IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 125 OF 2005

BETWEEN

KHAKI …… APPLICANT

-and-

INDE BANK …… RESPONDENT

CORAM: R. ZIBELU BANDA (MS) – CHAIRPERSON
Applicant; Present
Respondent; Absent no Valid Excuse
Gowa; Official Interpreter

JUDGMENT

Dismissal-Justification for Dismissal- Reason-Burden of proof- Employer to show reason-Operational Requirements- Redundancy- Procedure for Redundancy-Consultation.

Facts
The applicant was invited to meet the Chief Executive Officer where he also found Legal Counsel for the respondent. The applicant was there and then presented with a letter of redundancy. The applicant was until this time not aware that the respondent was carrying out a restructuring programme. Nor was he aware that the restructuring process would affect his position. He was never consulted and did not know the reason why out of the whole establishment, he was the one to be selected for redundancy. He challenged the termination alleging that the reason was not valid and that the procedure was flawed. The respondent sent a legal practitioner to defend the case when leave for legal representation had not been granted. Leave was accordingly denied because the conditions for granting leave under section 73 of the Labour Relations Act were not satisfied, see **Cement and others V Shoprite Trading (Mw) Ltd** [Matter Number IRC 49/2005 (unreported)].

Issue
The Court was called upon to determine whether the dismissal was unfair. A dismissal is unfair if there was no valid reason for the dismissal and where in the case of redundancy the applicant or his representative was not consulted.
THE LAW

Reason

Section 31 of the Constitution guarantees every person the right to fair labour practices which entail the right to know the reason for dismissal as provided in section 43 of the Constitution. The burden of proving the reason for dismissal is on the employer, see section 61 of the Act and **Earl V Slater & Wheeler (Airlyne) Ltd** [1973] 1WLR 51at 55, where it was held that:

> "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."

The Employment Act provides in section 57 that an employee shall not have his services terminated unless there is valid reason for that termination connected with his capacity or conduct or based on operational requirements of the undertaking. The provision makes it mandatory that there must be a valid reason for dismissal.

In section 43 of the Constitution, it is provided that every person shall be furnished with reasons for any administrative action that adversely affects him. The reasons must be furnished before that action is taken so that the affected person can defend himself, see ***Chawani V Attorney General*** [MSCA Civil Appeal No 18 of 2000 (unreported)].

Section 61 of the Employment Act places the burden of showing reason for dismissal on the employer. The applicant need just allege that there was no valid reason. In this case the employer cited redundancy as reason for dismissal but did not justify how the redundancy affected the applicant.

Redundancy is where an employer terminates contract of an employment because the employee's position no longer exists or is to be temporarily or permanently scrapped off due to operational needs of the employer.

The ILO Convention Concerning Termination of Employment at the Initiative of the Employer ratified by Malawi in 1986 is a good source of the law on redundancy. In **Ngwenya and another V Automotive Products Ltd [**IRC Matter Number 180 of 2000 (unreported) at 7,] the Chairman of the court held that:

> " …..section 211(1) of the Constitution 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. This is a Constitutional provision which mandates the courts to have recourse to International Labour Standards of the ILO ratified by Malawi."

The ILO Conventions can be used to interpret national law where there is a lacuna in national law. The chairman in the ***Ngwenya*** case supra, at 9, explained that:

> "……labour courts use International Labour Standards to assist them in understanding and interpreting national legislation and to decide on matters of equity and fairness. In these cases ILO Standards do not so much serve as legal basis on which questions (of law) can be decided, but serve as a tool to clarify issues on which national law is unclear or ambiguous."

Article 13 of **Convention No. 158 Concerning Termination of Employment at the Initiative of the Employer** provides that:

1. When the employer contemplates termination for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) "provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

In the instant case none of these were complied with by the respondent. No information was given on the nature of restructuring that was taking place or indeed who else was on the list of termination. There was no justification for abolishing the position of Human Resources Officer held by the applicant. The court finds therefore that there was no valid reason for dismissal. The respondent failed to discharge the burden of showing any valid reason for dismissal.

Assuming however that the respondent genuinely dismissed the applicant for grounds of redundancy, the next test for determining fair termination is whether the respondent consulted the applicant to warn him of the redundancy before-hand and to discuss whether there could be other alternatives to dismissal. This process is what in labour and employment circles is termed 'procedure'; others call it 'due process'.

Procedure

Where an employer has a valid reason for dismissal, the general rule is that, the reason must be communicated to the employee so that he can say something in relation to that reason. In redundancy situations the process is referred to as consultation.

It was thus put in the English Court of Appeal in **Polkey V A E Dayton Services Ltd** [1987]3 All ER 974 at 983-984; per Lord Bridge of Harwich:

> "An employer having prima facie grounds to dismiss ……will 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."

See, also Bristol **Channel Ship Repairers V O' Keefe** [1972]2 All ER 183.

The requirement to consult is crucial in all redundancy cases because the consultation process brings out information pertaining to why the applicant and not someone else should be declared redundant; who made the decision; what information did he or they base their decision on; what period would be required to carry out the redundancy and whether there is any way of averting dismissal. It was held in **Freud V Bentall Ltd** [1982] IRLR 443 EAT that:

> "Consultation is one of the foundation stones of modern industrial relations practice. In the particular sphere of redundancy, good industrial relations practice in the ordinary case requires consultation with the redundant employee so that the employer may find out whether the needs of the business can be met in some other way than by dismissal and, if not, what other steps the employer can take to ameliorate the blow to the employee."

In the instant case the respondent did not show the Court that they consulted the applicant. The applicant was invited to meet the Chief Executive Officer who presented him with a letter of termination on ground of redundancy without any prior warning whatsoever. This conduct was unfair as it did not comply with the requirement to consult or hear the other side as demanded by the Constitution, international labour law or good industrial labour practices.

Finding

The court finds that the applicant's termination was unfair because the respondent did not comply with the law in effecting the termination. They violated the applicant's right to fair labour practices.

Assessment of Remedies

The applicant is entitled to a remedy under section 63 of the Employment Act. The matter shall be set down on a date to be fixed for assessment of an appropriate remedy.

Any party aggrieved by this decision is at liberty to appeal to the High Court in accordance with the law.

Pronounced this 9th day of August 2006 at **BLANTYRE.**

Rachel Zibelu Banda
CHAIRPERSON.