

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

MZUZU REGISTRY

MATTER NO. IRC 70 OF 2006

BETWEEN:

PHIRI (MRS)..... APPLICANT

-and-

SMALLHOLDER COFFE FARMERS TRUST..... RESPONDENT

CORAM: R. Zibelu Banda (Ms.); Chairperson
Applicant; present
Munthali; Human resource and Administrative Officer for Respondent
Namponya; Official Interpreter

JUDGMENT

1. *Dismissal Law-Justification- Reasons for dismissal-Fixed contract-Expiry of term*
2. *Dismissal-Reason-Sexual harassment-Revealing act of sexual harassment-Discrimination-Sex discrimination*
3. *Reason for dismissal-Must be valid-Employer to show valid reason-Court may lift the veil-To find a real reason behind dismissal*
4. *Evidence-Facts may show real reason for dismissal*
5. *Remedies-Compensation-Just and equitable- Additional compensation- For discriminatory reasons*

Background

The applicant was employed on a fixed term renewable contract as a Security Guard. The contract was renewable upon satisfactory performance. The applicant had up to the end of contract performed well. Towards the end of the contract term in December the applicant was attacked by her colleague who attempted to rape her. The applicant shouted for help and the assaulter was apprehended with his pants down. The matter was reported to management who called both the applicant and her assaulter for a hearing. The applicant was the complainant. As it turned out, Mr Munthali, the Human Resources Officer who also appeared at this hearing was in attendance. He accused the applicant of misconduct for revealing to the public what was an otherwise inside thing, meaning the attempted rape. He admonished the applicant for reporting on the incident. According to Mr Munthali, the applicant had embarrassed the Trust because of talking about the rape. This was on 30 December. A few days later the applicant was dismissed citing grounds of expiring of fixed term contract.

The first issue that needs to be dealt with concerns dates. As at 26 December when the rape incident happened and reported the applicant was working normally without notice from the respondent that her employment would be terminated at the end of the month. On 30 December when the hearing took place the respondent had not notified the applicant that her contract would not be renewed. It was only after 31st December that the applicant received a letter of termination.

The respondent admitted that in their Trust they required services of security personnel. This was a position that fulfilled a lasting requirement of the respondent's operations. It was therefore reasonable for the applicant to expect that her contract would be renewed. This is why when the applicant received a letter of termination she suspected that it was because of her alleged misconduct for embarrassing the employer.

The court agrees with the applicant that she had reason to believe that her contract would be renewed and that the failure for the respondent to renew the contract was based on the incident of 26 December. The court finds that the reason for termination of the applicant's contract was based on her reporting the attempted rape.

The Law

Until the recent amendments to the Employment Act, sexual harassment was not provided for in the labour laws of Malawi. The closest that the labour system came to proscribing for sexual harassment in the workplace was by section 5 of the Employment Act and the Labour Relations Act read with section 20 of the Constitution. These are provisions that prohibit unfair discrimination in all its forms. It has been said that sexual harassment is a form of discrimination on the basis of gender.

It is on the basis that sexual harassment tends to prevail against women more than men and that this is because of the gender roles created in the workplace. This court shares the view that sexual harassment is form of discrimination on the basis of gender and sex.

Sexual harassment means, in the context of a worker's employment, the following actions by that worker's employer or representative of that employer or co-worker: –a request of that worker for sexual intercourse, sexual contact or any other form of sexual activity which contains an implied or overt promise of preferential treatment in that worker's employment; an implied or overt threat of detrimental treatment in that worker's employment; or an implied or overt threat about the present or future employment status of that worker; or the use of words, whether written or spoken, of a sexual nature or physical behaviour of a sexual nature, which is unwelcome or offensive to that worker, whether or not that is conveyed to the employer or representative or co-worker and whether or not that is aimed directly at the worker or at another person, and has a detrimental effect on the worker's employment, job performance or job satisfaction by creating a hostile, intimidating or humiliating working environment for the recipient.

The colleague against colleague type of harassment creates hostile job environment. This form of sexual harassment constitutes unwelcome and inappropriate sexually based behaviour e.g. sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature, which renders the working atmosphere intimidating, hostile or offensive.

It is because of this that despite that the labour laws do not specifically provide against sexual harassment, the Industrial Relations Court has found certain acts as constituting sexual harassment and therefore unfair labour practices. The court held in *Jumbo V Banja La Mtsogolo*¹ that it was unfair labour practice to enquire into a married woman's private affairs with her husband.

A more serious case of sexual harassment constituting a series of acts forming a pattern was held in *Kamkosi V Office of the Ombudsman*². In this case the Applicant, a Secretary was assigned field work which involved travelling with her boss to out stations where the boss and the Secretary would spend nights away from home. During these trips the boss would ask for sexual favours. The court did not hesitate to find that there was sexual harassment and delivered judgment in favour of the Applicant.

Sexual harassment is a form of gender stereotyping whereby it is considered normal for a man to demand sex or behave in certain ways towards women: Institutionalising sexual harassment in the workplace. In this case the Human Resources Manager admonished the Applicant in the following terms: "You are a disgrace to the organisation. How could you reveal such confidential activity? You have embarrassed us," before dismissing her.

It has been easy for the court to find that the real reason for not renewing the contract was because the Applicant had disclosed matters to the public, which should have been kept confidential within the organisation. The Applicant in this case suffered loss of her job because her male boss found that sexual harassment which she had complained against was an internal matter and that it was not an issue.

¹ [Matter Number IRC 222 of 2001 (unreported)] IRC

² [Matter Number IRC 70 of 2003 (unreported)] IRC

This is what institutionalisation of sexual harassment in the work place is all about. Incidences of sexual harassment in the work place are not handled with the seriousness they deserve; often they are trivialised or personalised, if not considered as natural and inevitable.

This was confirmed during hearing of this matter in court when the same Human Resources Officer when asked to comment on the allegation of sexual harassment said he was not interested to comment on it because as far as he was concerned this was not an issue for him. Trivialising the matter. He told court that he had come to court to talk about the Applicant's contract of employment and not the 'rape' incident. According to him, the woman had probably called for it. 'Because she was of questionable morals': Personalising the issue.

Victims of sexual harassment fear that they would be labelled women of low morals and that they provoked the perpetrator to behave in the manner that he did. They refrain from reporting the matter to the authorities for fear of such repercussions. They are intimidated with detrimental action like dismissal to bring more shame on them and vindicate the employer. In this case, when the husband was told about the ordeal he could not understand why if the woman was a victim she too was dismissed. He reasoned that the wife was in fact caught in the act of consensual sex. The relationship is ever since on the blink of collapsing. This case raises an issue of consequences of sexual harassment on the victim even outside the workplace which include disruption of family life, loss of self confidence and self esteem, exposure to ridicule and humiliation.

This case is an example of worst forms of sexual harassment and worst forms of uncaring employers. In the English case of *Bracebridge Engineering Ltd V Darby* [1990] IRLR 3, the Employment Appeal Tribunal (EAT) held that: "failure by the employer to treat an allegation of sexual harassment seriously is breach of the implied contractual term relating to mutual trust and confidence. The implied contractual term relating to mutual trust, confidence and support is an extremely important one for female staff".

Finding

The court finds that the respondent in this case breached an implied contractual term of employment relating to mutual trust and confidence. The employer had a legal obligation under the contract to protect its female employees. The employer used the sexual harassment to influence its decision to dismiss the applicant. The court finds that the reason for dismissal was unfair. The respondent violated the applicant's right to fair labour practices, the right to work, her right to safe working environment and personal dignity. As a direct consequence of this incident and the reaction of the employer the applicant also lost matrimonial peace and harmony. It will take time to revive the lost trust in her husband Mr Phiri. This was a case of the worst forms of unfair labour practices. The dismissal was unfair as the reason was not valid. It was a prohibited ground under section 57(3) of the Employment Act.

Assessment of remedy

Where a court finds that a case of unfair dismissal is well founded it can award one of several remedies including reinstatement, re-engagement and compensation. In determining the appropriate remedy, a court must first consider the remedy of reinstatement, section 63 of the Employment Act. It was obvious from the conduct of Mr Munthali, whose conduct and attitude the court condemns, that he is an uncaring Human Resources Officer. One shudders at even the prospect of having him as a boss let alone one in charge of staff welfare. The option of reinstatement in this case is not practicable.

Where reinstatement is not practicable the court must consider compensation. The applicant prayed for this remedy. Taking all factors to be considered in awarding compensation under section 63, the court awards the applicant compensation under section 63(4) comprising the equivalent of 57 months salary as per *Stanbic V Mtukula* [MSCA Civil Appeal Number 34 of 2006 (unreported)]. The applicant was receiving MK 6412.50 as salary and house allowance. Total award under this head is MK 365 512-50.

The law in section 63(5) also provides that where the reason for dismissal was a prohibited ground under section 57(3) which includes discrimination, the court may make an additional award. The award for cases of discrimination are not stipulated, it is in the court's discretion to come up with a just and equitable compensation. In this case, the court invokes the provisions of section 5 of the Employment Act. It provides that where a case of discrimination is founded, a court may order a fine of MK200 000-00 (after multiplying by 10 under the Fines (Conversions) Act. However because this matter was not brought under criminal jurisdiction, the court awards the applicant instead a compensation of MK 200 000-00 under section 63(5) of the Employment Act.

Section 63(5) in this sense is aimed at according full protection of people's rights under both the Employment Act and by extension the Constitution which contains a bill of rights that guarantees human rights. Courts must be seen to promote people's human rights and fulfil the intention of the legislature by awarding appropriate remedy as recommended by legislation.

The total compensation in this matter is **MK 565 512-50**. The respondent must pay the applicant this amount with immediate effect.

Any party is at liberty to appeal to the High Court within 30 days of this judgment in accordance with section 65(2) of the Labour Relations Act.

Pronounced this 31st day of January 2007 at BLANTYRE.

Rachel Zibelu Banda
CHAIRPERSON

