IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause No. 832 of 2010

BETWEEN

DARLINGTON NGOLA.....PLAINTIFF

AND

MOTA ENGIL LIMITED.....DEFENDANT

Coram: **Manda, J**

Kaphale for the Plaintiff

William Faulkner for the Defendants (Absent)

Mrs. Chilimampunga Court Clerk/interpreter

JUDGEMENT

The plaintiff's claim in this instance was for damages for pain and suffering, loss of amenities of life, loss of earnings and earning capacity, unfair dismissal and costs of the action.

The brief facts of this case are that the plaintiff was employed by the defendant as a welder. It is stated that on or about the 1st of November 2009, the plaintiff was a passenger in one of the vehicles operated by the defendant company registration number KK 3808 driven by a Mr. Katsabola. It was alleged by the plaintiff that Mr. Katsabola so negligently drove this vehicle such that it fell into a ditch just after crossing the Phalombe Bridge which is along the Chiradzulu/Chringa Road. By reason of the accident, the plaintiff sustained factures on the 4th and 5th ribs on his left side and was hospitalised for 14 days. It was further stated that after the plaintiff had resumed work he was on the 4th of December declared redundant and that this was done without

prior notice being given to him or him being consulted on the same. According to the plaintiff he believes that he was laid off due to his injuries and eventual incapacitation since he was retrenched when he was 52 years old and the retirement age was 60.

The plaintiff further averred that since his retrenchment he has not been able to find any other job as a wielder. However when the court enquired as to whether he cannot perform his duties as a wielder, the plaintiff's response was that he could perform all the other duties of a wielder except lift the 14 pound hammer (which is about 6 kilograms). I must point out in this regard that I was inclined to ask such a question because this action was not defended. Further, according to the medical report which the plaintiff tendered and which was marked ExP1, it does state that the plaintiff did not suffer any permanent incapacitation and that he would be able to continue with his previous occupation as well as house hold work. The only thing that the medical report states that the plaintiff cannot do, as he would have done before the accident, is manual work. In this regard the medical report only states that the plaintiff would be able to do manual work "with decreased capacity due to pain". This to me should be interpreted to mean that the plaintiff can actually do manual work but that perhaps it would take him some time to complete due to the pain he **may** experience. I do stress on the word may because again according to the medical report, it does state that the plaintiff prognosis is a good one and that any further medical care will "depend on the perception of pain". This in my view means that the plaintiff would make a full recovery and also that any pain he may feel would be treated as and when it happens but that he is not in constant pain. In conclusion the medical report does state that the injuries that the plaintiff suffered were not serious.

I should also point out that one of the issues the plaintiff does raise is one of him being declared redundant. In this regard the plaintiff only adduced in evidence a redundancy notice. In this regard, even though they did not argue their case, the defendants did file a defence in which they averred that the plaintiff and

others were actually consulted about the retrenchment before being made redundant. It was also the defendant's assertion that this retrenchment was normal and that it would normally happen during the rainy season. In view of this the defendants denied that there was unfair dismissal since according to them there is normally a reduction of work during the rainy season.

From the defence, it was my view that what effectively the defendants were alleging was that the plaintiff was more or less a seasonal worker and hence not on permanent employment. In this regard then I thought that the plaintiff would have actually demonstrated that contrary to the defendant's assertions he was on a permanent contract and thus guaranteed permanent employment as opposed to seasonal employment which I believe are different contracts with equally different procedures in as far as redundancy is concerned. Indeed the question that would arise in this regard would be whether a seasonal worker is supposed to be guaranteed employment each and every season? And specifically for the plaintiff, the question I would ask is whether after the rainy season had passed he did try to go back to the defendant's to ask for employment. All this was not demonstrated and I must state that I did have problems in as far as appreciating the plaintiff's argument that he was unfairly dismissed when he was made redundant.

In this regard I must make reference to following observations which have been made by the Employment Tribunal in England and Wales as well as other courts, when it comes to redundancy dismissals:

(a)**The Earl of Bradford v Jowett** [1978] IRLR 16 as an early example of recognition of the need for Tribunals to avoid substituting their own judgment for that of the employer over who should be selected for redundancy and that they needed to remember that the question for them was whether, bearing in mind the statutory language, the employer acted reasonably in dismissing the employee for redundancy;

(b) **Williams and others v Compair Maxam Ltd** [1982] 83 for the well known guidelines regarding redundancy dismissals (the fourth of which, that concerns the need for employers to seek to ensure that selections for redundancy are made fairly in accordance with the

relevant criteria which was relevant in the present case) and the observation that Tribunals should direct themselves that it is not their function to decide whether they would have thought it fairer to act in some other way since the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted;

(c) **Eaton Ltd v King** [1995] IRLR 75 for the comments made by this Tribunal to the effect that the test, when considering redundancy dismissals, is whether there has been an honest and reasonable process of assessment by the employer and it is not a question of how the Tribunal would themselves have marked the assessment;

(d) **British Aerospace plc v Green and others** [1995] IRLR 433 for the observations of Waite LJ and Millet LJ endorsing the approach of the Tribunal in **Eaton Ltd v King**;

(e) **John Brown Engineering Ltd v Brown and others** [1997] IRLR 90 for the Tribunal's observations that in a redundancy situation what matters is that there is a fair process and that it is not part of the Tribunal's role to examine the marking process under a microscope;

(f) **Sanmina SCI UK Ltd v McCormack and others** EATS/0066/05 for the observations to the effect that the correct approach was to consider whether the employer had acted reasonably and whether it could be said that no reasonable employer could have, in that case, adopted a particular criterion; and

(g) **Bascetta v Santander UK plc** [2010] EWCA Civ 351 for the Court of Appeal's recent restatement of the relevance of the observations made in **British Aerospace v Green**, of this Tribunal in **Eaton Ltd v King** and of it not being appropriate for an Employment Tribunal to embark on a reassessment exercise.

Accordingly, once a potentially fair reason for dismissal is established, the question of whether or not the employer acted reasonably in deciding to dismiss lies at the heart of every case where a claim for unfair dismissal is pursued including cases of dismissal on grounds of redundancy. It is not for an Employment Tribunal to ask themselves whether they would have dismissed the employee; it is not for them to seek simply to substitute their own decision for that of the employer (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439). As explained in

Iceland Frozen Foods, that is because the concept of reasonableness involves recognising that, in many cases, there will not be a single reasonable response to the circumstances that have led to the dismissal; there will be a band of reasonable responses within which one employer would reasonably take one view whereas another, equally reasonable employer, would take a different view. To put it another way, in many cases, there will be room for legitimate differences of opinion amongst reasonable employers as to what is a fair way to respond.

Against that background, various observations have been made in the authorities regarding redundancy dismissals which show that, in assessing the reasonableness of a decision to dismiss for redundancy, it will rarely be appropriate for an Employment Tribunal to embark on a detailed scrutiny of the criteria used for scoring or the application of those criteria to the particular circumstances of the claimant and others in the same pool. In **Buchanan v Tilcon Ltd** [1983] IRLR 417, a decision of the First Division in which the opinion was delivered by the Lord President (Lord Emslie) (referred to in both **Eaton Ltd v King** in 1995 and **British Aerospace plc v Green**) a clear limitation is expressed as to what was to be expected so far as scrutiny of employers acting in a redundancy situation was concerned:

> **" ...In this situation where no other complaints were made by the appellant all that the respondents had to do was to prove that their method of selection was fair in general terms and that it had been applied reasonably in the case of the appellant by the senior official responsible for taking the decision. As was pointed out by Phillips J in *Cox v Wildt Mellor Bromley Ltd [1978]*[1978] IRLR 157 it is quite sufficient for an employer in a case such as this to call witnesses of reasonable seniority to explain the circumstances in which the dismissal of an employee came about and it was not necessary to dot every "i" and to cross every "t" or to anticipate every possible complaint which might be made." (at p. 418)**

In the same vein, in **British Aerospace plc v Green**, Waite LJ, at paragraph 3, said:

> **"Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge – namely a swift, informal disposal of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."**

From the above cases and observations, I must point out that in as far as there was a claim before me which was

about unfair dismissal arising out of redundancy, then I must place myself in the same footing as an Employment Tribunal and ask myself whether it would have been reasonable for the plaintiff to be declared redundant because he was a seasonal employee and that at the time he was declared redundant there was no work for him to do. In my view I would think that if such were the circumstances then the plaintiff's dismissal would be fair unless of course he can demonstrate that there were other workers within his work category and with equal skill and competence who were maintained when he was laid off. As noted earlier the plaintiff did not demonstrate or argue this point and hence the reason why I did state earlier that I was finding problems with his argument that he was unfairly dismissed. Indeed since the medical report clearly shows that the plaintiff was going to make good recovery I would have expected that he would inform the court that he had presented the report to his employers as a demonstration of his fitness to work and that they just simply ignored it by proceeding to hire another worker of the plaintiff's skill and competence to replace him and that this was done on a permanent basis.

It must be recalled in the above regard, that under Section 57 of the Employment Act (Cap 55:01) of the Laws of Malawi, the employment of an employee can be terminated by an employer there is a valid reason for such termination connected with the capacity or conduct of the employee or **based on the operational requirements of the undertaking** [emphasis mine]. Indeed the non-availability of work for employees to do would in my view fall within the category of operational requirements, especially for seasonal workers. Nevertheless, I must address myself to the fact that the defendant's elected not to defend this matter and that judgment was entered as a result. Thus the issues of liability in this matter were settled in favour of the plaintiff including on the claim of unfair dismissal. In view of this and as a matter of procedure I must proceed to award damages. However in view of what I have outlined above with regard to redundancy and unfair dismissal, I can only really award the plaintiff nominal damages of K100.

I will now turn to the claims of damages for pain and suffering and loss of amenities of life. It must be stated that it is a normal practice that a single award is made to cover both pain and suffering and loss of amenities of life.

In this regard I must note that since this matter was undefended as such there is a requirement on this court to determine what will be reasonable damages in the circumstances (see ***Payzu Ltd v Saunders*** [1919] 2 K.B. 581). It is the view of this court that considering the prevalence of personal injury cases in Malawi and the fact that not all cases are defended, there is a need to ensure that damages are not at large. This can only be done by courts stepping in and determining what is reasonable as damages for pain and suffering. This is also in view of the fact that there is no precise measurement of pain and suffering and that the same is subjective to the plaintiff. Indeed what the court can only do when it comes to such cases is to commiserate with the plaintiff noting that monetary compensation cannot be a cure him or her.

While I do not have any issue per se with the fact that by reason of the accident, the plaintiff did experience some pain and suffering following the accident, I must take note of the fact that the plaintiff was given a "good" prognosis. At the same time I am however inclined to question the issue of loss of amenities of life. This is especially in view of the fact that the plaintiff did not demonstrate to the court that he was engaged in any special activities before the accident which he is now prevented from pursuing (see ***Heaps v Perrite Ltd*** [1937] 2 All E.R. 60). I do believe that where the plaintiff claims loss of amenities of life, it is trite that he or she should demonstrate the special activities he was involved in. In this instance the plaintiff did do so in his evidence and I do not think that it should be up to the court to determine by guessing what those special activities were. Thus with respect to the claim as pertaining to loss of amenities of life I was disinclined to consider awarding any damages. This notwithstanding I do believe that the plaintiff does deserve to be awarded damages for pain and suffering and considering that the plaintiff was admitted in hospital for 5 days and that he did suffer fractured ribs which I am sure were painful, I

would think that an ward of K400, 000 would be adequate compensation.[1]

Finally let me deal with the issue of loss of earnings and earning capacity. Again I must state that the plaintiff did not clearly state how he suffered this loss, all the plaintiff seemed to have emphasised on is the fact that he was unfairly dismissed and as already noted, he did not sufficiently prove this fact. Indeed the plaintiff did not demonstrate to the court that during the time that he was in the hospital the defendant never paid him his wages for that period. Further, it has been clearly stated in the medical report that the plaintiff can continue to perform his trade as a wielder, which fact the plaintiff also admitted in his evidence. In this regard then I do not see how the plaintiff can argue that he lost his earning capacity. In view of this, and also in view of what I have earlier stated in this judgment, I do not think that I can state that the plaintiff did establish his claim sufficiently enough for me to consider any award of damages save for nominal damages on account that the matter was undefended. In this regard then I would also award the plaintiff the nominal sum of K100.

In sum therefore the plaintiff is awarded the sum of K400, 200 as being the total amount of damages. This is also in view of the fact that there was no claim for special damages. The plaintiff is also awarded costs of the action.

Made in Open Court this.....day of.....2011

K.T. MANDA

JUDGE

[1] I do not that this award may raise some misgivings on the part of the plaintiff considering other awards that are being made in cases of personal injuries and in this regard, I would refer to my decision in the case of **Sadik Jamu v NICO** Civil Cause No. 984 of 2007 (UNREPORTED), in which I did provide an analysis as how the award of damages should be made in Malawi.