

The background of this matter is that the Appellant was at all material times an employee of the Respondent since 1983 and he was employed as a general worker, working both day and night shifts. In May, 2003 his employment was terminated. He felt that the termination was unlawful and unfair. He commenced an action in the Industrial Relations Court claiming for re-instatement and/or damages for unlawful termination in March, 2004. After long and protracted hearings which at one point were the subject of Judicial Review before Honourable Justice Potani, the Industrial Relations Court delivered its judgment on 27th May, 2008, declaring the dismissal of the Appellant unfair. Appropriate compensation and other claims were to be assessed later. The order of assessment was made on 10th November, 2008 at K136,632.20.

In this appeal there are three grounds, namely:

1. That the Learned Registrar erred in calculating compensation by using only 12 as a multiplier.
2. That the Learned Registrar erred in not considering that the Appellant's circumstances necessitated a higher multiplier than 12.
3. That the award of K124,290.24 was not sufficient compensation for the Appellant.

The Appellant thus seeks an order increasing the amount of compensation by using a higher figure as multiplier than 12 and costs of the appeal. The Respondents however pray that the order made by the lower court be confirmed by this court. I have had the benefit of reading the skeleton arguments relied upon by both counsel as well as arguments raised before me. I have also had a look at the elaborate assessment order by the Industrial Relations Court. Let me state at once that assessment of compensation is an exercise that is done within the discretion of the court. There are guiding legal principles which apply in the exercise of discretion. Once those principles have not been departed from, the exercise of discretion may not be faulted. Twea, J. put it rightly when he said in DHL International Ltd v Nkhata Civil Appeal No. 50 of 2004 that:

“Whenever the court is exercising its discretion in this respect it must give reasons. The decision of the court should not be arbitrary at all. It is not open to the court to award any sum as it wants. The court must award such sums as by law would be allowed.”

As was properly observed by the court below, Section 63 (4) of the Employment Act requires that an award for compensation be just and equitable consideration being had to the loss sustained by the employee as a result of the dismissal and the extent to which the employee himself contributed to his dismissal. I agree that the statutory requirement of a just and equitable compensation imports a duty on the part of the dismissed employee to mitigate his loss. There are factors to be taken into consideration in assessing a just and equitable compensation. These include the employee’s age, physical fitness, qualifications, the labour

market and the applicant's own efforts to mitigate the loss. It is also correct to say that a contract of employment should never be regarded as for life or indeed until retirement for there are other legitimate intervening situations that may interrupt employment. Assessment of compensation need also bear this in mind. The lower court having noted that the applicant had been on permanent employment for 17 years and was 37 years at dismissal would have had about 18 more years of productive services on the basis of average retirement age of 55 years said the following:

"Accordingly having considered all the relevant factors of this case we would use 12 as a multiplier in calculating his compensation. His salary was K9,631.52 in addition to this he was entitled to K720 house allowance. Thus his monthly take home was K10,357.52 which when multiplied by 12 translate to K124,290.24 which we award as his compensation."

In challenging the use of 12 as the multiplier for calculating compensation, counsel for the Appellant argued that 18 years of the remaining years before age of retirement of 55 translate to 216 months out of which the lower court only took 12 months. Counsel argues that this court should re-consider the number of months and use a higher number. Counsel did not say how high. Neither did he say why the figure should be high except to suggest that 12 months out of 216 months is too small.

The record suggest that at the time the Applicant was dismissed he had attained a qualification of a tractor driver. Although the Applicant produced no record of his written applications to DWASCO and Mulanje Estate looking for a similar job, the lower court and the Respondent seems to have accepted that there was such effort of search for a similar job to mitigate his loss. The court said:

“Moreover as rightly noted by the Respondents in their submission he has restricted his search for a job to tractor driver when it is evidence that he started as a labourer at Limbe Leaf.”

I think that when we talk of taking into account the job market we refer to a job of comparable character to the one from which the Applicant is dismissed. I do not think that a person who started off at the lower end of the ladder and rose through the ranks should be expected to find another job similar to the one at the lower end of the ladder. I am of the view that in considering the job market as a factor, the lower court should have considered availability of the job of tractor driver being the qualification of the Applicant at the time of dismissal. Had the lower court done so it would have come up with a different multiplier. Such multiplier though would not have been within the range of 3 months more. This is a limited increase of the multiplier based on the fact that it is shown that a little more time of vigilant search for another job would probably have yielded positive results for the Applicant. I therefore set aside the 12 months multiplier and instead use a multiplier of 15. This translates to (K10,357.52 x 15) as the compensation to be paid.

In this matter each party will bear its own costs.

The appeal succeeds to this limited extent.

PRONOUNCED in Open Court this 9th day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E