IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause number 3719 of 1998

Between

MACPHERSON NELSON MAGOLA Plaintiff

And

PRESS CORPORATION LIMITED Defendant

CORAM: D F MWAUNGULU (JUDGE)

Kasambala, Legal Practitioner, for the plaintiff

Chirwa, Legal Practitioner, for the defendant

Katunga, the official court interpreter

Mwaungulu, J.

JUDGEMENT

The employee, Mr. Magola, sues for compensation after the employer, Press Corporation Limited, terminated his employment on 13th May 1996. There is not much to the case. The plaintiff's employment's termination occurs during change from the Malawi Congress Party to the United Democratic Front and Alliance for Democracy alliance governments and because of the Press Trust Reconstruction Act. The plaintiff's employment oscillated between passing the Act and judicial battles in the High Court of Malawi and the Supreme Court of Appeal. The action arose after the 1994 Constitution and before the Labour Relations Act and the Employments Act. The Employment Act, of course, eased difficulties at common law employment law. The Act, despite many useful and reasonable changes, cannot apply retrospectively. The plaintiff, therefore, relies on constitutional human rights provisions, specifically, the right to fair labour practice under

section 31, and international agreements binding on the Republic. The plaintiff contends, and the defendant objects, that the termination was unlawful and unfair.

The plaintiff joined the corporation on 14th November 1994. In May 1995 the corporation introduced for senior staff a Contract of Service Option effective 1st October, 1995 where interested employees would enter into thirty months contracts under very improved conditions indeed. The corporation on 30th May 1995 wrote Mr. Magola and other senior staff introducing the option and asking those interested. Mr Magola on 2nd June 1995 expressed interest. He on 8the September 1995 signed the new employment contract.

Before 13th May 1996 Parliament passed the Press Trust Reconstruction Act affecting the trust holding Press Corporation Limited's share. Government changed trustees. Government, acting under the new Act removed Mr. John Tembo, the chairman of the trust, a close friend of the plaintiff. The plaintiff, according to the evidence, joined the corporation probably at Mr. Tembos' aegis. On 30th May 1996, the Corporation terminated the plaintiff's employment. This Court declared the Press Trust Reconstruction Act unconstitutional. Consequently the board of trustees with Mr. Tembo as Chairmanship continued. The corporation on 30th December 1996 re-instated Mr. Magola. The Supreme Court of Appeal reversed this Court's decision. The corporation on 12th February, 1997 once again terminated Mr. Magola's employment.

Mr. Magola accuses Press Corporation of terminating the employment unfairly and wrongly in contravention of the Constitution and rights under international agreements to which Malawi is a party. Mainly, Mr. Magola thinks, correctly on the testimony, that he was discriminated for political reasons because of association with Mr. Tembo. Discrimination for the reason suggested violates human rights under our Constitution and is an unfair labour practice under our Constitution. It is unnecessary to discuss the law on these matters. This was done in Nkhwazi v Commercial Bank of Malawi, Civ.Cas. No 233 of 199, unreported; and Kalinda v Limbe leaf Tobacco Ltd. Civ.Cas. No 542 of 1995. In fact the defendant only seriously contests the damages the plaintiff claims. The defendant contends the plaintiff can only claim damages as worked out at common law.

The defendant's contention cannot be right because of what this Court decided in Nkhwazi v Commercial Bank of Malawi and Kalinda v Limbe leaf Tobacco Ltd. In these cases this court thought section 31 of the Constitution creates a right to fair labour practice and in relation to termination, therefore, the section requires termination according to fair labour practice. The right works against termination discordant with fair labour practice. Such termination will be unfair under the section. Before the Employment Act, therefore, the Constitution envisaged unfair dismissal, so to speak, where the dismissal was dissonant with fair labour practice. For violation of section 31 of

the Constitution, sections 41 and 46 require adequate compensation to which, as demonstrated in Nkhwazi v Commercial Bank of Malawi and Kalinda v Limbe leaf Tobacco Ltd. common law decisions on damages for wrongful dismissal are irrelevant.

Both decisions followed the National Industrial Relations Court decision in Norton Tool Co Ltd v Tewson [1973] 1 All ER 183, followed in Morrish v Henlys (Folkestone) [1973] 2 All ER 137. The President, Sir John Donaldson, said in Norton Tool Co Ltd v Tewson at 186, about damages for unfair dismissal under the English Employment Acts (much like our Employment Act):

"Counsel for the appellants has submitted that it is well-established that at common law in any claim for wrongful dismissal, no account can be taken of injury to the plaintiff's feelings by the manner of the dismissal or, with the possible exception of the case of an actor, of the effect of the dismissal on prospects of future employment: see Addis v Gramophone Co. Ltd. The measure of damage in such a case is what the plaintiff would have earned during the period of notice, less anything which he in fact earned or, in accordance with the duty to mitigate his loss, he could have earned in that period….In our judgment, the common law rules and authorities on wrongful dismissal are irrelevant. That cause of action is quite unaffected by the 1971 Act which has created an entirely new cause of action, namely the 'unfair industrial practice of unfair dismissal. The measure of compensation for that statutory wrong is itself the creature of stature and is to be found in the 1971 act and nowhere else. But we do not consider that Parliament intended the court or tribunal to dispense compensation arbitrary. On the other hand, 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."

In my judgment, section 31 of the Constitution created a right not hitherto acknowledged by the common law. A termination otherwise lawful, in the sense that it is not wrongful at common law, could be an unfair labour practice under the Constitution. This concept occurs under the Employment Act. The Constitution talks about compensation, a similar concept under the English and Malawian Employment Acts, and damages at common law are inapplicable. The compensation is, as the President states, in the discretion of the Court.

The principles of compensation are the same under the Constitution, the English Employment Act and the Malawi Employment Act. The President states the principles:

"The court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances and there is neither justice nor equity in a failure to act in accordance with principle....First, the object is to compensate, and compensate fully, but not to award a bonus, save possibly in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or a

tribunal. Second, the amount to be awarded is that which is just and equitable in all the circumstances having regard to the loss sustained by the complainant."

The President then suggests the possible heads of damages for the employee unfairly dismissed: (a) her immediate loss of wages; (b) the manner of her dismissal; (c) her future loss of wages; and loss of protection in respect of his unfair dismissal or dismissal by reason of redundancy. Sir Donaldson thought these heads, based on the principles in the Employment Act, adequately compensate losses of an employee unfairly dismissed. The approach, in my judgment, is the appropriate one under our Employment Act which is in pari material with the English Act. These heads, in my judgment, are based on logic, fairness and reasonableness concerning the employee's losses and assist the Court attain the right compensation where, under the Constitution, the employer dismisses the employee contrary to fair labour practice.

In relation to the first head, unfair dismissal entails loss of wages. Sections 29 and 30 of our Employment Act provides for the loss of wages where the termination is unfair under this loss. The sums provided are minima. The calculation for loss is based on the employee's net pay, namely, after tax. It is not restricted to the week pay under the Employment Act: See Davies v Anglo Great Lakes Corporation Ltd [1973] 1RLR 133. Where not paid in lieu of notice, the employee is entitled to an award for this loss.

For purposes of this case, because of the length of the contract that still remains, it might be necessary to consider four persuasive decisions from English Court. In Norton Tool Co Ltd v Tewson, Sir Donaldson thought that as good industrial practice the employee should be awarded the notice pay even if she suffered no loss. The reasoning was that the employee is entitled to this notice by law. In Tradewinds Airways Ltd v Fletcher [1981] IRLR 272 the court thought, where the employee suffered no loss, the rules about mitigation applied. Consequently, the employee should mitigate the damage. Two subsequent decisions did not follow Tradewinds Airways Ltd v Fletcher but followed Norton Tool Co Ltd v Tewson: TBA Industrial Products Ltd v Locke [1984] 1RLR 48, [1984] ICR 228, EAT; and Babcock FATA plc v Addison [1987] 1RLR 173. Ralph Gibson, L.J laid the new approach:

"For my part I would uphold the principle established by the NIRC in Norton's case and followed since in the Employment Appeals Tribunal but, in my judgment, it is necessary to clarify the extent to which it states a rule of law. Mr. Pannick invited the court to reject the Norton principle if and so far as it could be held to apply so as to entitle Mr. Addison to recover any sum for wages in lieu of notice in addition to loss of earnings caused by the dismissal. I will come later in this judgment to the application of the principle to the facts of this case.

I would uphold the principle firstly because it is not shown to have worked

unfairly or in a manner contrary to the intention of Parliament in the limited form in which it was stated and applied in the cases cited. The first step in the reasoning of the court in Norton's case is that when a payment is made of wages in lieu of notice at the time of the dismissal of the employee, the employee would not have to make any repayment upon obtaining further employment during the notice period. That is in accordance with the normal intention of both sides when such a payment is made without stipulation of any special terms. The next step in the reasoning is, in my respectful opinion, of a different nature: because good industrial practice requires that the employer either give the notice of pay six weeks wages in lieu the employee, who is given neither notice nor payment, should not be worse off and therefore he also should not have to give credit for wages earned from another employer during the period of notice notwithstanding the direction that the rule as to the duty to mitigate shall be applied. I do not doubt that the industrial practice referred to was a good practice and right to be applied in a case such as Nation Tool and such a case must be typical of a very large proportion of the cases coming before industrial tribunals. In such a case the employer, if he was acting fairly, would pay the sum due in lieu of notice. It is usually convenient for the employer if the dismissed employee leaves the premises and if the wages for the whole period are paid in advance; and it is convenient for the employee to be released to look for other work; and the immediate receipt of wages for the period of notice, coupled with the chance of getting other employment during that period, may soften a little the blow of losing employment. In Norton Tool the period of notice was six weeks. In J Stepek Ltd v Hough cited above, where payment in lieu of wages was not made in full, the period was eight weeks. Not surprisingly there was no attempt in these cases to show that the circumstances in which full payment was not made justified or explained departure from the normal good industrial practice. It seems to me, however, that circumstances may arise in which, having regard the length of notice required, and the known likelihood of the employee getting new employment within a short period of time or for other sufficient reason, an employer may show that a payment less than the wages due over the full period of notice did not offend good industrial practice. The employer might tender two months pay in respect of a six month period of notice and ask to be informed if the expected new job was for any reason not obtained. I am unable to accept that any rule of law exists which requires that in all circumstances, irrespective of the terms upon which a payment in lieu of notice was made, and of any justification for not making payment in full of wages in advance for the full period of notice, the employee is entitled in claiming a compensatory award under s74 to disregard wages earned from another employer during the notice period. The number of cases in which an industrial tribunal, to justify departure from the general practice, will probably be small. But in my view no rule of law exists to prevent the industrial tribunal form considering such a case or from giving effect to it if it is established.

Next, and before dealing with the extension of the principle which has been effected by the EAT by the decision in Finnie's case and in this case, it is necessary to consider the limits of the principle. The employee is to be treated as having suffered a loss in so far as he recovers less than he would have received in accordance with good industrial practice. As Mr. Pannick submitted in this court, it seems to me that the principle, when applicable on the basis of good industrial practice, secures to the

dismissed employee the opportunity to earn during the period of notice without giving credit for earnings from another employer against wages due during the period of notice. It does not secure to him anything in addition to the amount of wages due during the period of notice: he can only get the extra if he gets the new job and thereby earnings from another employer. If the employer has paid the wages due in lieu of notice at the time of dismissal, the employer has complied with good industrial practice. If the employee does not get employment during the period of notice, no principle of good industrial practice can secure to the employee any further payment by way of lost wages in respect of the period of notice: he has received the wages for the period and if he is to recover the same amount again it must be by reference to some rule of law outside the provisions of the 1978 Act and in my view no such rule exists.

Under this head, the court must credit any payment by the employer to the employee. The Court of Appeal in Babcock FATA plc v Addison overruled earlier decisions and the Scottish case of Finnie v Top Hat Frozen Foods [1985] IRLR 365.

On the second head the President said, the court needs to consider 'whether the manner of dismissal could give rise to any risk of financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal.' A court awarding damages for an unfair labour practice must regard prospects of such a loss. Sir Hugh Griffiths makes a useful comment on Norton Tool Co. Ltd v Tewson in Vaughan v Weighpack Ltd [1974] IRLR 105:

"Finally, the employee submitted that he should have been awarded some sum by reason of the manner of his dismissal. He had been summoned from his home to the office by telephone on a Sunday morning, when he was summarily dismissed by the Managing Director. It was no doubt a most distressing experience for him, but that of itself is not a matter for compensation. It is only if there is cogent evidence that the manner of the dismissal caused financial loss, as, for example, by making it more difficult to find future employment, that the manner of the dismissal becomes relevant to the assessment of compensation. It was submitted that in the fairly small community in which he worked and lived, news would have traveled on the grapevine and some disgrace would attach to being called in and dismissed on a Sunday, which would make it more difficult to find future employment. This is pure speculation without a scintilla of evidence to support it and provides no grounds for increasing the assessment of his compensation. The court believes that it will only be on the very rarest of occasions that it will be found that the evidence justifies an award under this head. One would hope in any event that the decision of a tribunal vindicating the employee by a finding of unfair dismissal would rectify any temporary mischief that might have occurred as a result of the dismissal whatever its manner may have been."

Thirdly, the court must consider future losses of wages. Where the employee has another

job and earns the same or more than in the previous employment, this head requires considering whether she could lose this job. Where on the evidence there is no such threat, the court will not award on this head. Where the new job is insecure, the court must forestall such prospect by an appropriate award. Where the employer earns less, subject to her earning more in future, the award must regard the prospect of such a loss. This entails a consideration of the labour market, the employee's age and qualification, and the list is not exhaustive. These are the same sort of considerations where the defendant has not found a job. Where the employee receives less in the new employment or is not employed, the award must, after allowing for tax, regard that the money is paid well before it is earned. The onus is on the employee to prove the probable future loss and its scale: Adda International Ltd v Curcio [1976] 3 All ER 620. In assessing the prospect of a job loss the court can rely on its own knowledge of employment in the locality: Coleman v Toleman's Delivery Service Ltd [1973] ICR 67. Moreover the loss could be limited to the time of retirement or time when the employee cannot earn any more: Barrel Plating and Phosphating Co Ltd v Danks [1976] 3 All ER 652.

On the fourth aspect, section 35 of the Employment Act provides for a redundancy or severance pay. If an employer terminates employment unfairly, she affects the employee's right to payment under the section in three ways. First, immediately, the employee loses the right to the amount which the court must compensate for. Secondly, even if the employer pays for the immediate loss, the employee has to work for another prescribed period before she is entitled to another severance pay. Thirdly, her right to qualify for a higher pay on account of long employment is lost. She loses her right to protection against unfair dismissal.

In England the sum payable under this head has been very small. This is because of the scope of the loss. In Daley v A E Dorsett (Almar Dolls Ltd) [1981] IRLR 385 the Court said "this is not a claim of lost earnings over a period . . . it is a claim for compensation for the loss of an intangible benefit, namely, that of being entitled, in the course of one's employment, to a longer notice than might otherwise be the case." In Norton Tool Co Ltd v Tewson the award was 20 sterling and later hovered around 30 sterling. In Daley v A E Dorsett (Almar Dolls Ltd) the court awarded half the employee's statutory notice. SH Muffet Ltd v Head [1986] IRLR 488 extended the limit to 100 sterling and held that the half the statutory notice suggested in Daley v A E Dorsett (Almar Dolls Ltd) should be used rarely. In Malawi, with fluctuation in the value of money Daley v A E Dorsett (Almar Dolls Ltd) approach appeals to this Court.

These heads and others not covered for purposes of this matter are ones applied in England under the Employment Acts where compensation is the policy of the statute. These considerations are ones to be applied under our Employment Act which, as seen, is pari materia the English statute. This action however arose before our Employment Act which, like the English Act, introduced unfair dismissal. This Court, however, takes the view that the right under section 31 of the Constitution to fair labour practice presupposes fairness in dismissal and termination of employment. Consequently, a termination lawful

at common law could be unfair under the Constitution. Both under the English and Malawian Employment Acts on the one hand and the Constitution on the other the policy is compensation for financial loss for a dismissal which has turned out to be unfair. The heads of damages English decisions manifest reflect considerations that ensure adequate and equitable compensation for unfair dismissal under the Act or the Constitution. They reflect fair industrial and labour practice.

In this matter, as I understand it, the option the corporation introduced for senior officers, never meant termination of the contract at the end of the contract period. The contract was renewable at the end of the term. It seems to me that the contract was renewable as a matter of course. In this respect, the plaintiff's contract of employment persisted. I do not think that the change of trustees should affect legal arrangements between employees and the corporation. I do not even want, when considering compensation, to think that the plaintiff's employment would have ended with the change of trustees politically appointed. That would subject the employee to discrimination on political grounds, something clearly proscribed under the Constitution and the Employment Act. On the other hand credit will be given for sums the employer paid the employee.

This approach is new. The onus, as seen, is on the plaintiff to prove the losses and their extent. The plaintiff, in my judgment, proved the losses. In Norton Tool Co. Ltd v Tewson the President of the court emphasized the importance of a court awarding compensation to give reasons and detail on awards under the various heads of damage. Commenting on this practice Philips J. in Blackwell v GEC Elliot Process Automation Ltd [1976] IRLR 144:

"That practice applied equally in the Employment Appeal Tribunal and is current in all industrial tribunals now, and it is absolutely essential that industrial tribunals, when determining the amount of compensation, should explain and act out, in the matter prescribed in that case, the details of the individual heads under which compensation it awarded and, briefly at all events, the manner and reasoning by which they have arrived at those figures. It is necessary to do that for a number of reasons. First of all, if it is not done, the parties cannot see whether the amounts awarded are correct. Secondly, if they wish to consider and appeal, they cannot decide whether it is an appropriate case in which to appeal. Thirdly, the appeal tribunal, if it is not done, cannot see whether the order appealed from was right. And there is perhaps a more important point than any of those that, fourthly, the very discipline of having to set down in orderly manner the heads under which the compensation is awarded and the brief reasons for it, ensures that the tribunal does not make a mistake, does not omit anything and arrives at a reasonable figure."

The assessment of the award bases on the employee's loss which includes salary (including overtime payments) and other benefits which the employee might reasonably be expected to receive: the use of the company car free or cheap accommodation, tips,

mortgage allowances, school fee allowances, medical insurance as these cases show: Noha v Granitstone (Galloway) Ltd, [1974] ICR 173; Crampton v Dacorum Motors Ltd, [1975] IRL 168; De Cruz v Airways Acro Association Ltd, (6066/72, IT); Bradshaw v Rugby Portland Cement Ltd, [1972] IRLR 46; Hedger v Davy & Co. Ltd, [1974] IRLR 138; Butler v J Wendon & Son, [1972] IRLR 15; and Lee v IPC Business Press Ltd [1984] ICR 306.

The detail and care needed in each case was not appreciated by counsel. To do justice to the parties, I adjourn to Monday 24thto my chambers for assessment of damages.

Made in open court this 21st Day of November 2003.

D F Mwaungulu

JUDGE