

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 21 OF 2005

BETWEEN:

MKANDAWIRE..... APPLICANT

-and-

COUNCIL FOR THE UNIVERSITY OF MALAWI.....RESPONDENT

CORAM: R. Zibelu Banda (Ms); Chairperson

Applicant; present

Mwenye; Assistant Registrar (Human Resource) for the Respondent

Gowa; Official Interpreter

JUDGMENT

- 1. Dismissal-Reason for dismissal-Failure to improve-After warning*
- 2. Misconduct- Willful disobedience of University regulations and procedures*
- 3. Dismissal-Flouting teaching procedures*
- 4. Procedure- Opportunity to be heard- and defend oneself-Employer to provide opportunity*
- 5. Warning-Purpose of warning-To put employee on guard on acts of misconduct or incapacity-Employee to improve*
- 6. Interference with employer's decision-Where there is evidence of unfairness*

Facts

The applicant Urban Mkandawire was employed on 1 December 1998 as a Lecturer at Chancellor College. He was still on probation when his services were terminated on 2 December 1999 for insubordination and matters relating to teaching methods. In brief, the applicant was invited to a meeting following complaints by some students he was teaching. He refused to attend this meeting purportedly because his demands that certain material evidence to be produced before the meeting were not met. Following this refusal to meet the students and Head of Department, he was invited to a disciplinary hearing to answer charges of insubordination and ill treating students. After the hearing the applicant was found guilty of insubordination for refusing to attend a meeting summoned by the Head of Department. Following the guilty verdict he was warned to improve for the better. Further he was put under observation and his probation was extended until such time as he would show change for the better.

However the Head of Department did not observe any change in attitude of the applicant. For instance he recorded that the applicant failed to compose a lecture, he failed to interact with other members of staff and that he mistimed assignments. The Head of Department compiled a report which was submitted to the Principal.

The Principal submitted the report to the Vice Chancellor who had a meeting with the applicant on 2 December 1999. According to an exhibit dated 2 December 1999 written in ink on letter of 30 November 1999 from the Principal to the Vice Chancellor, the Vice Chancellor discussed the complaints raised by Head of Department with the applicant. After hearing the applicant, the Vice Chancellor approved a recommendation to dismiss the applicant's services. The recommendation considered the warning that had earlier been served on the applicant.

The letter of termination referred to the meeting between the applicant and the Vice Chancellor and it also referred to the warning issued earlier. The applicant was paid one month salary in lieu of notice.

Issue

Whether the applicant's termination was unfair. A termination is unfair if the employee is not given valid reasons for the dismissal and an opportunity to defend himself. The question is therefore whether or not before the termination of the applicant's services, he knew the reasons for the termination and whether before he was dismissed he was afforded an opportunity to be heard?

The Law

The cause of action arose before the Employment Act 2000 therefore this court will have resort to the Constitution which in section 31 provides for the right to fair labour practices. Section 43 provides that before any adverse administrative action is taken against an employee, he first must know the reasons for taking that action so that he can defend himself.

Reason

Fair labour practices entail that a person will not have his services terminated without a valid reason and without a fair hearing to defend himself. The burden of proving reason for dismissal is on the employer, see, *Earl V Slater & Wheeler* [1973]1WLR 51.

The Reason

The applicant was accused of insubordination and failure to conform to standard teaching methods. This was not clear in the letter of termination but it is discerned from reference to the warning letter and the subsequent events that led to the termination. The applicant was asked to appear before a meeting to resolve some students' concerns. His refusal to attend the meeting was construed as an act of insubordination. The court notes that the instruction was reasonable and made in good faith. It had come from a superior officer. The court finds that the applicant had no respect for authority and the reason was valid especially considering that such conduct was displayed in a learning institution where

moral standards of both the learner and the teacher have to be exemplary. The court upholds the reason of insubordination. This court has held in several cases that insubordination is ground for dismissal, see for example: **Mendulo V Malawi Revenue Authority** [Matter No. IRC 161/ 2003 (unreported)].

The second reason related to applicant's teaching methods. It is noted that the applicant was advised about students concerns in his teaching methods. Although he did not ill treat the students the applicant was advised to change in his teaching methods to conform to the practice and procedure at the department. The letter of warning referred to counseling in class conduct. However, the applicant failed to conform to expected standards. The court finds that this was a valid reason for dismissal and it is upheld.

Willful disobedience of rules, regulations and set standards in any enterprise is serious misconduct warranting summary dismissal; see *Mussa V Securicor (Mw) Ltd* [Matter No. IRC 2/2000 (unreported)] and *Mendulo V Malawi Revenue Authority* [Matter No. IRC 161/ 2003 (unreported)].

Flouting reasonable practice and procedures has been held in this court to constitute valid ground for dismissal, see *Nzangaya V Unitrans Malawi Ltd* [Matter Number IRC 32 of 2003 (unreported)].

The Court finds that the respondent had valid reasons for which they could institute disciplinary proceedings against the applicant. However before any adverse action against an employee is taken, that employee must first be afforded an opportunity to explain his side and defend himself; see *Chawani V Attorney General* [MSCA Civil Appeal No.18 of 2000(unreported)].

Procedure

The court heard from evidence submitted on behalf of the respondent that the applicant was invited to a meeting with the Vice Chancellor when it transpired that he did not heed to the warning to improve. This meeting gave the applicant an opportunity to explain his conduct. Prior to this meeting the applicant had appeared before a disciplinary hearing constituted to hear allegations of insubordination and ill-treatment of students.

In the case of *Fairmount Investments Limited vs. Secretary of State* (1976) 2All ER 865, it was stated that if a party is adversely affected by any evidence and is given the right to comment on that evidence, the principle of right to be heard is complied with.

In the case of *Benjamin Khoswe vs. National Bank of Malawi* [Civil Cause Number 718/2002 (unreported)] it was stated that 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. A fair hearing becomes the employer's justification for termination of employment where there is a disagreement of facts. The duty to apply principles of natural justice does arise beyond the broader principle that where one is to affect another's rights adversely for a reason, the other reasonably expects to be satisfied of the reason. The hearing must be fair and not predetermined. In the hearing the allegations

must be outlined to the applicant and he must be asked to answer to the allegations separately.

In this matter, the applicant was invited to a hearing where the allegations were outlined to him. He was warned to improve. He was given a period within which to change through extending his probationary period. However before this period of observation expired, he showed no interest to improve for the better. He was simply a man who was bent on doing his own thing and had no or very little regard to authority. No reasonable employer would be expected to continue such a relationship.

Previous Warnings

The applicant was issued with a written warning on 8 November 1999 for insubordination. Among other things arrangements were made that he should be counseled on class conduct. By 30 November the applicant had not shown any improvement. On 2 December he appeared before the Vice Chancellor on his failure to improve for the better. He was dismissed on that day after the meeting.

Warnings are an essential part of administrative disciplinary measure. It has been held that: An employer is allowed to consider previous written or verbal warnings when deciding whether to dismiss an employee. See the case of **Prindella V Limbe Leaf Tobacco Company Ltd** [Matter No. IRC 49 of 2002(unreported)], see also **Kamanga V Machinery Spares & Trading (MST) Ltd** [Matter Number IRC 51/2003 (unreported)]. It has also been held that it does not matter whether the warning was issued for the same act that constituted the reason for termination or not.

Interference with Employer's Decision

It has been held in this Court that decisions of employers should not be tampered with if there is no allegation that the process to arrive at the decision was not fair. See the case of **Kachingwe & others V Southern Bottlers Mw Ltd** [Matter No.162 of 2003(unreported)]. In that case the Court quoted with approval a holding of the Labour Appeal Court of South Africa in the case of **County Fair Foods (Pty) Ltd V CCMA & others** [1999]11BLLR 1117 (LAC), per Kroon JA:

“[interference] with the employer's sanction “ is only justified in the case ofunfairness.” However, the decision of the arbitrator as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all evidential material before the arbitrator.”

It was heard in the instant case that the applicant was invited to appear before the Vice Chancellor to answer to his failure to improve following a warning. The hearing was fair as far as the right to be heard in administrative setting is concerned. What was important was that at the time of the hearing the applicant was free to state his case and put in his defence. The decision to dismiss and the dismissal itself came after the hearing. The applicant was still on probation. All factors taken into consideration, this court finds no compelling reason to interfere with the sanction imposed by the respondent.

Finding

The Court finds that the respondent complied with the law. The dismissal was fair according to the Constitution and good industrial practice. The action is dismissed in its entirety.

Any party aggrieved by this decision is at liberty to appeal to the High Court within 30 days of this judgment.

Pronounced this 18th day of January 2007 at **BLANTYRE**.

Rachel Zibelu Banda
CHAIRPERSON.