

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CIVIL APPEAL NO. 67 OF 2008

BETWEEN

FRACKSON CHITHEKA APPELLANT

AND

**THE ATTORNEY GENERAL RESPONDENT
(MINISTRY OF FINANCE)**

CORAM : **HON. JUSTICE MZIKAMANDA**
: Unrepresented, Counsel for the Applicants
: Kachale, Counsel for the Respondent
: Mrs. I. Namagonya, Court Reporter
: Mr.Njirayafa, Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is an appeal against an order of assessment of compensation by the Industrial Relations Court made on 19th August, 2008 following a default judgment of 2nd February, 2004.

The background to the matter is that at all material times the applicant was an employee of the Malawi Government in the Ministry of Finance. He and others were dismissed. The lower court first ordered reinstatement but the Ministry of Finance did not comply. Then the lower court invoked Section 63 (1) (c) of the Employment Act to award a just and equitable compensation.

The lower court noted that the main heads of compensation for unfair dismissal are immediate loss and future loss. Immediate loss is calculated from date of dismissal to date of judgment or the date when the applicant secures another job whichever comes earlier. Future loss is calculated from the date of judgment to date of mandatory retirement or when applicant gets another job whichever comes earlier.

The applicant was dismissed in 1999, got another job in 2000 and lost it again in 2002 due to company closure. He did not look for another job. He went to his village to do farming. The court used 12 as appropriate multiplier in calculating the applicant's compensation at a salary of K2,700.00 per month, inclusive of other benefits. This came to K32,410.00. In accordance with Section 63 (6) of the Employment Act the applicant was further entitled to a special award of 12 weeks wages which came up to K8,100.00 The applicants severance allowance under Section 35 of the Employment Act for 9 years worked amounted to K12,150.00. The total award was K52,650.00 which should have been paid in 1999. On account of devaluation and high cost of living the lower court gave the K52,650.00 a 100% boost. This translated into a total award of K105,300.00.

The Appellant challenges this award on seven grounds, all of which relate to erring by the court in its calculation of compensation and in boosting it by 100% only. According to the Appellant the formula used should have been that used for Civil Servants and not the one the court used. In this court the Appellant seeks further damages for defamation, unlawful imprisonment for 42 days and 42 nights, for having acquired TB dysentery and Malaria. In incarceration, legal costs and transportation costs.

Counsel for the State argued that this appeal is not fit to come to this court on appeal as it raises factual issues and not legal issues as required by Section 65 (2) of the Labour Relations Act. As regards compensation for costs incurred in prosecuting in Industrial Relations Court and defending him through a Criminal trial, these were not raised before the Industrial Relations Court.

Now compensation as a remedy for unfair dismissal is provided for in Section 63 (1) (c) of the Employment Act. Such compensation must be that which the court considers just and equitable considering all the circumstances of the case. As has been stated on a number of occasions compensation is at the discretion of the court to make good the loss suffered as a result of defendant's breach of contract of employment. It is intended to ensure that as far as money can do, the Plaintiff should be placed in the same position as if the contract had been duly performed. It is made in reference to the employee's net monthly pay and loss of fringe benefits. As was stated by Twea, J. in *DHL International Ltd v Nkhata Civil Appeal No. 50 of 2004* in exercising its discretion in assessing compensation the court must give reasons. The award must be such as by law would be allowed.

As will be seen the issue of compensation for unfair dismissal is a matter governed by the law with the discretion of the court built in. Although the grounds of appeal raise factual matters, it is clear to me that they attach the legal basis for the award and therefore fall within the purview of Section 65 (2) of the Labour Relations Act. This appeal therefore is competent.

In assessing compensation for unfair dismissal the court takes into account a number of factors. These include the applicant's effort to mitigate his loss, employee's age, physical fitness, qualification and the prevailing labour market. These factors inform the court in determining the multiplier, and the formula for calculating is set by the law. In matters that came to the Industrial Relations Court it is the general formula that will apply unless some special formula is pleaded and proved. The Appellant would like to have a formula for the Civil Service apply. Such formula was never brought to the attention of the court for the court to consider it. In this case the lower court was right in using the formula it did. The court was also right to use the salary at the time of dismissal. As regards the multiplier of 12 I do not see how it could be faulted. Moreover no alternative has been suggested. The calculation of the compensation in my view was clear and systematic. I am unable to fault the process.

As regards the boost by 100% pension that was entirely in the discretion of the lower court considering the devaluation and rate of living at the time. I confirm that 100% boost.

I think that in this appeal the Appellant brought in matters that are not within the Industrial Relations Court. He cannot seek compensation for defamation and unlawful detention in the Industrial Relations Court which is there to give compensation for unfair dismissal. Those claims relate to a criminal prosecution which had nothing to do with the proceedings before the Industrial Relations Court. If the Appellant is minded of pursuing claim for defamation and unlawful imprisonment then he should commence fresh proceedings in the regular courts and not the Industrial Relations Court which is a specialized court.

The result is that in this court this appeal has not been made out. It is dismissed.

Each party will bear its own costs.

PRONOUNCED in Open Court this 22nd day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E