



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NUMBER 112 OF 2012
(Being IRC Matter No. 398 of 2008 at Lilongwe)

BETWEEN:

BERTHA SEFU.....APPELLANT

-AND-

MALAWI COUNCIL OF CHURCHES..... RESPONDENT

Coram: Hon Justice Dr. C.J. Kachale, Judge

Nthewa, of Counsel for the Appellant

Lameck, Counsel on brief for the Respondent

Mthuzi (Mrs.), Court Reporter

Choso (Mrs.), Court Clerk and Interpreter

JUDGMENT

Introduction

Bertha Sefu was an employee of the Malawi Council of Churches from August 1999 as Gender and Social Coordinator. On July 23rd, 2007, Mrs. Sefu was suspended with full pay, on charges of misconduct and breach of discipline pending review of the case by the Executive Board of the Malawi Council of Churches. The respondent however took a long time before attending to the Appellants suspension or disciplinary action; Mrs. Sefu eventually resigned in 2009. Thereafter she commenced proceedings in the Industrial Relations Court for unfair dismissal, claiming severance as well as notice pay; and payment of withheld salary for the duration of her suspension.

The Industrial Relations Court (IRC) upheld her claim for the withheld salary for 17 months, but dismissed her claims for unfair dismissal, severance pay and notice pay.

Summary of the grounds of appeal

Mrs. Sefu thereby lodged an appeal in this court; she asserts that the IRC erred in law by:

- i. Concluding that she failed to prove or indicate the crucial contractual term breached by the suspension;
- ii. stating that the appellant gave no evidence of unfair dismissal, specifically the issue of constructive dismissal; and
- iii. Dismissing her claims for severance allowance and notice pay.

Hence this court must answer the questions whether there was breach of a crucial contractual term; whether her resignation amounted to a constructive dismissal and indeed whether she is entitled to severance allowance and notice pay?

Summary of the applicable law

Section 56 of the Employment Act categorizes suspension as a disciplinary measure; however it is not supposed to be punitive. Suspension may also be justified in order to pave way for investigations into allegations of misconduct at the work place. Suspension can either be with or without pay depending on the terms stipulated in the employment contract. If the contract is silent then the suspension is presumed to be with pay. The Employment Act does not stipulate how long suspension should last. However, judicial precedent has established that the period of suspension should be reasonable. Thus in **Chulu-v-NBS Bank Ltd** IRC matter No PR 12 of 2010, it was decided that nine months suspension was inordinately long, a period of one month being considered more fitting in that scenario; the IRC specifically suggested that such suspension should not exceed six months, subject to section 41 (3) (b) of the Employment which precludes such period of suspension from being considered as an interruption to the employment contract for purposes of the overall employment contract.

Furthermore, in the case of **Manyengo and Ngwira-v-Agrimol MW (Ltd)** IRC Matter No. 420 of 2005, the court specifically found that it was an unfair labour practice to put employees on an indefinite suspension. Needless to say section 31

of the Constitution of Malawi prohibits unfair labour practices and grants every person the right to fair and safe labour practices.

Section 58 of the Employment Act defines an unfair dismissal as a dismissal that is not in conformity with section 57 or is a constructive dismissal. Section 60 of the Employment Act discusses constructive dismissal and states that:

“An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer’s conduct has made it unreasonable to expect the employee to continue the employment relationship.”

Thus the burden is on the employee to show that the employer’s conduct was so unreasonable that the employee could not be expected to continue with the employment relationship. See the decision of my learned sister nyakaunda Kamanga, J in the case of **Watson Kalonga-v-Stansfield Motors Ltd**, Civil Appeal (IRC) No. 11 of 2014.

The employee must show this through acts or omissions of the employer rendered against or to the disadvantage of the employee. Thus in **Namikungulu-v-Eastern Produce (MW) Ltd [2006] MWIRC 24** it was observed that:

“What constitutes unreasonable conduct, therefore, depends on circumstances of each case. It is a case by case assessment. The determining factor was raised in **Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27 CA**, Per Lord Denning MR: An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.”

Furthermore in **Banda-v-Dimon Malawi Ltd [2008] MLR 6 (HC)** court held that;

“That the test for constructive dismissal is a contractual one, namely, whether the employer’s conduct amounted to a fundamental breach or repudiation of the contract of employment”.

These decisions clearly place a burden on the employee to prove that the employer’s conduct was tantamount to a fundamental breach or repudiation of the contract of employment, in order to claim constructive dismissal.

According to **Western Excavating (ECC) Ltd-v-Sharp (above)** the test is that firstly, the employee must show that there has been a breach of a fundamental term of the contract of employment-which shows the employer no longer intends to be bound by one or more of the essential terms of the contract. Secondly, the employee must show that he did not waive the right to repudiate by acting promptly after the occurrence of the breach complained of.

Court's reasoned determination of the critical issues

1. Was a crucial contractual term breached by the suspension?

The basic elements and duties of an employment contract involve performance of work or services by an employee for remuneration by the employer. In the present appeal Mrs. Berth Sefu was engaged as a Gender and Social Coordinator with the Malawi Council of Churches; however the employer purported to suspend her pending further review of her position by appropriate authorities. The suspension effectively rendered it impossible for the appellant to continue to perform her contractual obligations. That suspension lasted for 18 months until she resigned; within the 18 months of suspension, she was only paid for one month.

It has been argued for the respondent that the factual findings of the IRC are binding as a matter of law, **Magalasi-v-National Bank of Malawi** [2008] MLLR 45. While that is indeed correct, it is very important to distinguish between factual findings and the legal implications arising from those conclusions. In that sense this court is prepared to accept the factual conclusions of the IRC about the duration of the suspension: however the subsequent question as to whether such a suspension was justified in the circumstances cannot be described as a mere factual finding; that is clearly a legal interpretation of a given set of facts which this court would be entitled to review on appeal.

On the basis of this understanding my court is unable to agree with the decision of the IRC concerning the justifiability of such an open-ended duration of suspension without any pay: see the case of **Manyengo and Ngwira-v-Agrimol MW (Ltd) (above)** which described such practices as unfair labour practices. This in turn means that the employer was in clear breach of the obligation not to subject its employee (the appellant) to such unfair labour practices. This was clearly a fundamental breach of the employment contract between Mrs. Sefu and the Malawi Council of Churches.

2. Was the appellant's dismissal amounting to a constructive dismissal?

There are two requirements necessary to establish that a resignation amounts to a constructive dismissal. The first requirement, being that there has been a breach of a fundamental term of the contract of employment (as evidence that the employer no longer intends to be bound by one or more of the essential terms of the contract) has clearly been satisfied, as the respondent neglected paying the appellant during her extended period of suspension when she was legally entitled to such.

The next question thereby arises: did the appellant act promptly after the occurrence of the respondent's conduct. The evidence shows that after five (5) months of her suspension the appellant wrote a letter to the respondent demanding payment of remuneration awaiting the disciplinary hearing; at that time the respondent paid only one month's salary. She also approached the respondent at an Executive Board meeting on October 25th 2007 to address the issues concerning her suspension. However, the appellant was not granted audience at this meeting, but was advised to respond to the suspension letter that she was given. The appellant did so and delivered a response to the allegations contained in the suspension letter on the 31st of October 2007.

The appellant having so responded to the suspension letter she could not reasonably be expected to act unilaterally when she had been assured that her case would be attended to by the relevant authority. The obligation was on the employer to act promptly on her suspension. The respondent negligently handled the matter by failing to make payments of her salary and not acting or making a decision with regards to her matter. The respondent suggested that the appellant responded late and that is why the issue was delayed, but even after her response was delivered, the employer still did nothing with regards to her issue or her suspension. Such conduct in this matter sufficiently amounts to a constructive dismissal of the appellant; the employee was left in a contractual no-man's land with no recourse to a disciplinary process where she could at least face her accusers and seek to clear her name; for such oppression and unconscionable conduct the responsibility must fall squarely upon the employer and not the employee.

3. Is the appellant entitled to severance allowance and notice pay?

Since the appellant's dismissal was a constructive dismissal, she indeed is entitled to severance allowance and notice pay.

CONCLUSION

The respondents conduct was in breach of the fundamental terms of the employment contract and the unreasonably long suspension was unfair and the appellant could not be reasonably expected to retain such employment. Her dismissal was a constructive dismissal and consequently an unfair dismissal. She is entitled to her severance allowance, notice pay and to be compensated as such. Let the Registrar compute the necessary compensation as per the applicable law. The same having been withheld for no demonstrable reason, the compensation will come with interest of 12% for each year since the resignation took effect.

Costs are for the appellant.

Made in open court this 28th day of July 2016 at Lilongwe.

C.J.Kachale, PhD
JUDGE