

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 295 OF 2003

BETWEEN:

KALOWEKAMO..... APPLICANT

-and-

**MALAWI ENVIRONMENTAL ENDOWMENT
TRUST RESPONDENT**

CORAM: R. Zibelu Banda (Ms), Deputy Chairperson
Ngwira of Counsel for Applicant
Kanyuka (Ms.) of Counsel for respondent
Ngalauka Court Clerk

JUDGMENT

*Contract-Employment-Fixed Contract-Specific Period of Time-Failure to
Renew-Dismissal-Justification for Dismissal-Reason-Right to be Heard.*

FACTS

The applicant was employed on 1 October 2001 as Operations Director on two-year fixed contract. The contract was expiring in 2003. He applied for its renewal as provided by the contract. The respondent refused to renew the contract for another two-year period. No reasons were given for refusing to renew. The applicant challenged the failure to renew his contract. He alleged that the respondent had discriminated against him. The respondent on the other hand, averred that they were not under any legal obligation to renew a fixed contract.

ISSUE

The Court was called upon to determine whether refusal to renew a fixed contract constituted unfair dismissal.

THE LAW

The short answer to this question is found in section 28 as read with sections 29 and section 57 of the Employment Act. For purposes of this case and for better reference section 28(3) reads as follows:

“Where the purpose or effect of a contract of employment that is purported to be for a specific period of time...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 the instant case the respondent through the Chief Executive, Mr. Tikhala Chibwana, told Court that the post of Operations Director was a post connected with the normal and permanent activity of the respondent’s undertaking. In his own words Mr. Chibwana informed Court that:

“ Yes, we do have an Operations Director. The position of Operations Director still exists at MEET. We employed another Operations Director”.

Further it came out in evidence that was uncontroverted that the applicant was advised by the respondent to apply for renewal of his contract when the contract period was approaching expiry. This was an indication that the post, which the applicant held was on a lasting basis.

In addition, one of the respondent’s objectives is to ‘establish, develop and manage an endowment fund to provide sustainable financing for environmental activities in Malawi’. The respondent awards grants to institutions to carry out environmental activities. Responsibilities of Operations Director include; to ‘promote and administer grants disbursement portfolio...’; and analyse incoming proposals and maintain current communication with recipients (of the grants).’

The above shows that the post of Operations Director, which the applicant held was very crucial. According to the description of the activities of the respondent and responsibilities of the post of Operations Director, the Court finds that the post was a core office without which the trust would not operate effectively or at all.

The purpose or effect of the applicant's contract of employment was the filling on a lasting basis of a post connected with the normal and permanent activity of the respondent's trust. Therefore in terms of section 28(3) of the Act the Court finds that this was a contract of employment for an unspecified period of time. The Court shall therefore treat the contract between the applicant and respondent as a contract for unspecified period of time.

A contract for unspecified period of time can be terminated by either party upon giving the other party notice in accordance with section 29 of the Act. The contract can only be terminated fairly by following the provisions under the Constitution and section 57 of the Employment Act.

The Constitution in section 31 guarantees every employee the right to fair labour practices. Fair labour practices entail the duty on the employer to give an employee it intends to dismiss a reason for the intention, see section 43 of the Constitution, which states that:

“Every person shall have the right to lawful and procedural 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..”

The employee must know why an adverse action is intended to be taken against him and the applicant must be able to say something in his own defence. The Supreme Court of Appeal in *Dr B S Chawani v The Attorney General* (MSCA No. 18 of 2000, per Tambala JA, held that:

“The purpose of section 43 is clearly to ensure transparency in decision making where the decision is likely to infringe the rights, freedoms, interests or legitimate expectations of others. The section was also intended to enable persons affected by administrative actions to have adequate opportunity to defend themselves effectively. A person would be able to present a good and effective defence to an administrative action when he knows the reason supporting the action.”

This Constitutional provision was incorporated into Section 57 of the Employment Act, which provides that:

“The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.”

The burden of proving the reason for dismissal on a balance of probabilities is on the employer, see section 61 of the Act. In *Earl v. Slater and Wheeler*, [1973] 1 WLR 51 at 55 the Court of Appeal held:

“It is for the employer to show what was the principal or only reason for dismissal.... and that it was a potentially valid reason.... If the employer fails to discharge this burden, the tribunal must find that the dismissal was unfair.”

In the instant case the respondent told Court that they were under no legal obligation to give the applicant any reason for dismissal. Obviously because the respondent was under the mistaken belief that this was a specified contract that terminated with lapse of time.

The respondent might be wondering what the intention of the legislature was in providing for contract of employment for specified period of time if as in this case a Court can reverse and find that the contract was for unspecified period of time. An answer to such question is that the legislature was trying to avoid incidents like the one in the instant case. There are genuine contracts of employment for specified period of time. However the legislature had the foresight to protect some innocent employee who might fall into the trap of entering into fixed contract that was in fact mere sham.

People’s right to employment under section 29 of the Constitution would be an illusory if employers craftily drafted employment contracts that automatically terminated through lapse of time. Employers would choose sometimes for unconstitutional and invalid reasons which employees to maintain and which ones to dispose of. Section 28(3) is aimed at preventing such unfortunate developments.

In the instant case the Court held allegations and counter-allegations of issues ranging from discrimination to incompetence. These were the issues, which must have prompted the respondent to give reasons for terminating the contract. If the applicant was incompetent, the respondent was required by law to give the applicant full particulars of his incapacity so that he could answer to the allegations and have an opportunity to improve if necessary.

The Appeal Court in *Polkey V A E Dayton Services Ltd* [1987] 3 All ER 974 at 983-984, held; per Lord Bridge of Harwich:

“An employer having prima facie grounds to dismisswill in the great majority of cases not act reasonably in treating the reason as sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as ‘procedural’, which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning to mend his ways and show that he can do the job.”

In the instant case if the respondent had found it necessary to regard the applicant’s incapacity as ground for termination, he should not have hidden behind the lapse of time in terminating the contract. He should have come out in the open and informed the applicant that he was incapable of performing the duties for which he was employed. The applicant would have answered to the allegations and basing on the response, the respondent would have been entitled to either dismiss or take any other disciplinary measure against the applicant.

The respondent was under legal obligation as demanded by the Constitution, Employment Act and common law to provide a reason before terminating the applicant’s contract. The reason would have negated any views held by the applicant that he was actually discriminated against.

FINDING

Since the respondent did not comply with legal requirements stipulated above before terminating the contract, the Court finds in accordance with section 58 of the Act that the termination was unfair.

The Court will not comment on submissions made by Counsel for the respondent on damages because damages were not in issue. The matter shall be set down on a date to be fixed to assess an appropriate remedy under section 63 of the Act.

Pronounced in Open Court this 6th day of April 2004 at **LIMBE**.

**R Zibelu Banda (Ms.)
DEPUTY CHAIRPERSON.**