each other such that they may take place simultaneously. In practice a disciplinary hearing will usually be concluded earlier than a criminal trial because the latter involves more officers and there is less proximity of such officers in a criminal trial than it is in a disciplinary hearing. In *Mangwiro v Financo Bank Malawi Ltd (In Liquidation)* the IRC held that the applicant's refusal to attend a disciplinary hearing because of criminal proceedings against him was wrong and a decision made in his absence to dismiss him was upheld.

In terms of the outcome of a criminal trial i.e. whether the employee is convicted or acquitted, the same has little bearing, if any, on the disciplinary hearing. It is settled law that an employee who has been acquitted by a Court may either be dismissed or reinstated depending on whether the alleged acts constitute misconduct. A criminal trial is different from a civil trial. More importantly, the burden of proof is more onerous in a criminal trial than it is in a civil trial, which is akin to a disciplinary hearing.

The question whether an employer can dismiss based on police findings was determined in *Kasama v Bata Shoe Company Ltd* where the Court accurately stated that it was legally incorrect to dismiss an employee basing on police reports. The police were carrying out criminal investigations and not employment misconduct. Issues of employment are dealt with by the employer and not by a third party namely, the police. The respondent was supposed to carry out its own investigations and hear the applicant before dismissal. A police officer should not be allowed to conduct the disciplinary hearing on behalf of the company.

549HC Misc Civil Cause No. 50 of 2006.
550While commenting on suspension, in *Chulu v NBS Bank Ltd* IRC Matter No. IRC PR 12 of 2010 p. 10, the IRC observed that the employer does not have to wait until the police case is over for them to carry out their own internal disciplinary proceedings. The suspension should, therefore, not depend on the outcome of the criminal proceedings. For this reason, an employer will not be justified in keeping an employee on suspension pending the outcome of criminal proceedings.
552See Justice Chimusula Phiri's sentiments in *Namawu v Wood Industries Corporation Ltd* [1997] 1 MLR 162. See also Justice Jere's comments in *Kajambo v People's Trading Center Ltd* [1978] 9 MLR 123 at 136. See
553IRC Matter No. 235 of 2003.
(v) Oral Hearing or Hearing Through Statements; where facts of a case are in dispute, it is necessary to give an oral hearing to satisfy the rules of natural justice or the duty to act fairly. It is fair to consider written statements as opposed to allowing an oral hearing where the facts in the case are not in dispute, for example where a person is caught red handed committing an act of misconduct.\textsuperscript{354}

(vi) Confrontation; where a matter concerns serious allegations the applicants must be given details of the allegations with particulars properly outlined and they should be afforded the opportunity to confront those who accuse them.\textsuperscript{355} In \textit{Kwisongole \& Others v Toyota Malawi Ltd},\textsuperscript{355} the plaintiffs were dismissed from their employment with the defendant on the basis of an allegation by a fellow employee that they solicited a bribe from one of the defendant's suppliers. Although it was a term of their employment that following such an allegation, they should each receive a disciplinary memorandum (that set out the allegation) to which they should respond within 3 days, that was never done. Besides, they were neither formally charged with any wrongdoing nor were they invited to any hearing to be informed of their offence so that they could defend themselves. Moreover they were never allowed to question their colleague who reported them or the supplier from whom the bribe was allegedly sought. It was held that their dismissal violated Section 57(2) and was therefore unfair.

In \textit{Khosue v National Bank of Malawi Ltd},\textsuperscript{357} the plaintiff was summarily dismissed by the defendant because of a fraudulent transaction that he had handled involving one of the defendant's customers. He claimed that the dismissal was unconstitutional for being in breach of fair labour practices. It was held that the plaintiff was unfairly dismissed and general damages were awarded. The reason for the decision was that the defendant had compromised on the principle of natural justice. The plaintiff was asked by an investigator and the manager to write a report on the incident. He was not shown any of the reports written by other employees including the crucial reports by the commissionaire and the Customer Services Manager. He was never invited to any hearing nor was he given an opportunity to cross-examine those who gave conflicting reports.

(vii) \textit{Legal Representation}, the law does not require that the applicant be legally represented at the disciplinary hearing. It is generally accepted that disciplinary proceedings are not supposed to take a judicial form. In \textit{Katsenge v Insor Distributors Ltd},\textsuperscript{358} the IRC set aside an \textit{ex parte} Order restraining the respondent from carrying out an intended disciplinary hearing on the ground that the applicant should be allowed legal representation. In that decision the Court clearly stated that there is no law that provides an employee the right to bring a legal practitioner to a disciplinary hearing.

The author has however come across a couple of 'high profile' labour disputes in which parties have mutually consented to legal representation at a disciplinary hearing. This, in our view, should be avoided where possible. In \textit{Blaaw v Oranje Southwerke},\textsuperscript{359} the South

\begin{itemize}
\item See \textit{Khosue v National Bank of Malawi} [2008] MLJR 201 discussed below.
\item Ibid.
\item HC Civil Case No. 3071 of 2000.
\item [2008] MLJR 201.
\item IRC Matter No. PR 30 of 2012.
\item 1998 3 BALR 254.
\end{itemize}
African Commission for Conciliation, Mediation and Arbitration (CCMA), while maintaining that there is no legal right per se to an attorney in a disciplinary hearing, found that a dismissal was unfair where the employer was represented by an attorney when the employee was denied any form of legal representation. In European Member States, employees may seek legal representation in a disciplinary hearing where, for example, a dismissal would lead to being barred from ever practicing their profession.

(viii) Trade Union Representation; it is recommended that where an organisation has a trade union in the workplace, the leaders must be allowed to represent their members in disciplinary proceedings. In *Pellami v Illovo Sugar Company Ltd* the Court upheld the decision of the disciplinary hearing and in assessing its fairness considered, among other factors, that the applicant was represented by members of the Trade Union - shop stewards.

(ix) Decision Making: the person considering the allegations against the employee and any responses thereto, often referred to as the chairperson, should be free of bias against the employee concerned and must keep an open mind before making any decision. The model is not a judicial one; the employer is primarily intent on establishing the facts and is entitled to take a preliminary view on both the facts and the disciplinary action, but must remain (and be seen to be) open to being persuaded otherwise. This does not mean that the disciplinary hearing should be composed of people who are completely not connected with the issue. In other words, there is no requirement to engage outsiders to conduct the disciplinary hearing.

A person or body making the decision must have authority and act on advice from those who heard the employee in a hearing. In *Chitembeza v Malawi Posts and Corporation* the Court observed that, 'notable breach of rules of natural justice in this case was that a higher body, that was not part of the disciplinary hearing made an adverse decision of dismissal contrary to the recommendation made by a panel of disciplinary committee members who were present at the hearing and in a better position to assess the evidence and demeanor of the applicant at the hearing.' On a rather different point, the general rule is that in a holding and subsidiary company situation, either company may not discipline the other's employees as they are treated as separate legal entities.

(x) The Punishment must Fit the Offence; it is trite law that punishment must fit the offence. In *Matipwiri v Securicor Malawi Ltd* it was held that 'the fact that the applicant was absent for five days without permission on one occasion could not constitute a

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360 See also *Capron v Cape Display Chain Services* 1995(4) SA 175 (D) where the Court remarked that 'it appears settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation, and where the relationship between the parties is governed by contract, the right of the person being subjected to an enquiry arising out of that contract to be legally represented at such enquiry must depend upon the terms of the contract itself.

361 See Article 6 of the European Convention of Human Rights, Council of Europe Treaty Series, No. 5.

362 IRC Matter No. 82 of 2003.

363 In *Cement and Others v Shoprite Trading (Malawi) Ltd* IRC Matter No. PR 49 of 2005 the IRC found the applicants' dismissal to have been unfair as the chairperson of the hearing was also the complainant in the matter.

364 'This was the conclusion of the High Court in *Maxapeti v Council for the University of Malawi* HC Civil Cause No. 392 of 1994 and applied by the IRC in *Kwakwe v Orphan Support Africa* IRC Matter No. GK 26 of 2010.

365 IRC Matter No. 87 of 2001.

366 See *Banda v Gilcon Ltd* HC Civil Cause No. 286 of 1987.

ground for termination of services. The respondent should have exercised lenience towards the applicant after hearing the reasons for the absence in an impartial disciplinary hearing. The Court finds that the punishment did not fit the offence.  

(xi) Record Keeping: there is no legal requirement for disciplinary proceedings to be recorded or for minutes to be kept. However, it is advisable that the employer keeps a coherent record, not least to avoid disputes as to what had transpired. If the proceedings are recorded, it is a moot point whether the employer is obliged to make a copy of the record available to the employee. Our view is that, if the employer allows an internal appeal amounting to a review of an earlier recorded inquiry, the record should be made available to the employee.

(xii) Internal Appeals; in some cases it may be necessary to provide for internal appellate procedures. Where such an internal appeal procedure is provided for, the Court may hold that an action commenced without following the appeal procedure is premature unless parties agree.  Where the employer refuses to consider the appeal, when one is provided for in the contract of employment, the same will amount to an unfair labour practice.  

Section 57(3) provides for some of the invalid reasons for dismissal. They include discriminatory termination of employment on such grounds as the employee's race, colour, sex, language, religion and political or other opinion. The following further grounds are also invalid reasons for dismissal; the employee's exercise of his or her rights under the LRA, employee's temporary absence from work due to sickness or injury, withdrawal of labour due to imminent or serious danger to life or health, the filling of a complaint or the participation in proceedings against an employer involving alleged violations of laws, regulations or collective agreements.

It must be noted that the burden of proving that the reasons for dismissal are valid lies on the employer otherwise the Court will presume that the dismissal was unfair. This is provided for in Section 61 which goes further to say that in addition to complying with Section 57(1) the employer should in all circumstances act with justice and equity in dismissing the employee.

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368 See Kalidozo v Ilovo Sugar (Mw) Ltd IRC Matter No. PR 181 of 2007 where the IRC held that theft by the applicant of sacks which the respondent would dispose of anyway was not serious enough to warrant a dismissal. The respondent should have opted for other disciplinary actions such as a warning given that the applicant had worked for the respondent for over twenty years.
369 See Piriella v Limbe Leaf Tobacco Ltd IRC Matter No. 49 of 2002.
370 See Thorn v Pump Aid Malawi IRC Matter No. PR 263 of 2011.
371 See Banda v Dimon (Mw) Ltd [2008] MLR 92.
372 See Kaunda v Tukombo Girls Secondary School [2008] MLR 446 where the applicant was dismissed due to her husband’s resignation where both were working for the respondent. The IRC held that the effect of the respondent’s decision was to prevent married women from seeking and sustaining employment in their own right.
373 See above under Anti-discrimination.
374 See also Section 6 of the LRA. In the South African case of Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LCA), the Labour Appeal Court held that the dismissal of an employee partly as a result of his union
375 See Council of the University of Malawi v Kabwila-Kapasula and Others HC Civil Cause No. 84 of 2011.
Commenting on Section 61, Dr Chilumpha suggests the following:

"First, it is for the employee to prove that he was dismissed by the employer. Specifically, he must show that his employment was terminated by, or at the initiative of the employer. Second, having proved the dismissal, the employee is not required to go further and show that it was unfair. On the contrary, at that point the evidential onus shifts to the employer to prove that the termination of employment was in fact fair. To quote the South African Labour Court, 'the employer is statutorily bound to establish the fairness of its employee's dismissal'. And to discharge that burden, the employer must show that he complied with Sections 57 and 61. The wording of these provisions clearly casts upon him the onus of proving the fairness of a dismissal. They require him first and foremost, to demonstrate that he terminated the employment for a reason, and not just on a whim. In fact Section 61(1) places him under a statutory duty to provide the reason. Having brought the employment to an end, he should be able to give the reason for doing so. Failure to provide the reason creates a conclusive presumption that the dismissal was unfair.”

In *Jawalu v Malawi Revenue Authority*, the Court found that the employer had not acted with justice and equity when, inter alia, the disciplinary panel included the Commissioner General who had laid the allegations and the plaintiff was not given an opportunity to confront (cross-examine) his accusers.

**C. Dismissal Based Operational Requirements**

The IRC in the *Nguyen Case* adopted the definition of the term 'operational requirements' as is provided for under Section 213 of the South African Labour Code. 'Operational requirements' means requirements based on the economical, technological, structural or similar needs of the employer. This definition is very similar to what Convention 158 of the ILO states.

On the other hand, Kibling cites three main retrenchment situations. They include closure of a business as a whole; closure of a particular workplace where the worker was employed and lastly reduction in the size of the workforce.

In *Chima v The Development Centre* the Court said that retrenchment refers to workforce reduction as a result of ‘economic down run, and redundancy refers to workforce reduction as a result of technological innovation. In modern Labour Law terms such as rationalization or restructuring of the organisation are also used. Consultation between the employer and employees is required by both national and international standards. The consultation may not involve each and every individual but their representatives as was the case in *Dzipemba and Others v RBM* where the IRC indicated that all the 600 employees could not be consulted individually.

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377 *OCPAIPU & Another v County Fair Foods (Pty) Ltd* [2001] ZALC 169, para. 89. Per Gamble, AJ.
378 *Unfair Dismissal; Underlying Principles and Remedies*, Montfort (2007) p. 14. See also *Mandala v Phiri Building Contractors* IRC Matter No. TO 350 of 2008 where this suggestion was relied upon, against the applicant who hardly exhibited that he was dismissed.
381 Employment Law, Legal Action Group (2000) p. 188.
382 Similar categorization was discussed in *Chima v SS Rent A Car* IRC Matter No. 149 of 2000.
The Courts have set up standards that an employer must comply with before effecting the intended retrenchment or redundancy. The IRC first discussed the standards in the Nyamweya Case and are also reproduced in the reported case of Boloweza and Another v Doolies Lodge. The following are the questions which the Court must ask itself in determining whether or not the redundancy or retrenchment was properly proceeded with:

(i) Was there any consultation between the employer and the employees or employees’ representatives?
(ii) Was there any attempt to reach a consensus?
(iii) Was there any disclosure of information to the employer?
(iv) Were the employees afforded an opportunity to make representations? and
(v) What were the selection criteria as regards those who were to be on retrenchment or redundancy list?

Commenting on the foregoing standards in Malawi Telecommunications Ltd v Makande and Another, the Supreme Court opined that the consultation prior to dismissal based on operational requirements must in fact entail genuine engagements of the employees in the process of restructuring. It should not merely be a purported attempt at effecting a unilateral notification from the employer to employees, in a manner which does not at the same time seek feedback from employees. On the facts of the case, the Court held that the respondents were not communicated to and it was in evidence that only members of senior management were engaged in the making of the selection and recommendation of the number of employees whose employment contracts had to be terminated thereby. The appeal was thus dismissed in its entirety.

Circumstances of the dismissal based on operational requirements will have a bearing on the quantum of compensation payable. In Omar v Malawi Telecommunications Ltd IRC Matter No. PR 70 of 2001 the IRC opined that it would be unjust to award the applicant compensation up to the date of retirement as her contract of employment was terminated due to operational requirements save that she was not consulted. She was awarded compensation covering the period between the termination and date of the judgment.

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388 [2008] MLR 35.
389 A similar finding was made by the IRC in Tembo v Dorvic Hotel IRC Matter No. PR 527 of 2007 where the concerned employees were engaged in meetings on the same day of the dismissal. The assertion by the respondent that this amounted to consultation was rejected. See also the ruling in Mwala and Others v Shifa Medical Services
4. Summary Dismissal

The EA also envisages a situation where the employer may dismiss the employee without following certain requirements in the Act. Thus Section 59(1) provides for summary dismissal, which is defined in Section 59 (2) as:

"Termination of the contract of employment by the employer without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term."

There are five grounds for summary dismissal under Section 59(1):

i. Where an employee is guilty of serious misconduct such that it would be unreasonable to require the employer to continue the employment relationship;
ii. Habitual or substantial neglect of his duties;
iii. Lack of skill that the employee holds out to have;
iv. Willful disobedience to lawful orders given by the employer; or
v. Absence from work without permission of the employer and without reasonable excuse.

In Macholowe v Universal Industries Ltd 390 it was held that habitual absenteeism is a ground for summary dismissal. In Chongu v Stanfield Motors (Mw) Ltd 391 the applicant was involved in a spare part scandal and consequently absconded from work for about three weeks upon which his employment was terminated. The Court held that the respondent could not be expected to hold a hearing in the absence of the applicant. The dismissal being fairly done, he could not claim severance pay or notice pay. In Dulawevu v Grey Securities Services, 392 it was held that an allegation of corruption amounts to serious misconduct under Section 59(1) (a), so does theft and gross negligence.

In Khanyeza and two Others v Securicor (Mw) Ltd 395 the applicants (security officers) in the course of their employment retrieved stolen property but conspired to sell it. They were dismissed instantly. It was held that their gross dishonesty was a good ground for summary dismissal. 396

The MSCA discussed 'willful disobedience of lawful orders given by the employer' 397 in Magalasi v National Bank of Malawi Ltd 398 where the applicant had driven a motor vehicle without having the prerequisite driving licence and refused to receive a warning letter in that regard. His appeal on unfair dismissal was dismissed with costs. Justice Mtambo said the following at page 49:-

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391 IRC Matter No. 75 of 2003.
392 IRC Matter No. 28 of 2002.
393 See Ibrahim v Suncrest Creameries Ltd IRC Matter No. 73 of 2003.
396 See also Kachingwe v Shire Bus Lines Ltd IRC Matter No.18 of 2000.
397 Section 59(1)(d) of the E.A.
398 [2008] MLR 47.
"Insubordination has been deemed as refusal to obey some order which a superior officer is entitled to give and have obeyed; it imports a willful or intentional disregard of the lawful and reasonable instructions of the employer."

In cases of a summary dismissal it has been submitted that the employee will still be entitled to procedural justice such as the right to be heard under Section 57(2) where it is practicable. However, a recent dictum from the MSCA suggests that a hearing may not be necessary in summary dismissal cases. This is how the Supreme Court put it:-

"It is the view of the Court that the conduct of the appellant (theft of fuel products) in this case fell within Section 59(1)(a). The employer had a right to dismiss him summarily and in that event the questions of the appellant's right to be given an opportunity to be heard and the right to be treated with justice and equity would be irrelevant."  

This dictum has raised debate amongst legal practitioners. Strict employment rights lawyers would argue for a hearing, where practicable, in the event of summary dismissal. However, the MSCA was perhaps more concerned with expediency. One wonders what purpose a disciplinary hearing would serve, for instance, where an employee is caught in the act of stealing, perhaps mitigation of sentence? If so, our view is that the MSCA's position is sweeping and needs to be reconsidered by asserting that a hearing may be required depending on the facts of the case. An example is Kondwani v Malawi Postal Corporation, where the applicant was summarily dismissed for insubordination for refusing a transfer. The IRC agreed with the reason for the dismissal but on the ground that he was not given the right to be heard, the IRC found the dismissal unfair. We think in such a case the hearing would promote fairness and equity in allowing the employee to explain the reasons for refusing a transfer.

5. Constructive Dismissal

Constructive dismissal is a form of unfair dismissal under Section 58 of the Act. Constructive dismissal itself is provided for under Section 60 of the Act. The Section provides that an employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship.

The classic example of constructive wrongful dismissal case is Western Excavating Ltd v Sharp where Lord Denning MR had this instruction at page 769:-

"If the employer is guilty of conduct which is significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. **He is constructively dismissed. The employee is entitled in those circumstances to leave...without giving notice.**" (Emphasis supplied)
Constructive dismissal was proved in *Banda v Dimon (Mw) Ltd* 403 where the defendant forced the plaintiff, a computer programmer, out of his job by taking away his office, accommodation, computer hardware and files. In that case Justice Ndovi applied the Sharp case.404

In *Chisanthi v National AIDS Commission*,405 the IRC found that the applicant's resignation was not at his own volition. He was forced to do so by the unreasonable conduct of the employer. The respondent's agent actually coaxed the applicant into resignation. It was therefore held that the applicant was constructively dismissed. This seems to be good law to us as some employees have resorted to getting rid of employees they do not like by coaxing them into resignation. In the alternative, we think that where issues of conduct or capacity have genuinely arisen, the employer should feel free to discipline the employee in accordance the F.A.407

Chilumpha407 argues that an employee does not need to invoke Section 60 in every case of objectionable conduct by the employer falling short of a dismissal.408 Where, for instance, the employer's action takes the form of an unlawful demotion of the employee or a disciplinary sanction that is out of proportion to any wrongdoing allegedly committed by him, instead of terminating the contract and seeking relief for constructive dismissal, the employee could leave the contract intact but avail himself of his right under Section 64(3) by asking the Court to reinstate 409 him to his previous position410 or to review the sanction imposed by the employer. By its very nature, Section 64 allows him to make that choice. That may be more useful than directly proceeding under Section 60. For very often once the employment has been terminated, the employer will take immediate steps to fill the vacancy so that by the time the matter comes to Court for hearing, there is no longer any position to which the employee can be reinstated. Where that happens, Courts are often reluctant to order reinstatement.411

6. Remedies for Unfair Dismissal

Remedies for unfair dismissal are those provided for under Section 63 of the Act.412 However it must be noted further that an employee may seek remedies under common law for wrongful dismissal. Wrongful dismissal entails dismissal without due regard to terms and conditions of a particular contract of employment. However remedies for wrongful dismissals lie in damages only.413 The distinction between Section 63 remedies and common law remedies should now be considered as superseded following the MSCA judgment to that effect.414

Justice Chikopa 415 is of the view that the unfairly dismissed employee Section 63 sought to
protect does not include one who claims unfair dismissal simply because they have not been given reasons for the termination. He should be the one whose termination cannot be justified on the reasons given or cannot be justified in the absence of reasons. Much as the distinction makes sense, we are of the view that in practice this would be difficult to distinguish and should better be understood as an academic exercise rather than a practical approach to remedies for unfair dismissal.416

Remedies for unfair dismissal are three-fold; reinstatement, re-engagement and compensation. In awarding one or more of these remedies, the Court is called upon to take into account the wishes of the employee and the circumstances in which the dismissal took place.417 This includes the practicability of the order. For instance in 128 Trade Union Members v NSCM Milling Division the complainants were seeking a remedy of reinstatement but the IRC found that this was impracticable taking into account the period of time that had elapsed between 1996 and 2001. Compensation was ordered instead.

\textit{i. Reinstatement}

The Court may order reinstatement under Section 63(1)(a) whereby the employee is to be treated in all respects as if he had not been dismissed. It has been said that reinstatement should be automatic where employment is terminated on grounds of discrimination on the basis of race, gender, political consideration or ethnicity. Where the termination of employment is on other grounds other than discrimination, reinstatement should only be ordered where the employer and employee are willing to continue the employment relationship.419 In Jumbo v Banja La Mtsogolo, 420 the plaintiff was unfairly dismissed on the grounds of her pregnancy. The IRC ordered reinstatement.421

A reinstated employment is regarded as having continued in the employment. In short, where there is an order of reinstatement the employee must be paid all remuneration that his or her colleagues earned between the date of dismissal and the date of reinstatement.

According to Section 63(6), a special award of compensation is payable to the employee where the employer does not comply with the reinstatement order. In Stanbic Bank Ltd v Mwasha the MSCA awarded the respondent compensation representing 12 weeks' pay arising from the appellant's refusal to reinstate the respondent.

As we have pointed out, in awarding any remedy the Court is called upon to take into account the wishes of the employee and the circumstances in which the dismissal took place such as the employee's own contribution to the dismissal.422 Thus, an award of reinstatement may thus raise evidential matters as observed by the IRC in Jawada v Malawi Revenue Authority, 423 at page 409:

\footnotesize{416 The High Court discussed unfair dismissal and wrongful dismissal in Magola v Press Corporation HC Civil Cause No. 3719 of 1998 and Mvula v Norse International Ltd 15 MLR 331; Mtwali v New Building Society 15 MLR 311 and Mwafuulira v ADMARC HC Civil Cause No. 1396 of 1992. For the English position, which is generally tenable in the Malawian context, regard should be had to the decision of Dolmadson J. in Norton Tool Co. v Tewston [1973] 1 All ER 183.

417 Section 63(2) of the EA must be compared with Section 8(3) of the LRA. See also Wawanya v Malawi Housing Corporation MSCA Civil Appeal No. 40 of 2007.

418 IRC Matter No. 8 of 1999.


420 [2008] MLR 460.

421 See Saukila and Another v Malawi Telecommunications Ltd IRC Matter No. PR 489 of 2010.

422 See Section 63(2) and (3).

"A Court cannot make an award of reinstatement outright from a finding of unfair dismissal. The applicant must first show the Court that reinstatement is possible under the circumstances of the case. The law, therefore, places a burden on the employee to show that reinstatement is possible. This burden would shift where the employer on the other hand alleges that reinstatement is not possible...these are matters of evidence requiring a special hearing."

In appropriate cases, the Court may indeed refuse to order reinstatement, as was the situation in the High Court decision of *Lumgari v AG*. In that case Mkandawire, J declared that the plaintiff’s removal from the office of Inspector General of Police was unlawful and unconstitutional in that Sections 43 and 154 of the Constitution were not complied with. The judge, however, declined to reinstate the plaintiff. He relied on the case of *Chief Constable of the North Wales Police v Evans* where the Court refused to grant an order of *mandamus* to reinstate the applicant because in practice such an order would border on usurpation of the powers of the Chief Constable, which was to be avoided. In the present case, an order of reinstatement would constitute usurpation of the President’s power to appoint an Inspector General of Police.

Again in *Banda v Tobacco Association of Malawi* the IRC ordered compensation instead of reinstatement because reinstatement was not practicable after two years had elapsed since the dismissal took place. In *Nazombe v Malawi Electoral Commission* the applicant, a personal secretary to the Chief Elections Officer was transferred to a different department to work as a copy typist. The Court found that she was constructively demoted and ordered her reinstatement. In *Chisona v Lilongwe Hotel* allegations of incompetence on the part of the applicant were not proved and so his dismissal was held to be unfair and his reinstatement was ordered. In *Phiri v Sunbird Living Lodge* the applicant was on a sick leave. His employer declined to reinstate him after bringing a medical report certifying his fitness. Again the Court ordered reinstatement.

Zibelu-Banda observes that although Section 63(2) providing that in considering an appropriate remedy reinstatement shall be considered first, it leaves too much room for the employer to opt to pay compensation instead of reinstatement by pleading that reinstatement is impracticable. It is further observed that compensation has proved inadequate and ‘wealthy’ employers have in some cases abused it.

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42 See Chapter One on Development of Employment Law.
42 Section 154(4) provides that a person holding the office of Inspector General of Police shall be subject to removal by the President only by reason of that person being: (a) incompetent in the exercise of his or her duties; (b) compromised in the exercise of his or her duties to the extent that his or her capacity to exercise his or her powers impartially is in serious question; (c) otherwise incapacitated; and (d) over the age prescribed for retirement.
42 (1982) 1 WLR 1155.
42 See also *Nangwale v Speaker of Parliament and Another* Misc. Civil Cause No. 1 of 2005.
42 [2008] MLR 342.
42 [2008] MLR 460. See also *Nyiszenda v AG* IRC Matter No. 45 of 2003.
42 IRC Matter No. 35 of 2001.
42 A similar conclusion was reached in *Bezeni v Education Department of Nkhoma Synod* [2008] MLR 352.
44 See *Chisale v Malawi Telecommunications Ltd* IRC Matter No. 328 of 2002.
ii. Re-engagement

The Court may order re-engagement under Section 63(1)(b) whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties. In Chakbaya v Portland Cement Co. Ltd, the plaintiff an internal auditor, was dismissed without a hearing on allegations that he had leaked an audit report to the Malawi News Paper. The allegations were not substantiated and the High Court found that the plaintiff had been unfairly dismissed. The Court further ordered both re-engagement and compensation.

A special award of compensation is payable to the employee where the employer does not comply with the re-engagement order according to Section 63(6).

It appears before the 1994 Constitution, the remedies of reinstatement and re-engagement were not available to an employee because of the decision in Ridge v Baldwin and the High Court position propounded in Mwahewa v Press (Holdings) Ltd.

iii. Compensation Award

The Court may order compensation under Section 63(1) (c) of the EA. In Kachingwe v Group Commodity Brokers Ltd the IRC had this to say with reference to compensation:-

"Compensation is a lump sum of money that is awarded to a successful applicant for the wrong done to him. The award must be just and equitable and must arise from the loss suffered due to the dismissal. A Court has wide discretion in making the award. The discretion however must be exercised judicially and equitably. A Court is not allowed to dream up a figure without showing how it was arrived at."

In Chizoua v Ibrahim Cash n' Carry unlike Jumbo v Banja La Misogolo, the applicant who was unfairly dismissed on the grounds of her pregnancy was awarded compensation rather than reinstatement. Again in Ngwenya and Gondwe v Automotive Products Ltd the IRC having found breach of the Act ordered immediate compensation.

Section 63(4) provides that an award of compensation shall be such amount, as the Court considers just and equitable in the circumstances having regard to, first, the loss sustained by the employee in the consequence of the dismissal in so far as the loss is attributable to action taken by the employer and, secondly the extent, if any, to which the employee caused or contributed to the dismissal. Now whereas Section 123(4) of the English Employment Rights Act, 1996

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436 [2008] MLLR 118.
438 10 MLLR 321. See also Chanumana v Olilcom (Mw) Ltd HC Civil Cause No. 2001 of 1996 and R v East Berkshire Health Authority, Ex parte Walsh (1984) 3 All ER 429.
439 See also an article by Dr C. Chilumpha titled Compensating Unfair Dismissal under the EA, 2000: A Search for Guiding Principles in University of Malawi Students Law Journal Vol. 9, No. 1, 2010 p. 66-86.
441 The reader must note that the case of Chawani v AG [2008] MLLR 1 (referred to earlier on) holds that Section 43 of the Constitution does not cover the issue of damages for unfair labour practices. The Chawani case overruled the following cases on the issue of an award of damages for the loss of expected benefits to which an employee has no contractual right, namely Phiri and Others v Minister of State in the President's Office and Another [2008] MLLR 264, Kalumo v AG [1995] 2 MLLR 669 and Mvalo v Council of the University of Malawi [1995] 2 MLLR 434.
442 [2008] MLLR 385.
445 See also Statute Law (Misc. Provisions) Act Cap 5:01 of the Laws of Malawi Part IV on Contributory Negligence and whether the same applies to employment contracts and the IRC, which we are of the view that it does.
specifically incorporates the duty of an employee to mitigate his loss, there is no similar provision in the EA. We may only assume that for the compensation to be *just and equitable*, the Court is granted wide discretion in arriving at the same including determining whether the employee mitigated his loss or not. 445

Section 63 (4) must be read together with Section 63 (5) which provides for minimum amounts of compensation which an unfairly dismissed employee can be paid under Section 63. There is though nothing to stop the Court, if it was minded, from awarding compensation for the unexpired term of a fixed term contract or indeed a shorter period or up to the date of retirement.446

Unfortunately what is *just and equitable* is left to the discretion of the Court leading to variant awards some unjustifiable. Our view is that the concept of *just and equitable* must be seen to be applicable to both the employer and the employee. An illustration of our view is *Community of Saint Egidio v Mbole*. 447 In that appeal from the IRC, Justice Chirwa set aside an award of about K3,500,000.00 made by the IRC representing damages for a remaining part of the employee's contract of employment which was curtailed by an unfair dismissal. The remaining period was 36 months whereas the period worked was 7 months only. It was, in our view, correctly held that had it been that the period worked was 36 months and that remaining was 7 months such an award would be justifiable.448

An issue has also arisen as to what extent common law principles are applicable in assessing compensation. It has been argued that damages based on common law principles have proved inadequate and rendered the law of unfair dismissal nugatory as at the end of the day remedies have not changed with the coming in of the EA.449 On the contrary, it must be appreciated that the entrenched common law principles are still very useful in the assessment of damages. In *Wavanya v Malawi Housing Corporation* 450 the MSCA concluded that-

"Our reading of Section 63(4) is that a Court has considerable latitude in awarding compensation under the EA. In the end it really should not make any difference whether one wants to call the award an award under Section 63 of the EA or a common law award or any other description as one may please."

According to Section 63(4) the Court must consider also the employee's own contribution to the dismissal. Examples are *Mbole v National Bank of Malawi Ltd* 451 where the applicant despite being unfairly dismissed,452 for his prosecution arising out of fraudulent activities in the course of his employment as a bank clerk, was awarded a lesser amount of compensation. The Court took into account the financial risk the applicant posed to the respondents. In *Magawa v Auction Holdings Ltd* 453 where the applicant was dismissed for violating a condition of his employment not to grow tobacco or sell his own or third parties tobacco to the respondent. He was not given an

445 See also Statute Law (Misc. Provisions) Act Cap 5:01 of the Laws of Malawi Part IV on Contributory Negligence and whether the same applies to employment contracts and the IRC, which we are of the view that it does.
446 See Wawanya v Malawi Housing Corporation MSCA Civil Appeal No. 40 of 2007 where the applicant who had worked for 5 days only was awarded three months pay and three months housing allowance and this was distinguished from the Chawani case where the employee had worked for a very long period of time and was awarded compensation covering the remaining period before retirement. In Chitsazani v National AIDS Commission IRC Matter No. PR 477 of 2009, the IRC held as follows: 'Since the applicant was on a fixed term contract, the appropriate remedy is compensation. In cases of fixed term contract, the compensation reflects the lost income from the date of the dismissal up to the date the contract would have come to an end. We therefore order compensation in that regard. This is to say, the applicant should get payment of his remuneration from the date of dismissal and for the residual period of the contract.' In Madinga v Petroleum Control Commission IRC Matter No. PR 176 of 2001 the applicant was awarded K17,541,520.00 covering benefits between the date of his dismissal and retirement - 8 years. He was aged 56 and unlikely to find alternative employment.
447 HC Civil Cause No. 15 of 2010.
448 In Omar v Malawi Telecommunications Ltd IRC Matter No. PR 70 of 2001 the IRC opined that it would be unjust to award the applicant compensation up to the date of retirement as her contract of employment was terminated due to operational requirements save that she was not consulted. She was awarded compensation covering the period between the termination and date of the judgment.
450 Civil Appeal No. 40 of 2007 at page 8 of the transcript.
451 IRC Matter No. 23 of 2002.
452 He was denied a hearing because he had had warnings.
opportunity to be heard. As he had worked for more than 10 years but less than 15 years, relying on Section 63(5)(c) the Court awarded him 3 weeks pay for each of the completed year of service. Clearly the thinking here was that because he had caused his own dismissal, he should only be awarded the very basic award for a person of that period of service. In *Byko v Flaps Investment* 454 according to the terms of the contract of employment between the parties, the applicant was given a maximum of four days for his daughter's funeral. He however overstayed by twelve days. Despite being unfairly dismissed, the Court awarded him his severance pay but without any compensation due to his contribution to the dismissal.455

It is clear from Section 63(4) that principles in tort as regards the remoteness of damages and contributory negligence come into play. Indeed the Norton Case held that the subsection is analogous to the provisions of the Law Reform (Contributory Negligence) Act 1945. In *Morish v Henlys (Folkestone) Ltd* 456 the Court went further to state that the words "caused or contributed" should be regarded as "incorporating some measure of blameworthiness" and that the assessment is only to be reduced to the extent that it is just and equitable.

In *Magola v Press Corporation Ltd*, 457 a matter of unfair dismissal that took place after the 1994 Constitution but before the E.A, Mwaungulu J. held that Section 31 of the Constitution envisaged unfair dismissal as an act of unfair labour practice and so the argument by the defendant that the plaintiff was only entitled to damages at common law for wrongful dismissal was unsustainable.

Mwaungulu J. in considering an award of compensation to be just and equitable, had regard to the Norton Case where an appeal was allowed because the Industrial Tribunal did not set out reasons for its lump sum award of compensation with sufficient detail. Delivering his judgment, Sir John Donaldson, the 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 President went further to formulate three heads of compensation, which were adopted in the Magola Case and are discussed below:

**a. Immediate loss of wages**

This head of compensation represents the loss suffered from the date of termination to the date of judgment. It is generally not affected by the fact that the employee has found new employment. The measure of damages under this head is however restricted to the notice period such that where an employee had some payment in lieu of notice, he or she will not be entitled under this head.458 In *Chiume v SS Rent-A-Car* 459 the applicant was unfairly dismissed after working for the respondent for nearly 3 years. At the time of the delivery of the judgment he had been unemployed for 2 years and 8 months.460 It was held that he was entitled to recover as immediate loss, his monthly salary for the entire period of his unemployment. In addition he was awarded both his pension contributions and those of the respondent for the 2 years and 8 months. Most cases take long to reach the judgment stage and in most cases through no fault of either party but as a result of the inadequate staffing of the Courts. As a result, Justice Chikopa461, observes that tying the amount of the award to the date of judgment will in many cases appear to unnecessarily punish the respondent employer. For that reason the Courts will
sometimes depart from the foregoing principle and award compensation on the basis of a period that is much shorter than the duration of the employee's unemployment.\textsuperscript{462}

\textbf{b. Manner of dismissal}

This head of compensation is crucial where the dismissal has affected the marketability of the employee to prospective employers or the manner of dismissal made him exceptionally liable to selection for dismissal. The Court, however, pointed out that this does not include injury to pride or feelings, humiliation and embarrassment. In \textit{Sinaa v Polypack Ltd},\textsuperscript{463} the Court refused to award damages for humiliation and embarrassment and in \textit{Chima v The Development Centre},\textsuperscript{464} the IRC said that it was unable to award damages for mental anguish such remedy being unavailable under the EA.

\textbf{c. Future loss}

This head of compensation is taken into consideration where the new employment is less secure. It roughly represents the period between the judgment and retirement or to the date when the applicant would secure alternative employment. The latter involves "guesstimating" after taking into consideration characteristics of the applicant including age, qualifications, health and the like. An applicant recovers nothing where he secures better or comparable alternative employment before assessment. In \textit{Chiume v SS Rent-A-Car},\textsuperscript{466} the IRC laid down the law as follows:-

"the Court will assess compensation under this head if the applicant is unemployed at the time of the hearing and will take into account the labour market, personal characteristics of the applicant, whether he is in a state that he can be re-employed. The Court must take care not to regard the contract of employment as a contract for life. Therefore the applicant cannot be paid future wages for the rest of his life."\textsuperscript{467}

Section 63 (5) provides for minimum amounts of compensation.\textsuperscript{468} Some experts have sought to argue that it is implicit from this subsection that an award of compensation may only be made where an employee has worked for at least a year. However we hold the view that the subsection is only directory and not mandatory such that an employee who has worked for less than a year will also be entitled to some kind of just and equitable compensation commensurate with his circumstances.

\section*{X CONCLUSION}

In conclusion, therefore it will be appreciated from the foregoing discussion that the enactment of the EA has gone a long way in satisfactorily addressing the vulnerable position of an individual employee. Before the adoption of the 1994 Constitution and the EA, Malawian Labour Law was unapologetically pro-employer. The employer had free reign to hire and fire employees. The minor shortfalls highlighted in this Book, including the demarcation of the jurisdiction of the IRC need urgent attention by all the three arms of government, including the private sector, where appropriate. We commend Parliament for addressing the concerns over pension and severance allowance through the enactment of the Employment (Amendment) Act 2010 and the Pension Act 2010.\textsuperscript{469}

\begin{footnotesize}
\begin{enumerate}
\item An example of such a situation is \textit{Marina v Kabula Foods Ltd} IRC Matter No. 31 of 2002, where the applicant who had been unemployed for 1½ years after being unfairly dismissed, was awarded compensation covering 6 months’ pay only.
\item IRC Matter No. 159 of 2001.
\item IRC Matter No. 41 of 2001.
\item See \textit{Mugafirima v Mania Malawi Ltd} IRC Matter No. 34 of 2004 and Banda R.Z., Op. Cit. p. 41.
\item IRC Matter No. 149 of 2000 at page 13 of the transcript.
\item See also the following crucial decisions: \textit{Kachinika v Portland Cement Co.} [2008] MLR 161, \textit{Nhlopi v Commercial Bank of Malawi Ltd} HC Civil Cause No. 233 of 1999, \textit{Kalinda v Limbe Leaf Tobacco Ltd} HC Civil Cause No. 542 of 1995, \textit{Mugafirima v Mania Malawi Ltd} IRC Matter No. 34 of 2004 and its appeal to the High Court in \textit{Mania Malawi Ltd v Mugafirima} HC Civil Appeal No 87 of 2004 and \textit{Kachinika v Group Commodity Brokers Ltd} IRC Matter No. 117 of 2000.
\item (a) one week’s pay for each year of service for an employee who has served for not more than five years; (b) two week’s pay for each year of service for an employee who has served or 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, and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57(3).
\item Discuss in Chapter Four.
\end{enumerate}
\end{footnotesize}
Chapter Three: COLLECTIVE LABOUR RIGHTS

I. INTRODUCTION

The Labour Relations Act 1996 (LRA)\textsuperscript{470} aims at promoting sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and the promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development. The main source of this piece of legislation is ILO Conventions 86 and 97 Concerning Freedom of Association and Protection of the Right to Organise (1948) and Concerning the Right to Organise and Collective Bargaining (1949) respectively. The LRA provides for rights of employees to organize and to bargain collectively. \textsuperscript{471} This Chapter examines some of the provisions of the LRA.

We need to state at the outset that there is not much litigation based on the LRA as compared to the EA and the 1994 Constitution. Zibelu-Banda\textsuperscript{472} thinks that the reason for this situation is the level of activism of trade unions and employers' organisations and their relationship with one another. We concede that much as trade unionism has grown since the inception of the 1994 Constitution, it is yet to reach satisfactory levels of engagement with employee organisations.

II. APPLICATION OF THE ACT

According to Section 3 of the Act, the Act applies to the private sector and the Government, including any public authority or enterprise. However the Act does not apply to members of the armed forces, the prison service or the police, except those employed in their civilian capacity. Thus applicability of the LRA is similar in material aspects to the applicability of the EA.\textsuperscript{473}

III. FREEDOM OF ASSOCIATION\textsuperscript{474}

The LRA entrenches freedom of association, which is a constitutional right.\textsuperscript{475} Everyone in the exercise of this freedom may establish and join organisations of his or her own choosing.\textsuperscript{476}

In \textit{Tourism Development and Tourism Company and Another v Mbango} \textsuperscript{477} the High Court upheld the IRC decision that a contractual clause which had the effect of infringing on the respondent’s freedom of association was void.\textsuperscript{478} It must be emphasized that an employee may not be compelled into or out of a trade union through any act whatsoever. This is guaranteed under Section 6 of the LRA which was discussed in the \textit{Tourism Development and Tourism Company} case above.

\textsuperscript{470} Cap 5401 of the Laws of Malawi.
\textsuperscript{472} Ibid p. 13.
\textsuperscript{473} See Chapter Two on Application of the EA.
\textsuperscript{474} See also the ILO Convention Concerning Freedom of Association and Protection of Right to Organize No. 87 which was in fact adopted just before the Universal Declaration of Human Rights (UDHR) in 1948.\textsuperscript{475} Under Section 31(2) and 32 (1), (2) of the Constitution.
\textsuperscript{476} See Mbango v Mount Soche Hotels Ltd IRC Matter No. 2 of 1999, Malhau v National Seed Company Malawi Milling Division IRC Matter No. 4 of 1999 and Mkwezalamba v Malawi Posts and Corporation IRC Matter No. 154 of 2001.
\textsuperscript{477} [2008] MLR 314.
\textsuperscript{478} See Section 2(3) of the LRA.
In *Mbango v AG*, the plaintiff was the president of the MCTU. By virtue of his position, he was required to go to National Seed Company of Malawi (NSCM) premises in Blantyre to quell a strike by the company's employees. Upon his arrival at the company's premises, he was arrested by the police and detained for about six hours. He was released without reason for his arrest being given. Not even a statement was recorded from him. The Court found that the plaintiff's liberty under Section 18 of the Constitution was infringed on when he was simply properly exercising his rights under Section 31(2) and 32(l) of the Constitution. He was awarded damages.

This demonstrates that Courts jealously guard an individual's freedom of association. All persons therefore, need to respect this freedom more especially agents of the government who are more often than not in blatant breach of constitutional rights.

**IV. TRADE UNIONS AND EMPLOYERS' ORGANISATIONS**

**A. Definition of a Trade Union and an Employer's Organisation**

Section 2(1)(c) of the LRA defines a trade union as 'any combination of persons, the principal purposes of which are the representation and promotion of employees' interests and the regulation of relations between employees and employers, and includes a federation of trade unions but not an organization or association that is dominated by an employer or employers' organization.'

The 'purposes' of an organisation are essential to its recognition. In *Midland Cold Storage v Turner*, which concerned an unofficial shop stewards' Committee drawn from the members of various unions in London docks, it was held that there was indeed an organisation of workers but it was not a trade union since its main objectives did not include regulating industrial relations between employees and employers. However, in *BÄALPE v NUT*, the Court of Appeal held that an association, which due to its size and constitution was not able to carry out all of the functions of a larger trade union, could still be a trade union.

Section 2(1)(c) of the LRA defines an employers' organisation as any combination established by employers, the principal purposes of which are the representation and promotion of employers' interests and the regulation of relations between employers and employees.

Under Section 5 of the Act, a trade union and an employers' organisation have, among other rights, the right to draw up their own constitutions, organize activities and affiliate themselves to international organisations to secure their respective interests.

The Act prohibits discrimination of any kind in the constitutions of the trade unions or employers' organisations. This does not however preclude any provision, programme or activity aimed at ameliorating the conditions of disadvantaged individuals or groups.

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479 Civil Cause No. 980 of 1998.
482 See Section 7(2) of the LRA and see also Section 20 of the Constitution.
483 See Section 7(3) of the LRA. Issues of discrimination were discussed by the IRC in the University Workers Trade Union v The Council of the University of Malawi, which we have already discussed in Chapter Two.
Where freedom of association and its associated rights discussed above are infringed, the IRC is empowered to make such orders as it deems necessary to secure compliance with part II of the Act. The order may extend to reinstatement, restoration of a benefit or advantage and compensation.

B. A Brief History of Trade Unions

The roots of trade unions generally dates back to the advent of industrialization in many parts of the world. With industrialization came the need for larger workforces in factories. Workers were performing their jobs under poor conditions amid widespread exploitation. Workers realized that individually they had no power but if they united they would be able to face up to their employer and demand better wages and conditions. That is how unions came into being.

In particular, trade unions in England have been subject to legal regulation for much of their history. Indeed, it is only in recent years that unions have been allowed a relatively free hand in the way that they are able to conduct affairs between members and employers or employers organisations. Further, free market economists have sought to destroy the power of trade unions, which are seen as impeding business by acting as a restraint on management and as pushing up prices by gaining larger pay increases for their members.

In our own history, following various strikes in the 1940s, the colonial government passed the Trade Union Act in 1958. The post-independence period (1964-1992), nevertheless, proved to be a disappointment as far as the furtherance of unionism was concerned. The MCP, the only party allowed during that time, viewed trade unions as a source of dissent and so, whilst maintaining the Trade Union Act in the laws of Malawi, the government tactically suppressed them. It was not until the enactment of the 1994 Constitution buttressed by the 1996 LRA, that tangible enjoyment of the fruits of unionism have come to bear. The trade union movement has thus undergone a process of both growth and decline over the past decades.

There are a number of current challenges that have been identified as retarding the growth of trade unions in Malawi. They include lack of knowledge on trade unionism on the part of the workers themselves and in few cases on the part of the employers as well. There are also a number of disturbing reports bordering on mismanagement and fraud of donor resources put at the disposal of the trade unions. It is on record that most trade unions in Malawi are run by persons who are no longer employees but have sought to earn a living by engaging themselves in trade union activities. This has the sad effect of denying the workers proper representation. Indeed

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484 See Section 8 of the LRA.
486 For instance there was a total ban on trade unions before 1824 and the British Industrial Relations Act was only passed in 1971.
490 Formerly Cap 54:01 of the Laws of Malawi but now repealed by the LRA.
491 See Section 31(2) of the Constitution which provides for that all persons have the right to form and join trade unions or not to form or join trade unions.
time has come when workers themselves ought to take over leadership of trade unions if their workplace problems are to be properly addressed.

C. The Office of the Registrar

For the effective running of employers' and employee's organisations, the LRA establishes some institutions and procedures to facilitate organisations' dealings. Section 9 of the Act establishes the office of the Registrar of Trade Unions and Employers' Organisations. The Registrar has the task of keeping and maintaining a register of Trade Unions and Employers' Organisations.

D. Registration

A trade union and an employers' organisation are different from a collectivity of all workers at a particular factory or employers in a particular locality respectively. This is so because of their constitutional formality.

Thus the rights that are recognized under the Act only apply to such organisations which are registered. The requirement for registration is that there must be seven members or more of an unregistered trade union or two or more members of an unregistered employers' organisation. These must be officers of the organisation that wish to register and they are supposed to make an application in a specified form together with two certified copies of the organisation's rules and a prescribed fee.

Where the Registrar considers that the application is in conformity with the Act, he will issue a Certificate of Registration but where he refuses registration, he may seek further information. Appeals with regard to the decisions of the Registrar lie to the IRC.

Upon registration, Section 12 says that every organisation shall be a body corporate with the capacity to contract and to hold property and to sue and be sued. In a nutshell it becomes a separate legal entity in similar terms to those of a registered company under the Companies Act.

For the smooth running of a trade union and an employers' organisation, Section 13 of the Act provides for the necessary rules that the organisation must abide by: The rules range from basics such as the name and objectives of an organisation to issues dealing with finances. The rules may be altered by a resolution duly passed by a majority.


495. Section 11 of the LRA.

496. See Midland Cold Storage v Turner [1972] ICR 230 and in Frost v Clarke and Smith Co. Ltd [1973] IRLR 216 a mere body of workers claiming to be a union under the Industrial Relations Act (1971) was held not to be one since (p. 218) "they had no name, they had no constitution, they had no rules, they held no meetings…"


498. According to Section 24 of the LRA.

499. Cap 460/3 of the Laws of Malawi.

500. See Section 14 of the LRA.
Through Section 16 of the Act two or more organisations may amalgamate into a single organisation.

E. Cancellation of Registration

In the spirit of promoting collective labour rights, the act provides for elaborate measures aimed at facilitating procedural cancellation of registration of trade unions and employer’s organisations.

Section 21(1) provides for instances in which the Registrar may cancel the registration of an organisation. They include (a) at the request of the organization upon its dissolution, after making such inquiries as the Registrar considers necessary; or (b) by order of the IRC, if the organization is unable to continue to function as a trade union or employers’ organization for any reason that cannot be remedied.

Whenever the Registrar reasonably believes that an organization is unable to continue to function as a trade union or employers' organization or has ceased to exist, he or she is mandated to notify the organization in writing that cancellation of the registration is being considered, state the reasons and give the organization thirty days to show cause why its registration should not be cancelled.

A person who is aggrieved by a decision of the Registrar may within thirty days of receiving written notification of the decision, apply in writing to the Registrar for a statement of his or her reasons for the decision. The Registrar is obliged, within thirty days of receipt of such application, to furnish the applicant with a statement of reasons. Where the organisation is not satisfied with the reasons, they can lodge an appeal to the IRC which may make any order that it deems necessary.

V. COLLECTIVE BARGAINING AND ORGANISATIONAL RIGHTS

Section 25 provides that where at least 25 percent of employees of an employer are members of a particular trade union, the employer shall recognize that trade union for the purpose of collective bargaining. The IRC in University Workers Trade Union v The Council of the University of Malawi.

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501 Section 21(1) of the I.R.A.
502 See Sections 23 and 24 of the I.R.A.
503 See also the Right to Organize and Collective Bargaining Convention, 1949 No. 98. Ratified by Malawi on 22nd March 1965 and the I.L.O Convention Concerning Freedom of Association and Protection of Right to Organize No. 87.
504 Collective bargaining is the establishment by negotiation and discussion of agreement on matters of mutual concern to employers and unions covering the employment relationship and terms and conditions of employment. It therefore provides a framework within which the views of management and unions about disputed matters that could lead to industrial disorder can be considered, with the aim of eliminating the causes of the disorder. Collective bargaining is a joint regulating process, dealing with the regulation of management in its relationships with work people as well as the regulation of conditions of employment. It has a political as well as an economic basis - both sides are interested in the distribution of power between them as well as the distribution of income.’ See Armstrong M, Armstrong’s Handbook of Human Resource Management Practice Kogan (2009) p. 883.
505 IRC Matter No. 46 of 2003.
intimated that there is no legal requirement that you can only consult a trade union once there is a collective agreement or recognition agreement. The Court stressed that once a union is legally constituted, the employer has to recognize it.\footnote{Banda R.Z, Op. Cit. (2005) p. 13.} For the purposes of Section 25 senior managerial staff are not considered employees.

Recognizing disagreements that may ensue as to whether a particular trade union should be recognized for the purposes of collective bargaining or not, the Act provides that such disputes may be referred to the IRC where the government is the employer or has a controlling interest or to the Principal Secretary in all other cases. This is the Principle Secretary in the Ministry responsible for labour matters.

Under comparable English Law, there are three propositions that have emanated from Court decisions as far as recognition is concerned.\footnote{Humphreys N, Trade Union Law, Blackstone Press (1999) p. 35.}

a) First, case law relating to recognition shows clearly that recognition can be expressly or impliedly agreed upon by the parties. For this position see the decision of\footnote{Phillips J. in National Union of Tailors v Charles Ingram and Co. Ltd 50\textsuperscript{5}} especially at page 148.

b) The second proposition that arises from the cases is that once an employer is taken to have recognized a union, he cannot, in the absence of formal withdrawal of the recognition, argue that he did not intend to recognize it. This position appears to be an estoppel.\footnote{See Union of Shop, Distributive and Allied Workers v Sketchley Ltd [1981] IRLR 291.}

c) Lastly, recognition also raises the question as to whether or not an employer's organisation can enter into an agreement that binds all of its members to deal with a trade union. Such a matter arose in the case of\footnote{[1977] IRLR 147.} National Union of Gold Silver and Allied Traders v Albury Brothers Ltd.\footnote{[1977] IRLR 173.}

Under Sections 26 and 27, the Act provides for sectoral level bargaining and the establishment of industrial councils. The functions of the councils are three-fold.\footnote{See Section 30, but the council may include any matters agreed by the parties.} First, to negotiate wages and conditions of employment, secondly to act as a dispute resolution machinery and lastly to develop an industrial policy for the industry concerned.

Parties may come up with collective agreements whose terms are provided for under Section 32 and are enforceable through Section 33 of the Act. It is envisaged under the IRC (Procedure) Rules 1999 that parties to a labour dispute will attempt to resolve the matter privately.\footnote{Rule 1, IRC Form 1, Par 7d.} This is where collective agreements become useful. Parties must exhaust internal dispute resolution mechanisms before they resort to the formal systems under the law. In\footnote{Kamphoni v Malawi Telecommunications [2008] MLR 429.} the collective agreement provided for disputes to be referred to arbitration before resorting to Courts. The Court
held, *inter alia*, that the matter should first be referred to arbitration before it could be entertained in the Court system.

Closed shop and agency shop agreements are not provided for under the LRA. Closed shop agreements are agreements between an employer and a trade union requiring all employees covered by the agreement to be members of the union. Agency shop agreements do not require employees to join the union but authorise the employer to deduct an agency fee from the wages of non-union employees and pay it to the union which is acting as their bargaining agent.

We suggest inclusion of these measures in the LRA as they are primarily intended to deal with so-called 'free riders' (employees who enjoy the benefits of collective bargaining without paying union dues). They are also seen as building workers' solidarity, discouraging employers from undermining unions and increasing trade union stability.\(^{515}\)

**VI. DISPUTE SETTLEMENT\(^{516}\)**

**A. Definition of a Dispute**

One of the Principles of National Policy in the Constitution is that the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving peaceful settlement of disputes by adopting mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.\(^{517}\)

A dispute is defined by Section 42 of the LRA in very broad terms as:-

"any dispute or difference between an employer or employers' organisation and employees or trade union, as to the employment or non-employment, or the terms of employment, or the conditions of labour or the work done or to be done, of any person, or generally regarding the social or economic interests of employees."

It may thus be said that a dispute means any disagreement between an employee and an employer as regards their contract of employment and matters ancillary thereto. Since such disagreements are numerous in employment settings, the Act specifically provides for their settlement as will be discussed in this section.

**B. Reporting Disputes**

Under Section 43, any dispute whether existing or imminent may be reported to the Principal Secretary responsible for labour. The reporting in this regard

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\(^{515}\) Ibid.

\(^{516}\) Mwaangula, J., reviewed most of the issues in this discussion in the High Court decision of Malawi Telecommunication Ltd v Malawi Posts and Telecommunication Workers Union Civil Cause No. 2721 of 2001.

\(^{517}\) Section 13(1)(f) of the Constitution.
is not mandatory. However, where government has an interest, parties to the dispute are obliged to agree upon a conciliator. This also shows that dispute resolution mechanism under the LRA does not apply to public servants in as far as the role of the Labour Officer in providing conciliation and mediation is concerned. Zibelu-Banda opines that perhaps the fear is that the Labour Officer being a public servant might favour the government side during the process. On the contrary it is critical to note that government employees may not have enough resources to obtain the services of an independent qualified conciliator.

In either case the Principal Secretary or the conciliator endeavours to conciliate the parties. The Act does not outline the mode of settling the matter. It is assumed though the mechanisms employed are aimed at resolving the matter out of Court. These mechanisms are collectively referred to as alternative dispute resolution (ADR).

Among many other advantages of the conciliation process, are that the process prevents labour disputes from getting out of control and disrupting industrial relations and production. In addition, mediation also facilitates dialogue and joint problem solving between employers and employees. As a result communication is improved leading to more amicable relations. It has been shown that many cases are settled at conciliation stage. Therefore, conciliation acts as a successful filter of Court process. The decision is jointly arrived at and it is, therefore, a more satisfactory mode of resolving disputes. The decision is final and binding hence conciliation is the best substitute to the more rigorous, adversarial, frustrating and lengthy Court process. Because conciliation takes place in the district in which the dispute arose, the cost of the process is cheaper to both parties. It is handled by lay-persons hence it is more user-friendly, less technical, simple, flexible, expedient and cost effective.

Against these advantages are set a number of challenges, for instance, there is a perception that labour officers will invariably side with employees because of their social-economic status as compared to the employers.

In conciliation the settlement of the dispute is a product of the parties to the dispute and not that of the conciliator. The conciliator only facilitates the process leading to a settlement agreement. Where a settlement of the dispute has been effected it is recorded in writing and signed by the parties and the conciliator or the arbitrator, as the case may be. However, where no agreement is reached within the prescribed time, or if a party fails to attend, the dispute becomes an 'unresolved dispute.'

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518 See Section 44 of the LRA and Malawi Telecommunication Ltd v Malawi Posts and Telecommunication Workers Union HC Civil Cause No. 2721 of 2001.
519 Sources and Institutions of Labour Law in Malawi, Montfort (2008) 33.
520 The words mediation and conciliation are used interchangeably and according to Hon. Mr. Justice Healy Potani, the words mediation and conciliation 'share the same definition; a process in which an independent third party helps parties to a dispute to try to reach a settlement.' See his lordship's short article titled Conciliation, Mediation and Arbitration in the Settlement of Labour Disputes (Unpublished) in Zibelu-Banda R et al eds. Access to Labour Justice, LexisNexis (2007) p. 30.
521 Under the South African LRA (No. 66 of 1995), a statutory body is created called the Commission for Conciliation, Mediation and Arbitration (CCMA) with clear mandate and procedures in conciliation.
524 It is observed that almost all the districts in Malawi have now got a labour office.
525 For a fuller discussion of the challenges resort must be had to Banda R.Z., Sources and Institutions of Labour Law in Malawi, Montfort (2008) p. 35.
526 According to Section 44(4) of the LRA.
527 See Section 44(5) of the LRA. Indeed there are various time limits within which a dispute or complaint must be resolved—under the LRA 21 days [Section 44(4)], under the same Act 14 days [Section 76(2)], under the Employment Act 30 days [Section 35(8), 56(7) and 62(3)].
C. Unresolved Dispute; Strike and Lockout

There are at least two consequences that may result from the fact that a dispute is unresolved. First, either party to the dispute, or the Principal Secretary responsible for labour may apply to the IRC for determination of the dispute.

Secondly, either party or both parties may give a seven days' notice that they intend to strike or lockout, providing that the matter is not in the IRC and the employer or employee is not engaged in the provision of essential service.

A strike is defined as:-

"concerted action resulting in a cessation of work, a refusal to work or to continue to work by employees, or a slowdown or other concerted activity of employees that is designed to or does limit production or services, but does not include an act or omission required for the safety or health of employees, or a refusal to work under section 52."

In Council of the University of Malawi v Kabwila-Kapasula and Others the High Court accepted the argument that the defendant workers were not on a strike but had withdrawn their labour for their own safety. In refusing to discharge an injunction earlier obtained by the defendant workers restraining the plaintiff from firing them on the ground of participating in an illegal strike, Justice Mbvundula had the following comment:-

"...since the defendants are entitled to the rights and freedoms referred to, derogation from which is proscribed by the Constitution, and since their withholding of teaching services is not a strike as legally defined in the LRA (such withholding being on account of fear for their own safety), not only would it be a violation of the defendants rights, but also oppressive of them, to compel them to return to an environment which they consider, for apparently good reasons, unsafe to carry out their said duties."

A lockout is defined as:-

"closing a place of employment, a suspension of work by an employer, or a refusal by an employer to continue to employ or re-engage any number of his or her employees, done to compel his or her employees, or to aid another employer to compel his or her employees, to agree to terms or conditions of, or affecting employment."
The definition contemplates only one species of lockout, namely the 'exclusion' lockout and not a lockout dismissal which results in termination of employment. This means that the contractual relationship between the employer and the employee, as is with a strike, subsists during the period of the lockout. Thus, an employer may not withdraw contractual benefits, such as leave or bonuses, in an attempt to induce compliance with its demands. However, the exclusion may, but need not, involve a breach of contract. Thus a withdrawal of discretionary overtime may constitute a lockout even though the employer has not breached the employees' contracts of employment.

Lockout is rarely used by employers in Malawi but it remains a powerful bargaining tool at the disposal of the employer.

D. Essential Services

Essential services are defined as those services by whomsoever rendered, and whether rendered by government or any other person, the interruption of which would endanger life, health or personal safety of the whole or part of the population. The Minister has the power to apply to the IRC for a determination as to whether a service is essential or not. However, we submit that this process would be cut short by having a non-exhaustive schedule of essential services under the LRA. To deal with this uncertainty, some countries, such as South Africa, have provided for the establishment of an Essential Services Committee with the power to investigate which services may be designated as essential for the purposes of the right to strike or lockout.

In addition to this, the law falls short of providing for any special procedures to be followed by workers intending to exercise their right to strike but are deemed to be an essential service provider. Shall we read this as an intention of Parliament to deny such workers the right to strike? If so, is such limitation constitutional under the test in Section 44 of the Constitution? These concerns notwithstanding, in practice, nurses and doctors, as an example, have gone on strike from time to time though informally regulating themselves by maintaining a skeleton staff to attend to emergencies.

As for members of the Police Service, Prison Service and Defence Force, save those employed in their civilian capacity, they are not entitled to strike by the mere reason that they are not regulated by the LRA and presumably the underlying reason is that the nature of their work invariably constitutes an

537 See Section 48 of the LRA.
539 Section 2(1) of the LRA. For the South African position resort must be had to Justice Nkabinde's opinion in South African Police Service v Police And Prisons Civil Rights Union And Ziyamile Cobekhulo Case CCT 89/10 [2011] ZACC 21.
540 Section 47(2) of the LRA.
541 Nyirenda A, et al, A Comparative Analysis of the Human Rights Chapter under the Malawian Constitution in an International Perspective (undated) p. 324 suggests that the following services be regarded as essential: health services, electricity supply services, water supply services, telephone services, and air traffic control. They do not regard the following as essential service: radio and television services, petroleum services and ports, banking services, computer services, the construction sector and agricultural activities. In our view, the classification seems subjective to an extent as petroleum services, for example, may be essential.
542 For the South African position resort must be had to Justice Nkabinde's opinion in South African Police Service v Police And Prisons Civil Rights Union And Ziyamile Cobekhulo Case CCT 89/10 [2011] ZACC 21.
543 Section 3(2) of the LRA- See also a similar provision in the EA under Section 2.
essential service. To say the least, a strike in the Defence Force would constitute a mutiny and limitation of the right to strike, in the case of security officers, would surely be justifiable under Section 44 of the Constitution.

Section 31 (4) of the Constitution obliges the state to take measures to ensure the right to withdraw labour. The said measures are detailed in the provisions of the LRA hereunder discussed.

**E. Effects of a Lawful Strike or Lockout**

Section 48 provides for the continued effect of collective agreements and contracts of employment where a strike or lockout is instituted in conformity with the LRA. Again Section 49 provides for civil immunity to an employer, employee and organisations taking part in a lawful strike or lockout. The provision clearly covers acts not constituting a criminal offence committed by such person or organization in furtherance of a strike or lockout.

The right to return to employment after the strike or lockout is guaranteed under Section 50 of the Act. In *128 Trade Union Members v NSCM Milling Division* the complainants who were involved in a lawful strike were dismissed by their employer for their participation in a strike. The Court found that their dismissal was unfair and ordered compensation. Where the strike is illegal, the employer will be justified in dismissing the employee. However, the right to be heard still applies.

An employer may not employ a person to perform work of an employee participating in a strike or locked out unless such work is necessary to maintain minimum maintenance services. This is perhaps so since such recruitment would undermine the whole essence of the right to withdraw labour.

During a strike, an employee has a right to refuse to do work normally done by him unless he performs an essential service. The employee may also involve himself in peaceful picketing. Picketing is a loose term used to describe kinds of activity . . . designed to gain publicity for, and support for, the workers' cause. Traditionally pickets aim to persuade fellow workers to join the strike, to prevent the employer taking on substitute workers, and so cause suppliers and customers to boycott the employer in dispute. This right extends to officers of a trade union and employers' organisation such that the curtailment of its enjoyment is against the law. Recognition of the right to picket also reflects a society's commitment to the fundamental human rights of freedom of expression, and freedom of assembly. Both freedoms are guaranteed in the 1994 Constitution, together with an express right to demonstrate. The Act recognizes the legitimacy of peaceful picketing but

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44IRC Matter No. 8 of 1999.
45Under the Trade Disputes (Arbitration and Settlement) Act, Cap 54:02 which is now superseded by the LRA
47See Rabson and Others v Malindi Tea and Coffee Estates Ltd IRC Matter No. TO 177 of 2009 where for want of a hearing, among other reasons, the applicants dismissal after a strike was held unfair.
48See Section 51.
49See Section 52.
50See Section 53.
52See Mhango v AG HC Civil Cause No. 980 of 1998.
53See Section 35 of the Constitution.
54See Section 38 of the Constitution.
55Ibid.
does not attempt to comprehensively regulate its conduct. We propose a comprehensive regulation of picketing as unregulated picketing may result into breach of other fundamental constitutional rights such as the right to life and property.

F. Injunction in respect of a Strike or Lockout  

The IRC or indeed the High Court may issue an injunction against a strike or lockout upon hearing an application by either party. The application must be served to the other party at least 48 hours before the hearing and the respondent must be afforded a reasonable opportunity to be heard.

The Court will also look into the substantive justice of the matter in deciding whether or not to issue an injunction. In *Malawi Telecommunication Ltd v Malawi Posts and Telecommunication Workers Union* the plaintiff sought an injunction against a strike planned by the respondent trade union. The High Court was of the opinion that issuing an injunction in the circumstances would be tantamount to deciding the case. For instance, if an injunction were issued and it was found out later that the trade union had a legitimate cause to strike, they would have lost out at the end of the day and vice versa. In the circumstances, the Court instead ordered an expedient inter-parties hearing.

In *G4S Malawi Ltd v Textile Garment, Leather and Security Services Union*, an injunction was granted against a planned strike over pay rise. The reason for granting the injunction was that the defendants having given the plaintiff a seven days' notice to strike in terms of Section 46 (3), went into further negotiations with the plaintiff which did not bear fruit. The defendants then sought to rely of the same, now expired notice to strike. Justice Chipeta ruled that the defendants were supposed to issue a fresh notice since the initial notice had expired and by going into further negotiations with the plaintiff the defendants were estopped from calling to aid the initial and expired notice.

VII. THE TRIPARTITE LABOUR ADVISORY COUNCIL

Labour matters are intricate and the government needs proper advice regarding the same. To address this, the Act establishes a Tripartite Labour Advisory Council under Section 55 of the LRA.

A. Composition of the Council

The Council is composed of four persons appointed by the Minister, four persons nominated by the most representative trade union and four persons nominated by the most representative organisation of employers. The origins of tripartism can be traced to the ILO. The ILO itself has a tripartite structure. The players in the field of labour and employment have different powers. The State wields the greatest power because of its leadership and legislative powers. Next in the hierarchy are the employers. It is the employers' economic might, as controllers of the means of production, that puts them on this level. Workers come last. Tripartism tries to balance the powers of the social partners so they interact as equals.

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555 See Section 54.
556 HC Civil Cause No. 2721 of 2001.
557 HC Civil Cause No. 181 of 2008.
B. **Functions of the Council**

The Council plays an advisory role to the Minister on all issues relating to labour and employment, including the promotion of collective bargaining, the labour market, human resource development and the review of the operation and enforcement of the LRA and any other Act touching on employment including the EA and now the PA.

Since we are living in a global village and Malawi being a signatory to a number of International Labour Organisation Conventions, the Council also advises the Minister on activities of the International Labour Organisation and all matters incidental thereto.

**VIII. THE INDUSTRIAL RELATIONS COURT (IRC)**

A. **Constitution of the IRC**

Section 110(2) of the Constitution states that:-

"There shall be an Industrial Relations Court, subordinate to the High Court, which shall have original jurisdiction over labour disputes and such other issues relating to employment and shall have such composition and procedure as may be specified in an Act of Parliament."

The Act of Parliament that specifies the composition and procedure of the IRC is the LRA 1996 under its Part VII.

The IRC has original jurisdiction to hear and determine all labour disputes and disputes assigned to it by the LRA or any other written law. For instance, Section 83 of the PA states that in addition to the provisions of the Financial Services Act 2010, the IRC has jurisdiction to hear and determine all labour related disputes arising out of the PA.

Note that according to **Liquidator, Import and Export (Mw) Ltd v Kankhwangwa and Others** it is trite law that the IRC has no jurisdiction to interpret the provisions of the Constitution but only to apply such provisions. The IRC derives its powers from the LRA but for a detailed listing of powers of the IRC resort must be had to Rule 25 of the IRC (Procedure) Rules, 1999.

B. **Appeals from the IRC and the decision in Phiri v Ilovo Sugar Ltd**

Appeals from the IRC lie to the High Court. The appeal must be lodged within thirty days of the decision being rendered. Notice must be taken of the fact that a decision of the IRC may be appealed to the High Court on a

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563See Section 64.
565It was observed by the High Court in **Council of the University of Malawi v Kamwila-Kaputa and Others** HC Civil Cause No. 84 of 2011 p. 5 of the transcript that the IRC may encounter jurisdictional constraints where constitutional rights such as the right to academic freedom and freedom of conscience and the right to education are in issue as was the case therein.
566HC Civil Appeal Cause No. 36 of 2008 (Mzuzu Registry).
567See Section 65 (2).
question of law or jurisdiction only. It has been observed that in some instances, matters have gone on appeal to the High Court wherein the appellate Court has not adequately addressed the issue of whether or not matters appealed against strictly relate to law or jurisdiction. This has undermined Section 65(2) of the LRA which is aimed at bringing litigation to finality unless there is an error of law. After all, issues of fact will have been resolved by the Chairperson sitting with assessors and so the law deems this sufficient enough to put matters of fact to rest.

In the circumstances, it is rather surprising that the High Court in *Phiri v Illovo Sugar Ltd* had the temerity to hold that Section 65(2) is unconstitutional. Justice Madise argues this way at page 4 of the judgment:-

"Secondly the Respondent argues that the Appellant has filed an appeal on a question of facts and not law or jurisdiction as required by Section 65(2) of the Act. I have gone through the issues raised by the Appellant in his appeal and truly some do not touch upon matters of law or jurisdiction.

However the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding under any law. (See Section 108 (1) and (2) of the Constitution). In essence this means that although the IRC has been granted original jurisdiction to hear labour disputes and other issues relating to employment as per Section 110 (2) of the Constitution, the High Court still has the exclusive preserve to entertain any labour dispute coming before it and it can deal with the matter as a Court of first instance.

The limitation created [by] Section 65 of the LRA creates an unpleasant situation. Litigants can be compelled to forum/judge shop. Any litigant who wants to go all the way to the Supreme Court on appeal on matters of facts will surely choose to go to the High Court as opposed to the IRC. This should not be allowed.

Secondly Section 65 of the LRA tends to usurp the powers of the High Court to hear appeals from the IRC on matters of fact. Section 65 (1) of the Act provides that subject [to] subsection (2) decisions of the IRC shall be final and binding. In essence S. 65 has made the IRC to be the final arbiter in respect of matters of fact. This is tantamount to creating a tribunal which has concurrent jurisdiction with the High Court and the Supreme Court. Section 103 (3) of the Republican Constitution is clear.

'There shall be no Courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court.'

56See the Supreme Court decision of *Magadzi v National Bank of Malawi Ltd* [2008] MLLR 45 and the High Court decisions of *Malawi Revenue Authority v Malambezi* [2008] MLLR 243 and *National Bank of Malawi Ltd v Zefu* [2008] MLLR 247.

56Zibelu-Banda R. et al Access to Labour Justice, LexisNexis (2007) p. 4. Much as 'the distinction between what is and is not a point of law is far from clear-cut. That there will be many instances where an appeal will raise issues of both fact and law...' per J. Chikopa in *Phiri v Shire Bus Lines Ltd* [2008] MLLR 259 p. 261 a.

56Civil Appeal Cause No. 36 of 2008 (Mzuzu Registry High Court).
Lastly Section 65 of the said Act is premised on the dangerous assumption that the IRC is immune from making errors of fact. To massive miscarriages of justice. We did state in the case of Mussa v R Criminal Appeal No. 43 of 2009, Mzuzu District Registry (Unreported) that:

'The process of appeal is the only legal engine which ensures that procedural and substantive errors of law and fact are adequately addressed by superior Courts.'

In conclusion therefore it is now evident that all appeals from subordinate Courts must lie before the High Court. In this regard any person aggrieved by the decision of a lower Court including the IRC shall have the right to appeal to the High Court and Supreme Court on any matter be it law, jurisdiction or facts.

Section 65 of the said Act actually violates constitutional provisions and cannot go unchallenged. It is the holding of this Court that any law which removes the right of an aggrieved party to any legal action to appeal to a superior Court on matters of law, jurisdiction or facts is arbitrary in law and violates Section 41(2) of the constitution which provides:

'Every person shall have access to any Court of law or other tribunal with jurisdiction for final settlement of legal issues.'

Final settlement must be understood in its natural sense. For an aggrieved party to have final settlement they must have access to all appeal Courts up to the Supreme Court of Appeal. Section 65 of the LRA purports to limit this right and cannot stand the constitutional test..."

This position has been viewed by some commentators, including the author, as a blatant departure from clear provisions of an Act of Parliament, which should not be encouraged. It amounts to judges making and unmaking the law willy-nilly, bearing in mind that the constitutional powers to make or unmake the law primarily lie in Parliament. Again, Section 65 of the LRA was earlier on upheld by the MSCA in* Magalasi v National Bank of Malawi Ltd* 568 where the Court warned itself in the following terms:

"We remind ourselves at the outset that we are restricted to only consider the questions of law which the appeal may raise as the decision of the IRC on matters of fact is final and binding: Section 65(1) and (2) of the LRA."

The High Court itself in *Khawela and Others v Standard Bank Ltd* 569 put it more persuasively as follows:

"In so far as questions of fact are concerned, decisions of the IRC are final and binding. Thus in dealing with the present appeal, the Court shall be on the lookout not to be dragged into entertaining

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568 2008] MLLR 45.
matters which are outside its appellate jurisdiction as set out in Section 65(2) of the LRA."\(^{570}\)

One wonders whether or not the all important common law doctrine of precedent was ever considered by the High Court in the *Phiri v Illovo Sugar Ltd* case. In my opinion subsequent High Court judgments ought not follow the jurisprudence created by the *Phiri v Illovo Sugar Ltd* case. In fact, the MSCA must be quick to overrule such judgments that ignore the written law and the doctrine of precedent. We can further demonstrate that this limitation is constitutional. It does not offend the right to access the Courts as enshrined in Section 41(2) of our Constitution. If tested against Section 44(2) of the Constitution, one will realize that the limitation created by Section 65(1) and (2) is prescribed by law; it is reasonable; it is recognized by international human rights standards and necessary in an open and democratic society.\(^{571}\)

**C. Stay of Execution**

In terms of Section 65(3) of the LRA, the lodging of an appeal to the High Court (on a point of law), does not stay the execution of an order or award of the IRC, unless the IRC or the High Court directs otherwise.\(^{572}\) It is trite that an appellate Court does not make the practice of depriving a successful litigant of the fruits of his litigation.\(^{573}\) The IRC itself has constantly dismissed motions for stay pending appeal on the authority of this provision.\(^{574}\) Counsel have, in turn sought to obtain the stay from the High Court where it would seem is readily granted. We suggest that the High Court must develop a more sober and reasoned approach to granting a stay of execution pending appeal as the status quo favours the employer who, often times, has resources at his disposal to pursue the appeal to the bitter end.

**D. Composition of the IRC**

The IRC has a Chairperson and Deputy Chairperson both of whom are appointed by the Chief Justice, on the recommendation of the Judicial Service Commission. The composition also includes panelists. The "employees' panel" consists of persons nominated by the most representative organisation of employees and the "employers' panel" consists of persons nominated by the most representative organisation of employers.\(^{575}\) The original composition prescribed for five persons each nominated by the most representative organization of employees and nominated by the most representative organization of employers and all appointed the Minister. This meant a total of 10 panelists which were hardly enough for the operations of the IRC. The Labour Relations (Amendment) Act 2012\(^{576}\) has made at least three important changes to Section 66 as follows:-

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571See also the unanimous judgment of the Constitutional Court in *Mkandawire v Council of the University of Malawi* [2008] MLR 63 where at page 67 the Court correctly observes that 'as a High Court, we feel we should come in as an appellate Court pursuant to Section 65(2). Much as the main argument was not on Section 65(2), we can still more find solace in the fact that the Court, by implication, endorsed Section 65(2) as a sound limitation on the right to access the Courts.

572See *Catholic University of Malawi v Valera* Civil Cause No. 25 of 2011.

573See *National Bank of Malawi Ltd v Nkhoma* Civil Appeal No. 6 of 2005.

574See *Mwala and Others v Shifa Medical Services and Another* IRC Matter No. 449 of 2011 and *Catholic University of Malawi v Valera* IRC Matter No. 591 of 2009.

575See Section 66 and an article by Justice D. Tambala entitled *Member Panelists in Labour Dispute Resolution* at page 88 of *Zizelu-Banda R. Sources and Institutions of Labour Law in Malawi, Montfort* (2008).

576In the Malawi Gazette Supplement, dated 1st June 2012.
1. The maximum number of panelist that the Minister may appoint is twenty.  

2. Whatever number of panelists the Minister appoints must have equal representation from employers' and employee's most representative organisations.

3. The Minister is given power to publish in the Gazette the minimum qualifications for the persons appointed to sit as panelists so long as the minimum is a Malawi School Certificate of Education (MSCE) or its equivalent.  

The sitting of the IRC is constituted by the presence of the Chairperson or the Deputy Chairperson and one member from the employees' panel and one member from the employers' panel. This does not however preclude the Chairperson or the Deputy to sit alone where the dispute involves only a question of law.

The sitting of the IRC is crystal clear; it does not generally extend to the Registrar of the IRC. The position of the law in terms of the functions of the Registrar has been amended by the IRC (Procedure) (Amendment) Rules 2009 introducing Rule 5A which provides that the Registrar or his or her Deputy have power to transact all business which may be transacted by the Chairperson or Deputy Chairperson in Chambers except the following:-

1. Matter relating to the question whether or not a dismissal was unfair;
2. Applications for stay of execution of any decision of the Court or by the Chairperson or the Deputy Chairperson;
3. Construction of documents or determination of a question of law;
4. Any other matter which by the IRC Rules is required to be heard by the Chairperson or Deputy Chairperson.

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577 According to Hon. Deputy Chairperson of the IRC J. N’riva, the initial proposal was for 100 panelists and it went down to 60 and finally Parliament passed the 20. This indicates to us that another amendment is inevitable as the caseload increases.

578 This is a welcome development as some panelists could not appreciate issues in dispute due to their academic qualifications. It is hoped that the Minister shall even order higher qualifications than the basic Malawi School Certificate of Education (MSCE) or its equivalent.

579 See Section 67. The members from the employees' panel and the employers' panel are referred to as 'assessors' and are not employees of the IRC. These assessors have full time employment elsewhere and this has led to incessant adjournments for lack of quorum. Paradoxically, proposals to put the assessors on full time employment with the IRC would be perceived as defacing their impartiality. This problem has been partially dealt with by increasing the number of assessors from 10 to a maximum of 20 - See the Labour Relations (Amendment) Act 2012 discussed above [See- Zibela-Banda R. Creating a More Conducive Legal Framework for the IRC, Montfort (2005) p. 34-35]. On the tripartite composition of the IRC see an article by Wafwile Msukwa, Labour Tripartism in Malawi and the IRC in Zibela-Banda R. Creating a More Conducive Legal Framework for the IRC, Montfort (2005) p. 36.

580 See Section 64.

581 See Section 67(3) and in Phiri v Shire Bus Lines Ltd [2008] MLLR259 the decision of the Chairperson was held ultra vires where the Chairperson sat alone without assessors, when deciding on factual issues.

582 In I Conforzi (Tea and Tobacco) Ltd v Marriette [2008] MLLR 149 the High Court held that the proceedings presided over by the Registrar were a nullity and ultra vires the Act. See also Mpaso and Others v Securicor (Mw) Ltd IRC Matter No. 118 of 2001.


To guard against abuse of power by the Registrar, Rule 5A(2) mentions that any decision of the Registrar or a Deputy Registrar may be reviewed by the Chairperson or Deputy Chairperson on application by an aggrieved party.  

**E. Practice and Procedure in the IRC**

The practice and procedure in the IRC is different from that of any other Court of Law. In *Chirimba Garments Manufacturing Ltd v Nyaiha* the High Court opined as follows:-

"The White Book has no application in the IRC. Even Subordinate Court Rules have no application in that Court. Statute has dictated that the Chief Justice promulgates special rules for [the IRC]..."  

Section 71(1) of the LRA provides that the Chief Justice on advice from the Chairperson may make rules for the purpose of regulating the procedure of the IRC. Currently the IRC applies simple and straightforward procedure obtaining from the LRA IRC (Procedure) Rules, 1999. Such rules are made with regard to the need for informality, economy and dispatch in proceedings of the IRC. This provision may stand in favour of Justice Kapanda’s stand that labour disputes ought to be commenced in the IRC. He alluded to several reasons why this should be so. They range from jurisprudential, evidential as well as economic reasons and the creation of an environment that helps in the development of a specialized Court.

Rule 25 (1) (m) (i) of the IRC (Procedure) Rules has provided some notable jurisprudence. The Rule provides that 'without prejudice to the decision - making power of the Court under Section 67, the Court may on application or of its own motion at any time grant relief pending a decision of the Court after a hearing.' The interim relief has often had an injunctive nature. In *Chinkondeji v Stock Exchange Ltd,* the IRC said that this Rule allows for an urgent interim relief such as reinstatement pending the substantive hearing of the case. In *Madise v Electricity Supply Commission of Malawi* this remedy was denied due to inordinate delay. The Court proceeded to make the following rules:-

(i) the application must be made at least within 7 days from the date of termination of employment;
(ii) the applicant must show that he has a good chance of succeeding at the main trial;
(iii) to achieve fairness, the application must be made inter-parties, giving the other party 48 hours notice.

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584The Chairperson or Deputy Chairperson may (a) dismiss the application or confirm, set aside, vary or amend the decision (b) determine the matter as if it was coming before him for the first time or (c) refer the matter to the Registrar or Deputy registrar with directions for further consideration.

585HC Civil Appeal No. 58 of 2003 and in Kasito v NICO Life Insurance Company Ltd IRC Matter No. PR 622 of 2009 the Deputy Chairperson refused to entertain a motion for summary judgment or judgment on admission as the same involved a question of fact which had to be decided by a full Court in terms of the IRC rules.

586The Supreme Court Practice (1999).

587The Malawi Gazette supplement dated 30th April, 1999 - Government Notice No. 16.

588See Section 71(1) and Kapanda J. in Kamphoni v Malawi Telecommunications Ltd Civil Cause No. 684 of 2002 had this to say at page 5; "Indeed, pursuant to Section 71(3) of the said LRA the IRC may receive hearsay evidence which is otherwise inadmissible in a Court of law."

589See Kapanda J. Of severance allowance and Jurisdictional Issues (Unpublished).

590[2008] MLLR 379.

591See also Bvumwe v Banja la Msogolo IRC Matter No. 219 of 2002.

592[2008] MLLR 449.
In Oponyo v Registered Trustees of Raising Malawi Academy for Girls Trust and Others the applicant’s contention that the respondent should continue paying school fees for his children after the termination of employment but before the hearing was rejected by the IRC. Lastly, on similar issues to those in Rule 25 (1) (m) (i) of the IRC (Procedure) Rules, the MSCA in SGS Blantyre (Pvt) Ltd v Marinbo dismissed the appeal and agreed with the High Court that normally, the Courts will not grant an injunction in cases where the relationship of master and servant is at an end. However, he went on to state that where there is a matter pending, a Court may grant an injunction.

F. Legal Costs

The IRC does not make orders for costs except where a party fails to attend without good cause or where the matter is vexatious or frivolous. For the avoidance of doubt, legal collection charges are costs according to the High Court judgment of Liquidator, Import and Export (Mw) Ltd v Kankhwangwa and Others, which was upheld on appeal, by the Supreme Court. Commenting on Section 71(1), the Supreme Court made the following instructive remarks at page 34 of the judgment:

"Clearly the purpose of this statutory provision is to make proceedings in the IRC inexpensive and thereby widen access to that Court. The purpose of the law would be frustrated if, while the IRC is not permitted to make an order for costs, it is at the same time allowed to make an order for legal collection charges."

G. Pre-Hearing Conference

The procedure in the IRC, according to the IRC (Procedure) Rules, 1999 Rules 11 and 12 is simple; the applicant files IRC form 1 (statement of claim) and the respondent files IRC Form 2 (Statement of response) and so these two documents are all that is required to set down the matter for pre-hearing conference. The pre-hearing conference has been mainly used to streamline issues. For instance, parties must be able to know, after the pre-hearing conference, whether the right parties are before the Court, issues for the determination of the Court, whether a full trial will be required. At the pre-hearing conference, the Court may dismiss a matter summarily where for example it is shown that the action is statute barred, or where the matter is res judicata.

595 IRC Matter No. 224 of 2011.
596 1999 MLR 375.
597 See Section 72 of the LRA, Kamphoni v Malawi Telecommunications Ltd Civil Cause No. 684 of 2001. See also Thompson v Leyland Daf Malawi Ltd Civil Cause No. 919 of 2003 where the High Court having decided the case declined to award costs since after all the IRC does not award costs. In Kamathwa v Makandi Tea and Coffee Estates Ltd IRC Matter No. PR 420 of 2008 the Court declined to award costs holding that the unlawful issuance of a warrant of execution by the applicant did not amount to the matter being vexatious or frivolous. Costs were also denied in Mthaba v Old Mutual Life Assurance Company IRC Matter No. PR 202 of 2004 and Nkhungamonde and Others v Press Properties Ltd IRC Matter No. PR 29 of 2010. 598 [2008] MLR 219.
The objectives of a prehearing conference are that in any action, the Court may in its discretion direct the lawyers for the parties and any representative to appear before it for a conference for such purposes as:-

1. expediting the disposal of the action;
2. establishing early and continuing control so that the case will not be protracted because of lack of management;
3. discouraging wasteful pre-trial activities;
4. improving the quality of the trial through more thorough preparation;
   and
5. facilitating the settlement of the case.

**G. Legal Representation and Attendance**

Section 73 tackles the issue of representation. In essence it provides that a party may appear personally or be assisted by a union’s official, a co-employee or any other person that he or she chooses. It must be noted that for a legal practitioner to represent a party, leave of the Court must be sought first.

In practice, counsel have often been frustrated in situations where the IRC has declined to allow them to represent a party. Other commentators have even argued that Section 73 is unconstitutional as it infringes the right to recognition as a person before the law and access to the Courts. It is worth noting that according to current judicial thinking, Section 73 is constitutional and we concur with that view.

The issue of legal representation in the IRC was thoroughly tested in the High Court decision of *Phiri v Shire Bus Lines Ltd* wherein the Honourable judge gave the following convincing elaboration:-

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595 Adapted from 'The Law Student's Handbook, Westlaw, 2002-2003' see also IRC (Procedure) Rules, 1999 rule 13. As to a detailed discussion of the objectives and considerations of a pre hearing conference resort must be had to Zibela-Banda R. Sources and Institutions of Labour Law in Malawi, Montfort (2008) at 43.

596 Zibela-Banda R. Creating a More Conducive Legal Framework for the IRC, Montfort (2005) p. 33 argues that 'the requirement to obtain leave before appearing by counsel is perceived as an unnecessary procedural technicality that is confusing and time consuming.'

597 This contention was discussed by the IRC in the decision of Cement and Others v Shoprite Trading (Mw) Ltd [2008] MLLR 367 at 371 and see generally Section 41 of the Constitution.

598 Civil Appeal No. 33 of 2002.
"Section 73 does not exclude the appearance of Counsel before the IRC. It only limits such appearance (or it only creates a potential for such exclusion). The LRA allows Counsel to appear but only when the IRC has, in its discretion, granted leave for them to do so. When the other party is itself a legal practitioner or is represented by a legal practitioner, such leave will be granted as a matter of course. Where, however, the other party is not a legal practitioner or being represented by one, the discretion whether or not to grant leave for Counsel to appear will have to be exercised more judicially. Relevant considerations might be questions of timeliness, simplicity of the proceedings (that is paying, as much as possible, little regard to undue technicalities) and generally ensuring that the lay party is not taken unfair advantage of. Where for whatever reason the IRC has to decline to grant leave, reasons must be given. The reason might have more to do with making the IRC more accessible (by simplifying the proceedings) and also ensuring that proceedings therein proceed with as much speed as possible seeing that Counsel have unfortunately gained the reputation for putting too much stock on legal technicalities, which apart from reducing the level of accessibility to the ordinary man, also wastes time."

Meanwhile instead of denying leave to legal practitioners the IRC has entered into a loose agreement with the Department of Legal Aid to make available lawyers to provide legal services to workers who qualify for legal aid at the government's expense.

Where a party fails to attend or to be represented at the proceedings of the IRC without good cause, the IRC may proceed in the absence of that party or representative. Rule 25(1) (h) of the LRA IRC (Procedure) Rules, however allows the IRC to rescind any order made in the absence of the other party upon showing a good cause. In Sani v St Patrick's Academy receipt of the notice of hearing after the date of the hearing was held to be a good cause.

H. Conclusion

As seen from the above discussion, the law is deliberately making it easy for an aggrieved party to get redress. The establishment of the IRC must really be cherished. The IRC continues to promote labour rights in Malawi in turn promoting the constitutional right of every individual to have access to justice and legal remedies.

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603 See Zibelu-Banda R.  Sources and Institutions of Labour Law in Malawi, Montfort (2008) p. 45
604 Section 74 of the LRA - See Wynn v Malawi Revenue Authority IRC Matter No. PR 61 of 2005.
605 IRC Matter No PR 122 of 2009.
606 See Section 41 of the Constitution
The LRA marks a major change in Malawi's statutory industrial relations system. Following the transition to political democracy in 1994, the LRA encapsulated the new government's aims to reconstruct and democratize the economy and society as applied in the labour relations arena. Specifically, the LRA has introduced new institutions aimed at giving employers and employees an opportunity to break with the intense adversarialism that characterized their pre-1994 relations, at promoting more orderly collective bargaining and greater co-operation at workplace and industrial levels, and at providing an expeditious dispute resolution system.
I. INTRODUCTION

The PA introduces new legislation to provide for mandatory pension in Malawi effective 1st June 2011. The PA is in line with the ILO Social Security (Minimum Standards) Convention of 1952, which describes nine specific contingencies, which social security schemes should cover. These include medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit; and survivors' benefit. By implication, these contingencies do define and delineate boundaries of social protection which any country, including Malawi should provide to its population.

The ILO defines social security as protection that the society should provide for its members through a series of public measures against social and economic distress, which otherwise would have been caused by sudden stoppage or substantial reduction of an income, accruing from the nine specific contingencies identified above. Social security measures in their conventional form are intended to provide a decent standard of living to people who are unable to earn an income due to invalidity, unemployment or old age. This has been the operational policy oriented definition of social security. Thus, the enactment of social security legislation such as the PA should have their foundation in this fundamental philosophy of providing economic security to the needy, at least to a certain acceptable standard within the context of Malawian society.

Prior to the Act, the pension funds industry has been governed by the Third Schedule to the Taxation Act and a number of directives issued by the RBM. These legal instruments were inadequate and hence the need for comprehensive regulation. The Act makes provision for mandatory pension, and for matters relating to the supervision and regulation of pension funds and umbrella funds, and matters connected therewith and incidental thereto.

Pension is understood as a regular payment made to a person after retirement by his or her former employer or by the government, usually from a fund to which the person contributed while working. A pension fund, on the other
hand, is defined firstly as a pension scheme that is an indefinitely continuing trust whether as a restricted or unrestricted fund and includes a defined contribution fund or defined benefit fund or a hybrid of the two; or secondly as an association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members, upon the death of such members. Lastly a pension fund is understood as a business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons. These definitions are far reaching and seem to capture a number of situations where persons may intend to establish a pension fund. This is particularly important in protecting members of the public from dealing with unlicensed pension funds.

II. APPLICATION OF THE ACT

According to Section 2 of the Act, the Act applies to every employer and employee. However, an employer or employee may be exempted by the Minister in writing, with the approval of the Cabinet. Government being a colossal entity, it is exempted from complying with the provisions of the Act for a period of twenty-four months beginning 1st June 2011 to 31st May 2013. This exemption is aimed at affording the government, in its capacity as employer, a reasonable opportunity of establishing the requisite structures for the smooth implementation of its pension scheme. It is hoped that come 31st May 2013, government will have put its house in order, ready to roll out a pension scheme for all its employees.

63A defined contribution fund does not promise fixed benefits at retirement. Instead the employer and employee contribute fixed amounts to an account in the fund. Once received, contributions are invested by the trustees and the employee ultimately receives the account balance, which is based on contributions made and investment gains or losses. Accordingly, employees assume the risk of investment volatility in the defined contribution funds. Under the PA (Section 12) contributions are prescribed at ten percent for the employer and five percent by the employee. It is therefore fairly safe to conclude that the PA promotes defined contribution funds as opposed to defined benefit funds. See an article by Prof. Mende Mhango titled Recent Pension Tax Reforms Detrimental to Pension Fund in the Daily Times of 20th September 2012.

64Defined benefit funds promise a fixed monthly benefit at retirement. These are therefore advantageous to the employee and the employer assumes the risk in the event of loss the employer will still be required to make the fixed monthly payments. See also an article by Prof. Mende Mhango titled Recent Pension Tax Reforms Detrimental to Pension Funds in the Daily Times of 20th September 2012.

65See Section 3 of the Act.

66Chikopa L. [Pension Act 2010: Views from the Streets, Unpublished p. 6] argues that the Act may as well be unconstitutional. He argues that under Section 29 of the Constitution every person has the right to economic activity which includes the right to work. In employment law the obligation between employee and employer is inter alia to work and to pay a wage respectively. He wonders whether in a constitutional dispensation like ours it is legal to make pension and membership to a pension scheme mandatory, so that an employer would be obliged to deduct a part of it to a pension scheme. He doubts this, especially when one considers that the scheme has limitations in investments and members are not free to access their pension as and when they want. He concludes his argument by stating that this does not sit well enough with the right either to economic activity or development. The author doubts this argument in the light of Section 44(2) of the Constitution - we think the Act places a reasonable limit on such rights as the right to economic activity and development and is recognized by international human rights standards and is necessary in an open and democratic society. It is our further contention that the Act does in fact enhance the right to economic activity much as it does the right to development of individuals and Malawi as a whole.

67A 2012 decision by government to pay all its employees through commercial banks may be a test case. This campaign has been marred by a lot of irregularities key among them being prolonged delays in payment of salaries. Government shall have a daunting task of making sure that all the structures are in working order at the time of implementing its ‘universal’ pension scheme in compliance with the Act.
The Minister and Parliament have since exempted certain employers and employees from complying with the Act. For instance, employers whose employees are salaried below K10,000.00 are not obliged to comply with the Act unless they employ more than five employees or their employees were already on pension at the commencement of the Act on 1st June 2011. Again the Act itself exempts employees who, at the commencement of the Act were entitled to pension benefits under any pension scheme existing before the commencement of the Act but have got three or less years until retirement date, from the requirements of the Act. Despite the non-application of the Act to such employees, they of course have the right to be paid their pension as and when it becomes due. The Minister has recently exercised his powers under Section 10 of the Act by exempting seasonal workers, tenants, domestic workers, members of Parliament and holders of temporary employment permits from complying with the provisions of the Act.

III. INTERPRETATION

Section 3 of the PA contains the interpretative. The interpretative, which is long and detailed, defines significant terms appearing in the Act such as annuity, dependants, member information, retirement age and Registrar's directives. Where appropriate, we shall be resorting to the interpretative as we go along. Note however that some of the definitions are similar to those provided for under the EA such as the definition of an employer and employee. As regards the retirement age, a debate ensured during the 2010 prolonged consultations on the Pension Bill. Government proposed retirement age at seventy whilst the MCTU wanted it as low as fifty. After further consultation the PA strikes a compromise by providing that 'retirement age' means the age stipulated in the rules of pension fund, which is between fifty years and seventy years or as may be prescribed by the Minister. Since the Act is at infancy stage, it remains to be seen how the courts shall shape the application of the Act as they delve into the tedious work of giving meaning to the letter and spirit of the Act.

IV. OBJECTIVES OF THE ACT

A list of objectives of the Act is found in Section 4 of the Act. They are as follows:

a) To ensure that every employer to which the Act applies provides pension to every person employed by that employer;

b) To ensure that every employee in Malawi receives retirement and supplementary benefits as and when due;

623 See Employment (Amendment) Act 2010, First Schedule, Part II, paragraph 3. See also Section 10 of the PA.
624 Our take is that the threshold is too low. This clause, in our view, encourages employer to pay their employees less than K10,000.00 to avoid the provisions of the PA. Considering the May 2012 49 percent devaluation of the Kwacha and expected levels of inflation, this threshold requires urgent revision upwards.
625 Section 86(3) of the Act.
626 See Section 86(4) of the Act.
627 See the Pension (Salary Threshold and Exemptions) Order 2011, Government Notice 32 of 2011 and Section 10 of the PA.
628 Cap 55:02 of the Laws of Malawi.
629 See Section 2 of the EA and Chapter Two of this Book.
630 In the UK the retirement age for state pension is 65 for men and 60 for women who have made sufficient contributions throughout their working lives. However, the ages are now being synchronized so that come 2020, the retirement age shall be 65 for both men and women- Blandell R et al, Pension Incentive and the Pattern of Early Retirement, The Economic Journal, 112 (March), Royal Economic Society, Blackwell Publishers (2002) p. 4.
c) To promote the safety soundness and prudent management of pension funds that provide retirement and death benefits to members and beneficiaries; and
d) To foster agglomeration of national savings in support of economic growth and development of the country.

We shall briefly comment on the objectives. The standout sense in the first objective is the introduction of a mandatory pension. A pension to which all persons to whom the Act applies should belong. That is to say that all employees should after retirement be able to look after themselves by resorting to a pension. Commentators have argued that this objective may not be achieved because of ‘many’ exemptions introduced by the law. It is believed that seasonal workers, tenants and domestic workers form a substantial part of the workforce in Malawi and so it is ridiculous to leave them out of the pension cake. That as it may be, our view is that the exemptions are temporarily necessary looking at the challenges of administering a pension scheme for seasonal workers, tenants and domestic workers, as an example. This view is formed bearing in mind the financial implications on employers if literally all employees were put on pension at once. We advocate for a gradual reduction in the categories of employees exempted from the provisions of the Act as the law and the economy mature.

The second objective talks of retirement and supplementary benefits being paid as and when due. The Act does that by setting out conditions in which pension will be accessed, enhancing licensing and reporting requirements for pension practitioners in order to reduce abuse, making trustees legally liable for their decisions and regulating fees payable, the nomination of death benefits beneficiaries and excluding pension from inter alia being pledged as collateral. Objective three appears to be an extension of objective two. It recognizes the need to provide for the safety, soundness and prudent management of pension funds. In the United Kingdom, for example, administration of pension funds have been embroiled in scandals involving dispassion of the pension funds due to unsound and imprudent management.

Objective four emphasizes the promotion of a saving culture and the raising of funds for investment. It is trite that pension funds are crucial for national

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631 They include exemption of seasonal workers, tenants, domestic workers, members of Parliament and holders of temporary employment permits.
633 The Tanzanian experience shows that pension benefits have often not been paid on time and this causes enormous economic problems to the beneficiaries—see A Performance Audit on the Processing of Terminal Benefits of Retirees from the Central and Local Government of Tanzania; A Case Study of Public Service Pension Funds (PSPF) and Local Authorities Pension Fund (LAPF) 2010.
634 Section 64 of the Act.
635 Part IV of the Act.
636 Section 36 of the Act.
637 Section 70 of the Act.
638 Section 73 of the Act.
639 See Bishoppgate Investment Management Ltd v Maxwell (No. 2) [1993] BCLC 814.
investment and overall economic development. One hopes that the funds shall not only benefit speculators and reduce government's liability towards retiring employees but also benefit employers and employees alike.

The reader must note that the Act applies in addition to the Financial Services Act, 2010 (FSA). The FSA itself makes ample provision for the supervision and regulation of financial institutions which include pension funds, umbrella funds, administrators and investment managers of pension fund and pension brokers. It is imperative that those dealing with legal and regulatory issues governing pension must understand the FSA and the PA together.

V. CONTRIBUTORY NATIONAL PENSION SCHEME

In order to achieve the objectives of the PA, the Act establishes a contributory National Pension Scheme (NPS). The NPS comprises a national pension fund established by the Act as well as other pension funds licensed under the Act. Further than this, the Act establishes the office of the National Pension Administrator with the function of setting up and managing the national pension fund. The Pension Administrator is answerable to the Board of Trustees responsible for the administrative and management policy of the Pension Administrator. The trustees are governed by the Trustees Incorporation Act as well as Registrar's directives on the powers, duties and functions of trustees. The Board itself is composed of seven trustees appointed by the President on recommendation of the Minister and includes a representative from the most representative organization of employers, most representative organization of employees, and the Secretary to the Treasury or the Secretary responsible for labour, or the secretary responsible for economic planning.

VI. MANDATORY PROVISIONS

A. Obligation of the Employer

Section 9 of the Act obliges an employer to make provision for every person under his employment to be a member of the National Pension Scheme. Where an employee, without reasonable excuse, fails to comply with Section 9, the employer is liable to administrative financial penalties under the FSA.

641 Act no. 26 of 2010.
642 Section 6 of the Act.
643 See generally Section 7 of the Act.
644 Cap 5:03 of the Laws of Malawi.
645 See Section 7(6) and (7) for further rules governing the trustees.
646 Section 61 of the PA requires employers to remit pension contributions no later than 14 days from the date on which the liability arose. Past experience shows that payment of contributions depends on the continued well being of the employers. And in some instances their willingness to participate in the scheme. It is common knowledge that many employers including government are in arrears over tax, medical aid insurance and loan remittances. It is yet to be seen if there is any assurance that pension contributions will be accorded priority. Indeed one wonders whether the measures to ensure compliance will be of much use. And it does not seem that the authorities have enough capacity to ensure that all employers comply. Will they have a register of employers? If for instance it is failure to remit contributions what is the use of imposing fines? The employer is already unable to pay. This is food for thought emanating from Chikopa L. Pension Act 2010: View from the Streets, Unpublished, a presentation at the Malawi Law Society Workshop on the Pension Act, 23rd September 2011.
B. Minimum Pension Contributions

Minimum pension contributions are provided for in Section 12 of the Act. The minimum for the employer is ten (10) percent whereas the minimum for the employee is five (5) percent. The employer is however allowed to contribute seven point five (7.5) percent for a period of two years from the date of commencement i.e. 1st June 2011 to 31st May 2013. Where the employer, prior to the commencement of the Act was contributing to a fund at rates higher than those prescribed in the Act, the employer is prohibited from revising those rates downwards. 646

Pension contributions are a percentage of pensionable emoluments. Pensionable emoluments are in that case defined as guaranteed wages 647 and other earnings, but not including personal investment income, capital gains or provision from employers in the form of houses or motor vehicles. 648 In practice what should be included in pensionable emoluments has been controversial and needs urgent clarification.

By notifying the Registrar, the employer and employee may agree from time to time to revise upwards their respective contributions. An employee may also enter into an agreement with his employer that the employer bears the full burden of the total contributions. The Act does not however give a corresponding option to the employee to enter into an agreement with his employer that the employee should bear the full burden of the total contributions. This is obviously so because the employee stands in a position of economic dependence to the employer. 649 It follows that the latter agreement would be void and unenforceable by the courts.

An employee or a self employed individual may however make voluntary contribution to his account. 650 A self employed individual is defined in Section 3 of the Act as any person who is running a business on his own as a sole trader, whether he has employed any other person or not. 651 Our finding is that the Act is biased towards employer/employee relationships and rarely makes provision for self employed individuals. Smit and Mpedi correctly observe that Southern African workers in the informal economy and their dependants are for the most part completely excluded from formal social protection schemes, in particular social insurance schemes. This is due to the fact that most social insurance schemes link the concept of contributor to that of employee. This is problematic, since the notion 'employee' is by and large used to refer only to 'standard' formal sector workers. We think that the Act should have highlighted self employed individuals as much as it does with employees since a good percentage of working people in Malawi are self employed. 652

646 Section 86 of the Act.
647 Guaranteed wages means basic wages excluding overtime and bonuses - Section 3 of the Act.
648 Section 3 of the Act.
649 See the definition of an employee under Chapter Two.
650 Section 12(4) of the Act.
652 See statistics at www.nso.malawi.net.
Where an employee chooses to make contributions to a fund to which his employer is currently contributing, he is not obliged to cover the costs of the pension fund, instead, his employer covers the costs. This is an incentive to encourage employees to contribute to the fund chosen by their employer, in turn the employer can manage only one or fewer funds than would be the case if every employee chose their own fund, which right they have under Section 14 of the Act. The right to transfer pension benefits may be exercised by the employee without giving reasons for doing so but may only be exercised once in two years. The employee bears the cost of the transfer and any excess costs in running the new fund as compared to the previous one, presumably chosen by the employer.653

C. Taxation

Section 13 of the Act provides that all contributions made by both the employee and employer, up to specified limits and any income accruing to the credit of such contributions after being invested, are deductible from the relevant taxable income. The Section further provides that any lump sum received at retirement is exempt from income tax. However, the application of this Section was suspended at the commencement of the Act, pending the amendment to the Taxation Act.655 Such amendment has since been effected.656 The effect of this provision is to allow for a better take-home package for pensioners than existing under the former tax regime. Nevertheless, some commentators have argued that the new tax regime will see employees saving less whilst government collects more tax than before. This is seen as detrimental to employees who belong to a defined contribution fund as their benefits are dependent on how much they contribute to the fund. Such employees would stand to benefit had government chose to defer pension taxes until the employees’ exist from the fund, which approach most countries have adopted.657

D. Life Insurance Policy

The employer, in addition to making pension contributions on behalf of the employees, is required under Section 15 of the Act to maintain a life insurance policy in favour of each of its employees for a minimum life insurance policy cover of one times the annual pensionable emoluments of the employee.

The PA does not define a life insurance policy. Neither does the Insurance Act 2009.658 However, life insurance policy is understood as a contract between an insurance policy holder and an insurer, where the insurer promises to pay a designated beneficiary sum of money upon the death of the insured person.659

653See Section 14 of the Act.
655Cap 41:01 of the Laws of Malawi.
656See the Taxation (Amendment) Act 2012.
657See an article by Prof. Mende Mhango titled Recent Pension Tax Reforms Detrimental to Pension Funds in the Daily Times of 20th September 2012.
658Cap 47:01 of the Laws of Malawi. Kaphale K, Litigation Flash Points and Other Areas of Legal Concern in the Insurance Act of Malawi Malawi Law Journal Vol 5, Issue 1/ June 2011, argues that the Insurance Act 2009 is a lost opportunity to legislate in favour of the insured in areas of life insurance as well as general insurance and the undue reliance the Act seems to place by this omission on the concept of freedom of contract in matters of personal and other insurance.
Like with pension contributions, where the employer, prior to the commencement of
the Act was maintaining a life insurance policy in favour of his employees at a value
higher than the minimum prescribed in the Act, the employer is prohibited from revising
those rates downwards.

VII. REGISTRATION AND LICENSING

The regulation of the pension industry in Malawi, through registration and licensing, is
partly driven by the same general objectives of regulation in other segments of the
financial sector-the promotion of resource mobilization and allocation through a
framework that ensures transparency, security and stability, minimizes costs, and that
promotes sound investment decisions. However, the regulatory framework for pension
funds also needs to consider the unique characteristics of these institutions, which derive
from the special role that they play in advancing key social policy objectives, such as
the provision of retirement income.

The PA makes ample provision for registration and licensing of pension schemes and
umbrella funds. In a nutshell, one may not operate a pension scheme or umbrella fund
without being licensed by the Registrar of Financial Institutions under the FSA. Stiff
penalties are provided for breach of this requirement as it goes to the root of the
preservation of the pension funds. The fact that the responsibility for regulating and
supervising the pension funds sector is vested in the Registrar has enormous advantages.
The Registrar will use the existing infrastructure, human resources and institutional
memory of the RBM. The Registrar under the FSA regulates and supervises a whole
spectrum of financial industry, from banking to insurance, stock-brokering, financial
intermediaries and non-banking financial institutions such as the pension funds. This
single regulator for the financial services creates opportunities for developing a rational
and coherent regulatory and supervisory scheme, where duplication and inconsistencies
in regulation can best be avoided.

Furthermore, experience elsewhere has shown that a single regulator approach has the
effect of reducing the costs of compliance and ultimately the costs of financial products
available to consumers. This remains so despite genuine fears that this kind of scheme
over concentrates regulatory powers in the Registrar and indeed the RBM, which is
jealously controlled by the executive arm of government and yet no remedy may be had
if the Registrar’s decisions lead to financial losses. The dilemma remains with us
despite an explicit provision that the financial services laws bind the government as
well. This is so because the extent to which such laws bind government in practice
may be questioned.

660 Section 86 of the Act.
661 See Section 4 on the objectives of the PA discussed above.
663 See Part IV of the Act.
664 See 16(3) of the FSA which provides for a penalty of K10 million and imprisonment for 4 years for a natural person and administrative penalties for a corporation under Section 75 of the FSA.
665 The single regulator approach has been adopted in the UK under the Financial Services Act 2000, Swaziland under the Financial Services Regulatory Authority Act 2010, Canada under the Office of the Superintendent of Financial Institutions Act 1987, South Africa under the Financial Services Board Act of 1990 and Botswana under the Non-Bank Financial Institutions Regulatory Authority Act of 2003 - see Mtende Mhangwa, Reform for Financial Efficiency: An Independent Assessment of Financial Sector Change in Malawi - an article in the Daily Times of Wednesday June 1 2011 page 2 of Business Section.
667 See Section 81 of the Act and the FSA.
668 Section 7 of the FSA.
669 An example is where the government has financial interest in a business entity such as the Malawi Savings Bank Ltd and such an entity breaches financial laws, will the Registrar treat its case as he would a private entity?
VIII. REQUIREMENTS FOR TRUSTEES, INVESTMENT MANAGERS E.T.C.

A. Trustees of Pension Funds and Operators of Umbrella Funds

The PA defines a trustee in relation to a pension fund with only one trustee, as the trustee of the fund and in relation to a restricted fund where there is a group of individual trustees as all of the trustees acting together. The trustee is understood as the person who holds the property of a trust and administers it in a fiduciary capacity for the benefit of the beneficiaries.

In common with other Anglo-American countries, the basis of occupational pension funds in Malawi is in Trust Law. In the United Kingdom, pension funds were originally a means of ensuring that endowments for widows and orphans were correctly managed. Trustees have fiduciary duties to hold the assets in trust for members, act impartially, keep accounts, check funding is in place, and seek expert advice when necessary. Under common law, in doing so they must "act in the best interests of the beneficiaries".

There are various requirements applicable to trustees under the Act. A trustee or operator of a pension fund or a director of a corporate trustee cannot be appointed as a trustee without his written consent. The Act requires that an umbrella fund and an unrestricted fund should have a single trustee which is a body corporate. Whilst a restricted fund with individual trustees must have a minimum of six trustees referred to as 'a group of individual trustees.' The group must consist of equal numbers of employer representatives and member representatives and the rules for appointment of member representatives are supposed to be established by the trustees. Where a vacancy occurs, the remaining trustees must fill it up within ninety days, after which period, the pension fund will be deemed to operate without the requisite number of trustees. This is an offence under the Act and will lead to liability for administrative penalties on the part of trustees.

An unrestricted fund and a restricted fund which has a corporate trustee that is not the trustee of another fund or trust are required to establish advisory committees for the fund. The committees act as advisors and have no more powers. All this is aimed at protecting the hard-earned funds for the benefit of the employee and the economy in general.

670 Section 3(1).
672 Which is governed by the Trustees Incorporation Act Cap 05:03 of the Laws of Malawi and the Trustee Act Cap 05:02 of the Laws of Malawi.
674 Ibid.
675 Section 24 of the Act.
676 This is the 'Equal Representation Rule' under Section 26 of the Act.
677 Section 29 of the Act.
678 Section 25 of the Act.
679 See Section 82 of the Act.
680 Section 28 of the Act.
B. Investment Managers, Administrators, Pension Brokers, Custodians and Actuaries of Pension Funds and Umbrella Funds

According to section 3(1) of the Act an investment manager means a person who, as a business, invests fund assets of pension funds or umbrella funds by arrangement with the trustees or operators of the funds concerned. An administrator means a person who, as a business, provides data management, specialist technical and financial services to pension funds or umbrella funds, by arrangement with the trustee or operator of the funds concerned. A pension broker means a person who as a business, provides consulting or advisory services to pension schemes or funds, including claims assistance, where required.681

More often than not, trustees will enter into an investment management agreement with an investment manager, who is a specialist in investment. An investment management agreement means an agreement between the trustee of a pension fund or the operator of an umbrella fund and an investment manager, for the investment of fund assets that for the purposes of the agreement, are under the control of the investment manager. The Act requires that an investment agreement must not exempt the liability of investment managers from liability for negligence.682 Further than that an investment agreement must include adequate provision for investment managers to provide trustees with information on their investment.683

To enhance prudential management of pension funds, the Act requires that the Registrar cannot license an individual as an investment manager or custodian for pension funds or umbrella funds, or an administrator of pension funds or pension broker.684 Where a trustee appoints an individual person other than a body corporate as its investment manager, administrator, pension broker, actuary or custodian, the trustee and the person appointed will both be liable to administrative penalties under the FSA and the appointment is void. An additional requirement is that, apart from appointing a body corporate, the appointment must also be in writing685. All these will have to be a body corporate considering that an individual is more prone to abusing the fund.

A pension fund is required, with the prior approval of the Registrar, to appoint a principal officer, whose removal also requires prior written approval of the Registrar.686 An individual cannot act as a pension administrator of pension funds.687 The Act does not however clearly particularize the functions of the principal officer. There is need to do so perhaps through the Registrar's Directive.

681 The PA does not define the terms custodians and actuaries. Without suggesting an exhaustive list of definitions, we believe the terms custodians and actuaries are central in pension law and ought to have been defined in the PA. A custodian is a person who cares for something, ranging from buildings to financial assets an actuary is someone who uses statistics to calculate insurance rates according to Blackwell A H, The Essential Law Dictionary, Sphinx Publishing (2008).
682 Section 49 of the Act.
683 Section 50 of the Act.
684 Section 30 of the Act.
685 Section 31 of the Act.
686 Section 33(1) of the Act.
687 Section 33(2) of the Act.
IX. REQUIREMENTS FOR FUND RULES AND PRUDENTIAL REQUIREMENTS

Part VI of the Act provides for requirements for fund rules of pension funds and umbrella funds. The pension fund rules constitute a legally enforceable contract between members and the trustees, and as between the trustee and each employer. The Act establishes various statutory covenants for both pension funds and umbrella funds. Examples of the covenants include undertakings by the trustee in favour of the members to act honestly, act with care, skill and diligence and to maintain a separate account for trust money and assets. Breach of such statutory covenants is not an offence and does not result in the invalidity of the transaction, but a person who has suffered loss or damage as a result of conduct of another person that is in breach of a statutory covenant may recover the amount of the loss or damage by action against the person in breach. Clauses in the fund rules that purport to exempt certain liabilities of trustees are void. The Act places a number of restrictions on amendment of fund rules. An important aspect of the restrictions is that an amendment to the fund rules does not have effect until the Registrar approves the amendment. The Registrar is given 30 days within which to approve the amendment but is given a leeway to extend the period in writing only once.

On the interpretation of the Act and pension schemes specifically we subscribe to the advice of the IRC in *Kalolokeya and Another v Beit Care International Hospital* quoting Millet J in *Re Courage Group Pension Scheme* that:-

"First, there are no special rules of construction of applicable a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by experiences of commercial life."

We hope that the Registrar will heed this advice in the process of approving an amendment to the fund rules.

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688 This is similar to a contract under seal created by the Memorandum and Articles of Association between the company and members and between members themselves in a company under Section 17 of the Companies Act Cap 46:03 of the Laws of Malawi.
689 See Sections 36 and 37 of the Act respectively.
690 Section 40 of the Act.
691 Section 41 of the Act.
692 Section 47 of the Act.
693 Before the coming into force of the PA fund rules could be amended in terms of the provisions of the fund rules themselves on amendment, however consultation remains a critical element - See *Kalolokeya and Another v Beit Care International Hospital* ICR Matter No. PR 396 of 2011 where the respondent received advice from their fund managers, Old Mutual, for an amendment to the fund rules to provide that severance allowance should come from the employer's pension contribution. This would reduce the employer's liability towards the employees. Nonetheless, the employees were not consulted and they were threatened that if they did not sign the new rules they would not get a salary increment. The Court held that the respondent had to refund to the applicants, the severance allowance they deducted from its contributions to pension.
694 IRC Matter No. PR 396 of 2011.
695 1987] 1 All ER 528 at 356.
X.  PRUDENTIAL AND OTHER REQUIREMENTS

The Act provides for prudential and other requirements for the operation of pension funds and umbrella funds including a number of matters that may be covered in the Registrar's directives.⁶⁹⁷

As earlier observed, the Act applies in addition to the FSA.⁶⁹⁸ A fair discussion of the FSA is therefore inevitable in examining the Registrar's directives.

A. Registrar's Directives

Registrar's directives are directives issued by the Registrar under the Act or FSA or under any financial services law.⁶⁹⁹ These directives must be considered for all intents and purposes as species of subsidiary or delegated legislation. As Bennion⁷⁰⁰ observes, there is no restriction on the name that an enabling Act may use to describe the delegated legislation to be made under it. Terms employed include the following: proclamation, warrant, declaration, scheme, general notice, direction, ordinance, legislative instrument, bye laws, rules, regulations, orders and statutory instruments.

In conferring a delegated legislative power, Parliament often retains some measure of control over the exercise of the power. For example, it may require instruments made under it to be laid before Parliament; and may make them subject to affirmative or negative procedure.⁷⁰¹ In Malawi, Section 17(1) of the General Interpretation Act provides that no subsidiary legislation shall come into operation unless it has been published in the Gazette. Section 58(1) of the Constitution provides that:

"Parliament may, with respect to any particular Act of Parliament, delegate to the executive or to the judiciary the power to make subsidiary legislation within the specification and for the purposes laid down in that Act and any subsidiary legislation so made shall be laid before Parliament in accordance with Standing Orders."

Hence there is a requirement that all delegated legislation be laid down before Parliament in accordance with Standing Orders, and the other requirement is that delegated legislation must be published in the Gazette. The case of Ex parte Golden Forex Bureau⁷⁰² held that Gazetting is the first act in the promulgation of delegated legislation following by the laying down of the delegated legislation before Parliament.

⁶⁹⁷A non-exhaustive list of areas that may be regulated by the Registrar's directives is found in Section 48 of the Act and Section 34 of the FSA. According to Section 34(3) of the FSA, this specification of areas that may be covered by the Registrar's directives does not limit the power of the Registrar to issue any other directives. This position which gives the registrar seemingly wide discretion has been criticized by Kaphale K., Litigation Flash Points and Other Areas of Legal Concern in the Insurance Act of Malawi Malawi Law Journal Vol 5, Issue 1/ June 2011p. 42. He argues that the governor is not likely to be a technocrat or expert in all the various fields of finance covered by the FSA, and indeed in this regard, the PA.

⁶⁹⁸Section 5 of the Act.

⁶⁹⁹See Section 3 of the PA and Section 2 of the FSA.


⁷⁰²Cap 1:01 of the Laws of Malawi.

⁷⁰³High Court, Misc. Civil Cause No. 16 of 2007.
The legal Affairs Committee of Parliament has, among other functions, the function of scrutinising, reviewing and reporting on all subsidiary legislation and statutory instruments promulgated under an Act of Parliament, and all matters relating thereto are severally deemed permanently referred to the Committee.

With regard to the Registrar's directives under the FSA, it is noted that under Section 34(4), the draft of any such directive, must first be published so as to bring it to the relevant financial institutions and the institutions have 21 days to make representations about the matter to the Registrar and the Registrar is required to have regard to the same. The directives do come into force upon being published in the Gazette. Though the FSA does not require the directives to be tabled before Parliament, some commentators have argued that since this is a requirement under the Constitution, any such directive must, before it becomes effective i.e. before being Gazetted, be so presented to Parliament otherwise its validity will be open to question.

Further, the directives must be consistent with main legislation. In that regard Section 21 of the General Interpretation Act provides that 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, unless a contrary intention appears.

Apart from Parliamentary control of delegated legislation, the Constitution also controls delegated legislation in many important ways. To begin with all laws in Malawi are subject to the Constitution and any law that is inconsistent therewith is invalid to the extent of the inconsistency.

Further than this, under Section 58(1) of the Constitution, all delegated legislation must be within the specification and for the purposes laid out in the enabling Act of Parliament. In addition Section 58(2) of the Constitution provides that Parliament shall not have the power to delegate any legislative powers which would substantially and significantly affect the fundamental rights and freedoms recognized in the Constitution.

Lastly delegated legislation is frequently controlled through judicial review proceedings. The ground for the review may be that the delegate has exceeded his powers or that the decision is unreasonable. Thus where an enactment conferring power to make delegated legislation requires the delegate to consult interested persons before exercising the power, this duty is mandatory rather than directory. It requires (a) the communication of a genuine invitation to give advice, and (b) a genuine consideration of that advice when given.

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64 Standing Order 161(b) - National Assembly Standing Orders made pursuant to section 56 (1) of the Constitution and adopted by the House on 22nd May 2003.
65 Section 34(7)(a) of the FSA.
66 Kaphale K, Litigation Flash Points and Other Areas of Legal Concern in the Insurance Act of Malawi (2011) Unpublished p. 15 a paper presented at the 2011 Malawi Law Society workshop on 23rd September 2011. We differ with Kaphale when he mentions that since there is no need for consultation or gazetting with regard to directives and these are issued to individual players and do not apply across the board, the directions are not legislative acts, but are more of administrative acts and are amenable to judicial review under Section 43 of the Constitution. We think the directives are proper subsidiary legislation and it is not uncommon to have subsidiary legislation applying to individual players in an industry.
67 Cap 1:01 of the Laws of Malawi.
68 Section 5 of the Constitution.
69 In Ex parte Golden Forex Bureau Case [High Court, Unreported, Misc. Civil Case No. 16 of 2007] the Court struck down a regulation that required all forex bureaux in Malawi to be owned by or be subsidiaries of financial institutions. The Court was of the view that this requirement breached the constitutional freedom of association and indeed the right to economic activity enshrined in Sections 32 and 29 respectively.
The framers of the FSA had this in mind when they enacted Section 34(4)(a) which not only requires a consultation before the issuance of the directives, but also a consideration of the representation made by the persons consulted during the process. We are of the view that to show that the representations by the stakeholders were taken into account, it is important, in keeping with Section 43 of the Constitution,\footnote{Which guarantees the right to lawful and procedurally fair administrative action and the right to be furnished with reasons in writing for administrative decisions and was discussed in Chapter One under Development of Employment Law.} that where the Registrar disagrees with any contrary representation by a stakeholder, justifiable reasons for the disagreement must be communicated, otherwise, it can easily be surmised that the consultative process was nothing but a charade.

The Registrar may however issue a directive without following the above procedures if he considers on reasonable grounds that it is necessary to issue the directive urgently. Such an urgent directive is valid for 90 days but may be renewed by the Registrar. The Act does not put a limit on the times that the Registrar may renew the urgent directive. This leaves the Registrar with unfettered power to renew the urgent directive at its expiry after every 90 days. We suggest that a limit be set to avoid such imminent abuse of directives.

Failure to comply with the Registrar’s directive is an offence under the FSA punishable by administrative penalty.\footnote{To conclude on the Registrar’s directives, we commend the introduction of such directives under the FSA, the PA and others financial laws and hope that the directives shall be reasonable and that the Registrar shall act \textit{intra vires} in all respects to avoid judicial review actions. It is our conviction that this in turn shall enhance the regulation of financial institutions and pension funds in particular for the benefit of the economy in general. We however suggest that the seemingly wide discretion given to the Registrar be streamlined by the law to promote transparency and accountability in the office of the Registrar.} To conclude on the Registrar's directives, we commend the introduction of such directives under the FSA, the PA and others financial laws and hope that the directives shall be reasonable and that the Registrar shall act \textit{intra vires} in all respects to avoid judicial review actions. It is our conviction that this in turn shall enhance the regulation of financial institutions and pension funds in particular for the benefit of the economy in general. We however suggest that the seemingly wide discretion given to the Registrar be streamlined by the law to promote transparency and accountability in the office of the Registrar.

\textbf{B. Investment of Pension Funds}

Pension fund assets must be invested at arm's length.\footnote{See Section 34(7)(8) of the FSA.} The investment must be distant, not intimate and it must be done in good faith, being a fair market transaction by parties with relatively equal bargaining power, in which neither one forces the other to accept terms.

In Australia,\footnote{See Australian Prudential Regulation Authority- Superannuation Circular No. II.D.5 - Investment to be at Arm’s Length Basis December 1998- available at www.apra.gov.au.} in deciding whether a transaction is undertaken on arm’s length basis, the transaction is judged according to all the circumstances of each particular investment. The test being whether a prudent person acting with due regard to their own commercial interests would have made such an investment. This entire rule ensures that trustees do invest fund assets in the best possible ventures.

In addition the Act sets strict rules that control the trustees’ acquisition of employer’s and member’s assets as assets of the fund.\footnote{See \textit{Dickson v Australian Newspaper Employees Union} (1994) BCLC 814.} For obvious reasons, trustees being
fiduciaries are prohibited from borrowing pension funds except as authorized by Registrar’s directives. Where an acquisition meets the criteria set out in the Act, the same must be approved by the Registrar. A trustee or an investment manager is prohibited from lending fund money or giving financial assistance to a member or his close relation. These provisions are extremely important in the preservation of the fund.

Section 56 of the Act restricts investment of pension funds outside Malawi. If any investment is to be made outside Malawi, the same needs to be in compliance with the provisions of the Exchange Control Act. The Exchange Control Act and its Regulations prohibit such activities as dealing in foreign exchange without a licence and above all provide for authorization from the Reserve Bank of Malawi (RBM) where externalization of funds is intended. Some commentators have argued that considering the global economy we live in and the size of our economy it would not be prudent to put restrictions on foreign investment of pension funds. It is thought that a decent return on investments might as well be achieved outside Malawi. This argument touches on the economics dilemma on whether or not exchange controls have an economic benefit at all, and is outside our scope. That said, our view is that such controls are necessary to avoid the funds being dissipated under a foreign regulatory regime which is subject to a peculiar political and financial environment.

The literature on pension fund regulation generally concludes that investment restrictions may be initially justified in emerging countries introducing private pension schemes, particularly those introducing a mandatory pension like Malawi. However, there is also a consensus on the need for such countries to relax the restrictions over time, in line with the development of institutions and instruments, improvements in the depth and liquidity of securities markets, and also improvements in the overall legal framework. The long run objective would be the adoption of a pension regulatory system where minimal restrictions are imposed also referred to as ‘the prudent man approach.’

XI. INFORMATION TO FUND MEMBERS AND BENEFICIARIES

Employment rights under pension schemes would be compromised if fund members, employers and beneficiaries were not properly informed about their investment and so the Act enshrines this right to information in Part VIII. Members must be given written fund information in a meaningful, accurate and complete manner at intervals prescribed by Registrar’s directives. A member is also allowed to seek fund information on his own at intervals of at least six months. The backdrop to this is the fact that despite most fund rules providing for provision of information to members, in practice it has been difficult for fund members to access such information as there was no regulatory framework. A case in point is *Mbewa and Others v Shire Bus Lines Ltd (In Liquidation)* where huge arrears on pension contributions due from the employer were only discovered by fund members when the respondent company was undergoing liquidation.

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122 Section 55 of the Act.
123 Section 53 of the Act.
124 Cap 45:01 of the Laws of Malawi.
127 Section 58 of the Act.
128 Section 60 of the Act.
In particular Section 3 of the Act states that 'member information' in relation to a member of a pension fund, means information about the nature and extent of the member's entitlements under the fund rules and otherwise in relation to the fund. The Section goes further to provide that 'fund information' in relation to a pension fund, means information about:-

a) The fund's investment strategy;
b) The fund's investment performance and financial position;
c) Fees and charges payable by, or borne by, members or beneficiaries in relation to the fund;
d) The rights and entitlements of members or beneficiaries under the fund rules and otherwise in relation to the fund;
e) The obligation of members to pay contributions under the fund rules; and
f) The obligation of employers to pay contributions under the fund rules and to provide life insurance under the requirements of the Act or as specified by Registrar's directive.

Thus Registrar's directives may extend to prescribe pre-membership rules touching on applications for membership; documentation to be provided to prospective members and circumstances in which the trustee may admit a person to membership of the fund.

In addition to providing information to fund members, trustees are mandated to establish a complaints system and attend to members' and beneficiaries' complaints within 60 days. This surely upgrades the position of a member in relation to trustees as the erstwhile arrangement left the member exposed to the whims of the trustees.

XII. CONTRIBUTIONS AND INVESTMENT RETURNS

A. Contributions

Section 61 of the Act provides that the employer must remit both his and the employee's pension contributions to the trustee no later than fourteen days after the end of the month in which the liability to make the contributions arose. This rule applies where the employer is authorized to deduct an amount from the remuneration payable to the employee as the employee's pension contribution. The trustee is also given fourteen days from the date of receipt within which to credit the member's account. This provision is important considering that in the past employers have had huge arrears on pension contributions some of which are only discovered by employees at the time the company is undergoing liquidation. This was the scenario when Shire Bus Lines Ltd was undergoing liquidation. Parties had to agree on a sum of pension payable together with interest.

795 Section 59 of the Act.
796 Section 57 of the Act.
797 Section 62(2) of the Act.
Under the Act an employer who does not remit pension contributions on time is liable to administrative penalty prescribed under the FSA. Further than that, the employer is liable to pay the trustee of the pension fund interest, at the rate prescribed by the Minister by order published in the Gazette. Currently the Pension (Interest Rate for Outstanding Employer Contributions) Order 2011 provides that the rate of interest payable by an employer to a trustee of a pension fund in respect of each month or part thereof during which any employer contributions, including interest, is outstanding, is the bank rate plus ten percent per annum.

B. INVESTMENT RETURNS

The trustee is mandated to credit the member's account with amounts of the employer contributions and the employee contributions as well as investment returns, in accordance with the fund rules and the Registrar's directives. The trustee is allowed fourteen days from the date of receipt within which to credit the member's account. The trustee is further mandated to debit the member's account with amounts of benefits paid from the fund in respect of the member; fees and charges; amounts owed by the member to the trustee in respect of the fund; and the proportion of the fund’s investment losses allocated to the account in accordance with Registrar’s directives.

XIII. PENSIONS AND OTHER BENEFITS

A. Payment of Benefits

Payment of benefits is a subject members are most interested in. Having sown, it is now time to reap. Section 64 enumerates instances in which benefits in respect of a member will be payable namely:

1. When the member has reached retirement age, which is an age between fifty and seventy years. Authorities have observed that the lower the retirement age the more trends towards earlier labour market exits which may not always be in the interest of the economy, hence there will be need to adjust the retirement age with changing times in the case of Malawi;
2. When the member has retired on the basis of years of service which is defined as twenty years of continuous service with a single employer or any other conditions under the fund rules as approved by the Registrar;
3. When the member is retired on the advice of a qualified medical practitioner registered with the Medical Council of Malawi;
4. When the member is about to leave or has left Malawi permanently;
5. When the member has died;
6. When the member has permanently left the service of the employer and the benefits are transferred to another pension fund;

7. When the Registrar has given permission, with the member's authority, for early payment of benefits. For instance, where employment is terminated through resignation or otherwise and the member has not secured another employment for a period of more than six months, the member may withdraw benefits limited to that part of the contributions paid by the member and not the employer.  

The general rule is that the benefits are supposed to be paid as an annuity calculated by a licensed insurer. An annuity is a fixed sum of money paid to a person periodically for a set period of time, often for life. Section 3 of the Act defines an annuity as 'the exchange of capital sum for a regular income benefit, which may or may not increase at a predefined level or according to an appropriate index, payable for the remaining life of the recipient.'

The Act or Registrar's directives may provide for the payment of the benefits other than through annuities. Thus Section 68 of the Act allows commutation of annuities into lump sums and provides conditions for such commutation including one that only forty percent of the benefits may be commuted and all benefits may be commuted where the member has left or is about to leave Malawi permanently. Having completed the commutation, the trustee can only pay forty percent of the benefits to the member who has left or is about to leave Malawi permanently upon obtaining an approval from the Registrar. The remaining sixty percent is payable after twelve months upon the trustee satisfying himself that the member has indeed permanently left Malawi. This provision is aimed at preventing early withdrawals based on exit from Malawi where the same is not permanent.

B. Death Benefit Nominations

Section 70 permits a member to give the trustee written nomination directing the trustee to pay the fund member's benefits on his death to defined persons who may include the member's widow or widower, member's child or a close relation. The nomination sets out the amount or proportion of the benefits to be paid to each beneficiary and is alterable at any point by the member in line with the fund rules. A member may also revoke a nomination by written notice to the trustee. Curiously a nomination is also revoked by the divorce or later marriage of the member. This policy is also reflected in the Deceased Estates (Wills, Inheritance and Protection) Act where it is generally provided that subsequent marriage and divorce revokes the testator's will. We doubt whether these provisions are in tandem with the constitutional right to property.

However we reserve that argument for the future.

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753 See Section 65 of the Act.
754 See Section 67 of the Act.
755 See Section 69 of the Act.
756 A child in relation to a member is defined in Section 3 of the Act as 'a child of the member, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother.'
757 A close relation means a spouse, brother, sister, parent, child, child of the spouse, aunt, uncle, grandparent, and the spouse of any of these - see Section 3 of the Act. This is a truly extended African understanding of a close relation and may not hold in developed countries.
758 The fund rules may put up reasonable limits on the member's right to amend the nomination for example setting maximum number of amendments within a certain period of time. This brings sanity in the administration of the pension fund.
760 Ibid Section 10.
761 Ibid Section 28 and 44 of the Constitution.
Our reading of Section 70 is that the death benefit nomination is not mandatory but optional. A member may choose to prepare the nomination or not. He may as well prepare a nomination with beneficiaries other than those specified in the Section. The aim of the nomination, in our view, is to foster certainty of beneficiaries when a member dies. This is so because the trustee is bound by the member's current nomination unless it is invalid for example it is not signed or the member's thumb was not procedurally affixed to the nomination. The trustees shall not accept a nomination if it appears to the trustee that the nomination or revocation was not made voluntarily. An evidential problem will arise in such situations since the member will have passed on. However it will be up to the parties involved to adduce evidence supporting their respective cases. For example, where a complainant asserts that the deceased was unduly influenced in making a particular nomination, he must satisfy the contractual principles applicable in proving undue influence.

Where the nominated beneficiary is under the age of eighteen, the benefit is supposed to be held by the trustee in a separate trust for the beneficiary and payable to him when he turns eighteen or to his parents or guardian at any time for the beneficiary's maintenance and educational needs and welfare.

Where a member dies without a valid current nomination, the benefits will then be paid in such propositions as the trustee determines to persons who, the trustee is satisfied,

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64 It is doubtful though that a member may validly nominate an artificial person or an estate as a potential beneficiary. Our reasons are (1) the language of the provision recognizes three classes of natural persons that may be nominated (widow/widower, member's child or a close relation) - the ejusdem generis rule of statutory interpretation may be applied in support of this view; (2) the provision and the Act in general is based on a social protection policy and would make it doubtful that Parliament intended to include artificial persons. See also Dyani N and Mhango M, Pension Death Benefits Under the Malawi Pensions Bill 14 of 2010: Reflections from South Africa and Australia (2010), The Comparative and International Law Journal of Southern Africa Vol XLV No. 1, March 2012.

65 A current nomination is not defined in the Act. In our view it simply means a nomination which is valid at the time of the death of the member in terms of the Act, subsequent legislation and Registrar's directives. However under Australian legislation one of the requirements for a current nomination is that it must be no more than 3 years old from the date on which it was first signed or last confirmed or amended - see Section 59(1A) of the Australian Superannuation Industrial Supervisory Act of 1993.

66 See Section 70(7) of the Act. In the Australian case of Collins v AMP Superannuation Ltd (1997) 75 FCR 565 the deceased member left a binding beneficiary nomination under which his two adult sons from a previous marriage were nominated as the beneficiaries. At the time of his death, there were two other minor daughters from a subsequent relationship. It was held that the nomination was a valid binding nomination regardless of the perceived unfairness on the part of the two minor daughters.

67 The principles are (1) that the one contracting party obtained influence over the other; (2) that this influence diluted his powers of resistance and made him pliable; (3) that the contracting party used the influence in an unlawful manner to persuade the other into a contract which he would otherwise not have concluded had his freedom of will not been subjected to this undue influence. See the South African decisions of Kruger v Central Retirement Annuity Fund [2002] 7 BPLR 3634 and Preller and Others v Jordaan 1956 (1) SA 483 at 492.

68 For the purposes of Section 23 of the Constitution, a child is a person below the age of 16 years - see Section 23 (5) and the Convention on the Rights of the Child defines a child as a person below the age of 18. It is suggested that the law ought to have prescribed a uniform age for the definition of a child as the present situation presents unnecessary confusion. The Act seems to favour the age of 18 and not even the general majority age of 21. See also Odala V, Childwood Denied: Examining Age in Malawi's Child Law, as the Constitution 'Becomes of Age' Unpublished. A paper presented at the Malawi Constitution at 18: Constitutionalism, Diversity and Social-Economic Justice 25-28 July 2012, Blantyre.

69 The current policy in the law seems to be moving towards a position that a minor is a person below the age of eighteen rather than twenty one. For instance the 2011 Deceased Estates (Wills, Inheritance and Protection) Act defines a minor in Section 3 as a person below the age of eighteen unless lawfully married, or is heading a household and is not below the age of fourteen or holds property in his or her own right in accordance with the law.

70 Section 71(4).
were financially dependent on the deceased member at the time of his death. This is so notwithstanding any other law to the contrary and so the Deceased Estates (Wills, Inheritance and Protection) Act has no application to pension benefits. In other words, one cannot validly dispose of his pension benefits through a will. Indeed Section 85 of the Act emphasizes this by providing that the Estates Duty Act and any other law relating to deceased estates do not apply to a member’s entitlement to benefits in a pension fund. Without much elaboration, Justice Chikopera views this scenario as incorrect. However, our view is that the position obtaining under the PA has practical advantages. Considering that a majority of Malawians do not write wills, it is better to ascertain their testamentary choice through the nomination under the PA. We believe that the majority of members will find the nomination process much more fitting than writing a will, which is largely considered a little more legalistic.

C. Protection of Benefits

The Act makes provision for the protection of pension benefits. The specific amounts that are protected are as follows:-

1. Amounts paid as contribution to a pension fund in respect of a member;
2. A member’s entitlement to benefits in a pension fund; and
3. Amounts paid out of a pension fund by way of benefits in respect of a member.

Such amounts cannot be liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever. The reasoning behind this is that the Act would not serve its purpose of ensuring that every employee in Malawi receives retirement and supplementary benefits as and when due, if the same were capable of being attached. If this was not so, a number of employees would end up having their benefits wiped out through debts. However, one would still argue that once the benefits are received and say converted into some asset, that asset can be legally attached, sequestrated or levied upon as the same is not caught by the provisions of Section 73 of the Act.

In addition the protection extends to an employee who has committed an act of bankruptcy or has indeed been declared bankrupt. The bankruptcy of a member does

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See Section 71(3)(c) of the Act. A dependant in relation to a member includes a spouse and child of the member, but is not limited so - see Section 3 of the Act. In comparison the Deceased Estates (Wills, Inheritance and Protection) Act defines a dependant in Section 3 as follows: ‘a dependant in relation to a deceased person means a person other than a member of the immediate family [a member of the immediate family means a person’s spouse or children], who was maintained by that deceased person immediately prior to his or her death and who was (a) his or her parent; or (b) a minor [a minor means a person below the age of eighteen unless lawfully married, or is heading a household and is not below the age of fourteen or holds property in his or her own right in accordance with the law] whose education was being provided by him that deceased person, who is not capable, wholly or in part, of maintaining himself or herself’. Admittedly the determination of what constitutes financial dependency is one of the most difficult questions in modern pension law. However, it has been established that to constitute financial dependency a member must have regularly contributed towards a person. Accordingly, irregular contribution or one off contribution will accordingly not qualify a person as a financial dependant of the deceased - Governer v Alpha Group Employees Provident Fund and Another (2001) 8 BPLR 2358 (PFA).

Act No. 14 of 2011 - Cap 100 of the Laws of Malawi.

Cap 43:02 of the Laws of Malawi. Our view, however, is that this law was properly passed by Parliament and it is within the powers of Parliament to curtail the application of one Act of Parliament over another.


Division 2 of Part XI of the Act - Sections 73 to 75.

See Section 4 of the Act, and the objectives of the Act discussed above.

See generally the Bankruptcy Act Cap 11:01 of the Laws of Malawi
not affect any liability of his employer to pay employer contributions to a pension fund, neither does the bankruptcy affect any entitlement of the employee to benefits from a pension fund. It is yet to be interpreted by the courts whether these provisions totally dispense with the application of the provisions of the Bankruptcy Act to pension benefits. Our view is that the Bankruptcy Act may still apply to pension benefits since this is not particularly prohibited under the Act.

Lastly, pension benefits may not be assigned, transferred, pledged, charged or otherwise be subject to a security interest, however described. This provision aims at curbing the common practice of using pension benefits as collateral for obtaining a loan from a financial institution. Proponents of this provision argue that this works towards the preservation of the fund and ensures that a member receives the benefits as intended by its framers. However, employees will have lost out on a readily available security, considering that most of the Malawian population does not own registered land which is a readily acceptable form of security by financial institutions. Resultantly, the banking industry faces a potential drop in its revenue, though they may consider it insignificant, following the implementation of the PA.

XIV. MISCELLANEOUS PROVISIONS

A. Missing Employees

The Act provides in Section 76 that where an employee is missing and is not found within a period of twenty four months from the date he was reported missing, the Registrar is mandated to set up a Board of Inquiry to determine whether the employee should be presumed dead. If the board decides that he should be presumed dead then his pension benefits will be treated in accordance with Section 71 and 72 above. It would be desirable for the Act or at least a Registrar's directive to put up rules governing the Board of Inquiry. Our presumption is that during the period of inquiry, the employee's obligation to make pension contributions in terms of Section 12 of the PA subsists.

The period for presumption of death in the PA is much shorter than, for instance, the seven years' period prescribed for under the Divorce Act. This should be a welcome move considering that seven years is an excessively long period for pension purposes, much as it is for divorce purposes. The risk and administration costs would be quite high if the presumption of death were enacted at a period of more than the twenty four months.

B. Notification of Significant Adverse Effects

A trustee is mandated to notify the Registrar in writing, within five days of an occurrence which has significant adverse effects on the financial position of the fund. An occurrence will be deemed to have significant adverse effects if it results in a situation where the trustee will not be able to make payments to beneficiaries as and when the obligation to make the payments arises, at anytime within the next twelve months. This

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776 Cap 11:01 of the Laws of Malawi.
777 See Section 74 of the Act.
778 Section 75(1) of the Act.
779 Cap 25:04 of the Laws of Malawi- Section 14.
780 Section 77 of the Act.
appears simplistic on paper but difficulties may arise as to the interpretation of particular events and their probable outcome, either a failure to pay or not.

In terms of Section 59 of the FSA, an external auditor is obliged to inform the Registrar about the insolvency or contravention of financial services laws, Registrar's directives or conditions in the licence of a prudentially regulated financial institution which includes a pension fund and an umbrella fund. The importance of this clause cannot be over-emphasized and a call goes to external auditors to abide by this significant provision.

C. Payment to the Employer

The Act prohibits payment of any amount to an employer, unless the same would amount to the arbitrary deprivation of a person's property. The right to property is constitutionally guaranteed and it includes the freedom to acquire property alone or in association with others and the freedom against arbitrary deprivation of property. In general the essence of any pension law is to act as a social security measure for the benefit of an employee and not an employer and so the possibility of an employer obtaining a payment from the pension fund must be duly restricted.

D. Victimization of Trustees

Section 79 of the Act prohibits victimization of a trustee, officers and employees of a corporate trustee. A person guilty of victimization is liable to a fine of K10,000,000.00 and four years imprisonment. In addition the victimized party can sue the person guilty of victimization to recover the amount of any loss or damage suffered. The provision goes further to define victimization which includes subjecting or threatening the trustee, officer or employee to a detriment on the ground that he has exercised his power in a particular way or has performed his duty or function in a particular way. This protection is important in ensuring that trustees perform their fiduciary duties free from potential or actual interference.

E. Remoteness of Vesting

The rule of law against remoteness of vesting is not applicable to a pension fund established after the commencement of the Act. The rule against remoteness of vesting, most commonly referred to as the Rule Against Perpetuities, is the judicially developed doctrine that states that every contingent future interest must vest, if at all, not later than the end of a period measured by one or more lives in being at the creation of the interest, plus twenty-one years thereafter. The rule is thus aimed at restricting the time period during which a property interest has to vest. The rule was developed because it was thought to be a bad thing for the dead to control the living too much and for property to be stopped from being able to move around the economy. Since this rule does not apply to pension funds created subsequent to the coming into force of the Act, such pension funds may be invested and re-invested perpetually or indefinitely.

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73 On the international scene the Energy scandal is a typical example of how auditors and accountants may contribute to breaches of the law leading to financial loss. The scandal revealed in October 2001, eventually led to the bankruptcy of the Enron Corporation, an American energy company and the dissolution of Arthur Andersen, which was one of the five largest audit and accountancy partnerships in the world. See www.enron.com.

74 Section 78 of the Act.

75 Section 28 of the Constitution.

76 See foot note 129.

77 Section 80 of the Act.

F. Protection for Discharging Obligations and Penalties for Contravening the Act, Regulations or Directives

The Act protects any person from civil action or civil proceedings in relation to an act done to discharge an obligation imposed by the Act, the Regulations or Registrar's Directives. This provision is seen as a major disadvantage of concentrating regulatory powers in the Registrar since the Registrar is legally less accountable to members or employees who may suffer loss following his directives.

As regards the penalties which may be mated against offenders, these are twofold. Firstly, any person who contravenes the Act, regulations or Registrar's directives for which no penalty has been prescribed is liable to administrative penalty under the FSA. Secondly, where the administrative penalty has been imposed and a person fails or refuses to comply with it he is deemed to have committed an offence under Section 82(2) of the Act. In the case of a natural person, he is liable to a fine of K10,000,000.00 and four years imprisonment, whilst in the case of a body corporate, the liability is determined in accordance with the provisions of the FSA.

G. Jurisdiction of the IRC

The IRC is given jurisdiction over all labour disputes arising from the PA, in addition to the FSA. Similarly as argued elsewhere, this provision does not, in our view, confer exclusive jurisdiction on the IRC. This clearly means that the IRC and the High Court have concurrent jurisdiction over all labour disputes under the PA, in addition to the FSA. We look forward to the accelerated development of relevant jurisprudence by the courts in the area of pension law following the commencement of the PA.

H. Regulations

The Minister is given power to make regulations for the better carrying out of the Act, upon recommendation of the Registrar. The Act prescribes some areas in which regulations may issue such as the management, control and administration of the National Pension Scheme, manner of paying pension benefits and transitional requirements.

Any person who contravenes the regulations is liable to penalties contained in the FSA. This is so regardless of the provisions of Section 21(e) of the General Interpretation Act, which provides for lighter fines and prison sentences for breach of subsidiary legislation. This underscores the seriousness with which Parliament attaches to financial crimes as the penalties under the FSA are stiffer.

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78 Section 81 of the Act.
78b See foot note 129.
79 On the Jurisdiction Bifurcation in Labour Disputes in Malawi in Zibaca-Banda R. Sources and Institutions of Labour Law in Malawi, Meentorn (2008) and Chapter One of this Book on Jurisdiction of the Courts.
79a Section 84 of the Act.
79b Cap 101 of the Laws of Malawi.
XV. TRANSITIONAL ARRANGEMENTS

Part XII provides for transitional arrangements including the mode of dealing with pension schemes in existence prior to the commencement of the Act and the recognition as pension, of the accrued severance liability for employees whose employers were not providing pensions prior to the commencement of the Act, and the requirement for the accrued severance liability to be calculated according to the provisions of the EA. This Part must be read in conjunction with Section 5 of the Employment (Amendment) Act 2010 which also provides for transitional issues.

A. Existing Schemes

In brief, existing pension schemes continue to exist provided that they meet the licensing requirements under the PA. Employees in existing pension schemes are free to choose any pension administrator to administer their pension. All pension schemes existing before the commencement of the Act are required to submit to the Registrar within three (3) months of the commencement of the Act, a statement of affairs effective at the last anniversary of the scheme prior to the commencement of the Act which includes assets, liabilities, a list of members and, in the case of a defined benefits scheme, the total pensionable salary of all members and the assumptions used in the assessment of scheme liabilities. Any employer operating a pension scheme prior to the date of commencement of the Act (1st June 2011) is mandated to remit all contribution arrears, if any, to the trustees of the fund within six (6) months from 1st June 2011.

B. Restricted Pension Fund

The employer managing a restricted pension fund requires to be licensed by the Registrar in order to continue operating such restricted pension fund himself or through a wholly owned subsidiary. A restricted pension fund is defined in Section 3 of the Act as one that, through its rules, restricts membership of the fund to officers and employees of a specified employer and its related bodies corporate.

C. Accrued Severance Liability

Every employer is required to recognize as part of an employee’s pension dues, each employee’s severance due entitlement accrued from the date of employment of that employee to 31st May 2011.

For employers not providing pension or contractual gratuity prior to the date of commencement of the Act the severance entitlement referred to above is calculated and paid out in accordance with the provisions of the EA. This sum will act as an opening balance for employees who are joining a pension scheme for the first time.

76 Generally see Section 87 of the Act.
77 Section 88 of the Act.
78 Section 91 of the PA. See also Nkhome v Medicines Sans Frontieres France IRC matter No PR 560 of 2011 where the Court observed that this section has retrospective application nonetheless ordered payment of severance allowance to the applicant which was over and above that required by the PA and the Employment (Amendment) Act 2010. It was further ordered that the difference be transferred to the applicant’s pension fund. We do not agree with this interpretation of Section 91 of the PA and think that the whole severance allowance ought to have been transferred into the pension fund. In Afhando v FDFH Ltd IRC Matter No. 590 of 2010, decided before the coming into force of the PA, the Court faulted the use of pension contributions by the respondent to satisfy severance allowance needs.
79 See Section 91 of the Act. The applicable EA (i.e. the version before the 2010 amendments) provides that employees who have worked 1-5 years are entitled to 2 week’s wages times number of completed years; those who have worked 5-10 years are entitled to 3 week’s wages times number of completed years; and 10 years and above are entitled to 4 week’s wages times number of completed years.
For employers providing pension prior to the date of commencement of the Act, the severance entitlement is calculated as having a value equal to the value of the severance entitlement calculated in accordance with the provisions of the EA; less the sum of the accumulated employer pension contributions made or gratuity paid prior to the date of commencement of the Act and any growth on such contribution; provided that the severance entitlement is greater than the sum of the accumulated employer pension contributions made prior to the date of commencement of the Act and any growth on such contribution; or if the severance entitlement is equal to or less than the sum of the accumulated employer pension contributions made prior to the date of commencement of the Act and any growth on such contributions the severance entitlement shall not be recognized as pension.

The value of the severance due entitlement calculated above shall be transferred into the pension fund of the employee's choice within a period not exceeding eight (8) years provided that such severance due entitlement shall be escalated for each year within the eight years that it is transferred to a pension fund, at the rate of the average annual Consumer Price Index as published by the National Statistical Office from time to time. Upon termination of employment the severance allowance due becomes immediately transferrable to a pension fund of the employee's choice i.e. the eight (8) year grace period ceases to apply. Failure to comply with these provisions is an offence punishable by administrative penalties under the FSA.

To conclude on the PA, our view is that the Act embodies audacious and far-reaching reforms. As argued by Mhango, much will depend on the will of the regulator, particularly the Registrar of Financial Institutions in the person of the RBM Governor, to carry out the letter and spirit of the reforms in the Act. There is no doubt that judicial interpretation of the Act and subsequent directives by the Registrar and regulations by the Minister of Finance will further clarify grey areas, which are bound to emerge in the course of its implementation.

X. CONCLUSION

To sum it all, Labour Law in Malawi has grown from strength to strength since the adoption of the 1994 Constitution. The enactment of the LRA in 1996, the EA 2000, the Employment (Amendment) Act 2010 and the PA in 2011 has further contributed to the furtherance of labour rights in Malawi. These principal statutes and many other labour related statutes have introduced new approaches to employment and industrial relations, formulated with internationally acceptable standards of good industrial practice in mind. It is to be hoped that the few dark areas highlighted in this Book will be addressed by all stakeholders including all the three arms of government, the employers' and employees' organisations, to augment the enjoyment of labour rights in Malawi.

79See Section 91 of the Act.
It has been proposed, among other things, that the employees' constitutional right to privacy would be better protected by an enactment on data protection, as is the case with other Commonwealth countries. Legislation against discrimination on the grounds of one's gender or HIV/AIDS status is also pertinent in the current employment setting. In that regard, the HIV and AIDS (Prevention & Management) Bill is a welcome development. However, the enactment process needs to be accelerated. We commend Parliament for passing the Disability Act 2012.

The coming into force of the PA on 1st June 2011 will remain a grand achievement in time to come, however, the challenge is on the Registrar of Financial Institutions to enhance its institutional capacity and successfully implement these commendable reforms for the stability of the Malawi financial system.

Lastly, the long overdue enactment of the Tenancy Labour Bill of 2005 will go a long way in addressing the labour rights of tenants across the country as well as issues surrounding child labour.
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