



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 14 OF 2016**

BETWEEN:

BANNET NANSONGOLE CLAIMANT

AND

NATIONAL BANK OF MALAWI DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Chayekha, of Counsel, for the Claimant
Messrs. Mwangomba and Mtonga, of Counsel, for the Defendant
Mrs. Jessie Chilimapunga, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

1.0 INTRODUCTION

- 1.1 This is this Court's judgement on the Claimant's action for unlawful and unfair termination of employment. The Claimant seeks reinstatement, damages for unfair dismissal, withheld annual bonus, damages for discrimination, damages for defamation and costs of this action.
- 1.2 The Claimant was employed by the Defendant until 13th July 2015 when he was dismissed with immediate effect. The Claimant states that the dismissal was unfair because the Defendant failed to comply with principles of natural justice and fair labour practices.

- 1.3 On its part, the Defendant denies liability and states that the Claimant was dismissed fairly. The Defendant, accordingly, prays that the Claimant's action be dismissed in its entirety with costs.

2.0 PLEADINGS

- 2.1 The Claimant has pleaded in his Re-Amended Statement of Case as follows:

- "1. The Plaintiff is of full age and was in the employ of the Defendant until 13th July 2015 when he was summarily dismissed on three grounds.*
- 2. The Defendant is a bank duly registered under the Laws of Malawi.*
- 3. The Plaintiff pleads that he was unfairly dismissed by the Defendant as the Defendant failed to comply with principles of natural justice and fair labour practices.*

Particulars of unfair dismissal

- (i) The Defendant failed to give the Plaintiff an opportunity to cross-examine whoever made a report or statement against the Plaintiff during the investigations.*
- (ii) The Defendant failed to provide or furnish the Plaintiff with copy of the investigation report for the Plaintiff to be fully aware of what was said against him in order to fully prepare his defence.*
- (iii) The Defendant dismissed the Plaintiff on charges which were not proved.*
- (iv) The Defendant dismissed the Plaintiff based on his attending a meeting called by a duly recognized group of workers' representatives to discuss employees grievances.*
- (v) The Defendant dismissed the plaintiff for sharing with others agreements reached at a meeting called by the said representatives.*
- (vi) The Defendant dismissed the Plaintiff for a charge he was not charged with at the disciplinary hearing hence did not defend himself.*

- (vii) *The Defendant failed to act with fairness and equity in the circumstances by dismissing the Plaintiff regard being had to the fact that he had no warning at the time.*
 - (viii) *The Defendant selectively disciplined the Plaintiff for attending the meeting called by the employees' representatives as some of the people who attended the meeting were not disciplined.*
 - (ix) *The Plaintiff's dismissal was premeditated taking into account the manner the Plaintiff was treated immediately prior to the dismissal.*
- 4. *In addition to the unfair dismissal the Plaintiff pleads that the Defendant unfairly withheld his bonus which he had already earned at the time of the dismissal.*
 - 5. *Further the Plaintiff pleads that the Defendant defamed the Plaintiff in wildly publishing that the Plaintiff had been responsible for discouraging fellow employees to attend a party a thing which was not true.*
 - 6. *The Plaintiff pleads that such publication lowered the Plaintiff's character and image in the eyes of his fellow employees as this could be understood that the Plaintiff is a confusionist.*

Therefore the Plaintiff claims:

- (a) *Reinstatement.*
- (b) *Damages for unfair dismissal.*
- (c) *Withheld annual bonus.*
- (d) *Damages for discrimination.*
- (e) *Damages for defamation.*
- (f) *Costs of this action"*

2.2 The Defendant filed the following defence:

- "1. *Paragraphs 1 and 2 of the statement of claim are admitted.*
- 2. *The Defendant denies that it unfairly dismissed the Plaintiff and will during trial require strict proof thereof.*

3. *Particulars of unfair dismissal pleaded in paragraph 3 of the statement of claim are denied and the Plaintiff is put to strict proof thereof.*
4. *The Defendant will during trial contend that it followed all necessary legal procedures before dismissing the Plaintiff.*

Particulars

- (i) *The Defendant investigated allegations against the Plaintiff before taking any action. The Plaintiff was duly interviewed during the investigations.*
 - (ii) *Upon establishing that the Plaintiff had a case to answer the Plaintiff was duly informed about the charges leveled against him and duly given full particulars of the charges.*
 - (iii) *The Plaintiff was given full access to all documentation on evidence relating to the charges to help him defend himself.*
 - (iv) *The Plaintiff was duly given an opportunity to be heard by the Bank's Disciplinary Committee and allowed to defend himself.*
 - (v) *It was only after the Plaintiff was heard in his defence that the Bank made a decision (based on the evidence) to dismiss the Plaintiff from its employment.*
 - (vi) *Even after dismissal the Plaintiff was given an opportunity to appeal to the Disciplinary Appeal Committee which also gave him an opportunity to present his case.*
 - (vii) *The Disciplinary Appeal Committee upheld the decision made by the disciplinary Committee to dismiss the Plaintiff on one ground and quashed the other ground of dismissal that was communicated to the Plaintiff in a letter dated 22nd July 2015.*
5. *The defendant will during trial contend that there was a valid reason or reasons to warrant dismissal of the Plaintiff the same being that the Plaintiff was found guilty of misconduct in that he discouraged employees from attending the Staff Christmas Party set for 20th December 2014 contrary to Clause 11.06 of the Bank's Terms and Conditions of Service.*
 6. *The defendant refers to paragraph 4 of the statement of claim and denies that the Plaintiff was eligible to receive a bonus under the*

Bank's Terms and Conditions of Services and will during trial strict proof thereof.

7. *The claim for defamation pleaded in paragraphs 5 and 6 of the statement of claim is not admitted.*
8. *The Defendant pleads that the claim for defamation is embarrassing as it does not give particulars of the alleged defamation and will contend that it be dismissed.*
9. *The Defendant also pleads that this being a labour matter the Plaintiff should have commenced this action in the Industrial Relations court.*
10. *In the premises the defendant avers that the Plaintiff is not entitled to any of the reliefs pleaded in the statement of claim.*
11. *Save as herein expressly admitted the Defendant deny each and every allegation pleaded in the statement of claim as if the same is specifically set out and traversed seriatim."*

2.3 A word about paragraph 9 of the Defence might not be out of order. The Defendant filed with the Court a summons to transfer the matter herein to the Industrial Relations Court. After hearing full arguments from both parties, the summons was dismissed on 20th December 2016 primarily on the ground that the proceedings herein relate to both unfair dismissal and defamation and the Industrial Relations Court does not have jurisdiction over defamation claims.

3.0 BURDEN AND STANDARD OF PROOF

- 3.1 It is trite that a claimant has the burden of proving the elements of his or her lawsuit on a balance of probabilities: see **Commercial Bank of Malawi v. Mhango** [2002-2003] MLR 43 (SCA), **Robins v. National Trust Co** [1927] AC 515 and **Constantine Line v. Imperial Smelting Corporation** [1943] AC 154.
- 3.2 As regards the standard of proof, it is a settled principle of law that in civil cases the standard required is proof on a balance of probabilities: see **Miller v. Minister of Pensions** [1947] All ER 372, where Denning J. stated, at page 373-374, as follows:

"If the evidence is such that the tribunal can say "we think it more probable than not, the burden is discharged, but if the probabilities are equal it is not".

- 3.3 The party on whom lies a burden must adduce evidence of the disputed facts or fail in his or her contention. In the present case, the burden of proof lies on the Claimant with respect to his claim.

4.0 EVIDENCE

- 4.1 The Claimant called three witnesses, namely, the Claimant himself (CW1), Tonnex Kazembe (CW2) and Cecelia Kuluwani (CW3).

4.2 Testimony of the Claimant (CW1)

- 4.2.1 CW1 adopted his witness statement, as his evidence in chief, wherein he states as follows:

“5.1 ... I was employed by the Defendant on 1st July 2009 and I was summarily dismissed on 13th July 2015 following a disciplinary hearing which I attended on 9th July 2015. I claim that my said dismissal was unfair and unlawful.

5.2 On 19th December 2014 a representative of the Joint Consultative Committee (JCC) of the bank, Cecilia Kuluwani, called for a meeting for all members of staff of Head Office Departments. This meeting was called through an e-mail and members of staff also passed on word to each other. I attach the e-mail marked “BN1”.

5.3 Joint Consultative Committee (JCC) is a representative group in the bank whose purpose is basically to facilitate easy communication between management and staff members. Whenever management has something to communicate to the staff members at large it would use JCC and when staff members have something to communicate to management it uses JCC. I attach the JCC Constitution marked “BN2”.

5.4 JCC representatives could call for staff meetings in order to discuss issues for presentation to the committee and management.

5.5 So as earlier stated on 19th December 2014 I was informed that a JCC meeting had been called to take place in the Pose room. I got the message from our Administrative Assistant, Mrs. Madalo Maziya. The meeting was for all Head Office staff members. I did not know what the meeting was about. I all the same went to attend the meeting.

- 5.6 *May I emphasize that I was not the one who called for the meeting. I only got word of the meeting. During the meeting the issue of the change of policy with respect to bonuses and the impending Christmas party were discussed.*
- 5.7 *As regards to change of policy, previously the bank would pay bonuses to its staff members in December and in April after the final accounts are out. Management communicated that from year 2014, bonuses would only be paid in April once the final accounts were out. This caused concerns to all staff members and we complained to management asking them to do the change gradually since staff members budgeted or planned about the December bonuses. However management only promised to come back on the issue but never did.*
- 5.8 *Before management reverted on the staff members' concerns the bank was busy preparing for a staff Christmas Party. As result Cecilia called for the meeting to discuss how to communicate to the management about the lack of concern. At the meeting, which was attended by more than thirty (30) people, members made contributions and at the end of the meeting it was resolved that we should not attend the Christmas party but those that wanted to attend should not be forced. Since the meeting was not attended by all staff members, we agreed to communicate to those who did not attend by sending messages including whatsapp messages. I, as a result, sent whatsapp messages to those I had their numbers.*
- 5.9 *The following day, 20th December, 2014, I had planned not to attend the party so I went out of town. On my way back, in the evening, I got rumours that people at the party were saying I was the one encouraging the people to boycott the party. So realising that it was not my decision to tell people not to attend the party and since those that wanted to attend were not blocked I decided to attend the party. This in my view was to show that I did not encourage people not to attend the party. However since I was coming from out of town I failed to go home to dress up according to the party's dress code. I then attended the party.*
- 5.10 *Later on after the party, I was called by my boss and reprimanded me for not dressing according to the party code. I explained what had happened and I apologised. I thought that was the end of the issue. This was December, 2014.*

- 5.11 *In January 2015, I asked for permission to go to Phalula in Balaka to see my sick sister. While I was away there was released a list of affairs in the bank which was circulated on e-mail. I later heard that people were saying I was the one who generated the report. This surprised me.*
- 5.12 *My surprise was double confounded when I got a phone call from my boss to see him immediately. But since I was out of town to where I had gone to see my sick sister, I advised my boss that I could only see him on Monday 2nd February 2015. When I came back I went to see him. I was given a letter of transfer to go to Karonga Branch. I was given only 5 days to organise myself. I was supposed to report in Karonga on 9th February, 2015.*
- 5.13 *I tried to complain to my boss that I had only been in the Finance Department for six years and there were others who had been there for a long time. I also complained that my children were in school and sudden transfer would make it difficult for me to get another school. But this was not taken.*
- 5.14 *I reported in Karonga on 9th February 2015. On 11th February 2015 the Branch Manager welcomed me and told me that I was supposed to go to Chitipa Agency to work as a Clerk. I complained that I was not capable to work at an agency since I had never worked at an agency before. I was advised to learn how to do cashiering within two weeks. I attach the letter of transfer marked "BN4".*
- 5.15 *However before the expiry of the two weeks, in fact just after a week, I was told by the Branch Manager that I was wanted at the Head office, the following day. I was told around 10.00 am. I was told to get a bus and ensure that I was at the Head office the following day. I was surprised with the urgency in all these.*
- 5.16 *At the Head office I was told to go to Internal Audit Department. There I was asked about the list of affairs I spoke about and the issue of the Christmas Party. I denied any knowledge about the list but explained about the party. I met the Auditor on Tuesday. I was told not to go back as they may need me again. On Thursday I was called again and I was given a letter of suspension on allegation that I encouraged members of staff to boycott the Staff Christmas Party. I attach the letter of suspension marked "BN5".*

- 5.17 *In June 2015 I received a Charge Form (Enquiry Form) and an invitation for disciplinary hearing. I attended the hearing on 9th July 2015. I attach the enquiry form and invitation for hearing marked “BN6” and “BN7”. I was required to respond to the charges in writing which I did. I attach my response marked “BN8”.*
- 5.18 *As can be seen from the Charge Sheet I was charged with three counts allegedly that I was party to the organization of a meeting in disregard of procedure and guideline, that I encouraged employees to boycott the Staff Christmas Party on 20th December 2014 and that I coerced fellow members of staff to attend a wrongfully convened meeting and advising members of staff at the meeting I called to boycott the Staff Christmas Party scheduled on 20th December 2014 and disseminating text messages via “whatsapp” to fellow employees to influence them to boycott the christmas party.*
- 5.19 *After the hearing I was given a letter of dismissal dated 13th July 2015. Despite the available evidence, I was dismissed on three reasons but to my surprise the third reason did not appear on the Charge Sheet. It only appeared on the letter of dismissal. I thus did not defend myself on this reason. This showed me that the Defendant was determined to dismiss me. Looking at the way I was treated prior to the dismissal I felt that the bank was set to get rid of me even though I was not guilty. I attach the letter of dismissal marked “BN9”.*
- 5.20 *Upon receipt of the letter of dismissal, I immediately felt that I was unfairly dismissed. It was clear in my mind that the panel did not consider the evidence with fairness. I then decided to appeal the decision. And after the appeal the reasons for dismissal were reduced but surprisingly I was still dismissed. I attach my appeal marked “BN10”, “BN11” and “BN12”.*
- 5.21 *At the time of my dismissal I had worked for the Defendant for 6 years and I was always appraised highly. I did not have a warning hence dismissal was not fair since even if I were to be guilty the Defendant’s Conditions of Service provide different ways of discipline but the Defendant chose the most severe. I attach the Conditions of Service marked “BN13” and Disciplinary Procedures Code marked “BN14”.*

5.22 *Considering the evidence before the panels I strongly state that the Defendant deliberately coined the charge to sabotage just to justify a dismissal but it should be remembered that I only communicated a decision of a JCC meeting which was attended by many and these people who attended and agreed were not dismissed. Those that were called for hearing were cleared except myself and the lady who called for the meeting. This is surely segregative and unfair.*

5.23 *As a result of this dismissal I have lost a lot of salary bonuses, terminal benefits and other benefits I enjoyed by virtue of the employment.*

5.24 *I therefore ask the Court to find the Defendant liable for unfair dismissal and order that I be reinstated to my position."*

4.2.2 In cross examination, CW1 stated that he was employed by the Defendant on 1st July, 2009 as a Bank Clerk and that at the time of his dismissal he was Reconciliation Clerk, earning a monthly salary of MK160,000.00 gross per month. When referred to clause 5 of the Constitution of the National Bank of Malawi Joint Consultative Committee (JCC) which prescribes the composition of the JCC, CW1 admitted that management was not part of the meeting of 19th December 2015. He, however, added that the meeting in question was not the one envisaged under clause 5 of the Constitution. He said this was not a committee meeting but a staff meeting called by a JCC representative.

4.2.3 CW1 admitted that the JCC Constitution does not provide for any other meetings. He also admitted that the agenda of the meeting was not circulated before the meeting but indicated that he was not the one who called for the meeting. He also told the Court that he was not aware that the email calling for the meeting (Exhibit BN1) was or was not sent to management. He agreed with Counsel Mwagomba that in terms of the grievance procedure, a complaint has first to be lodged with the Division/Branch Works Committee before escalating to JCC.

4.2.4 With regards to the party, CW1 told the Court that Christmas parties were an annual event. He stated that he was not aware that grievances in respect of the Christmas party had been

presented to management. CW1 confirmed in cross-examination that he sent the whatsapp message. He admitted that the meeting resolved not to force staff members whether to attend or not to attend the party but his message did not include this part.

- 4.2.5 Regarding his dismissal, CW1 confirmed that the letter of dismissal contained several reasons for his dismissal. He also confirmed that he attended the Christmas party and did not dress according to the dressing code but gave an explanation for his failure to do so, that is, he had been out of town and he did not have enough time to go to his home to change his clothes.
- 4.2.6 With respect to the disciplinary hearing, CW1 confirmed that he was (a) given charges and responded to them in writing, (b) called to a disciplinary hearing, (c) given opportunity to make oral submissions in defence and (d) allowed to appeal against the dismissal. He also testified that he attended the Appeals Committee's meeting for hearing of his appeal and made submissions during hearing of appeal.
- 4.2.7 On the transfers, CW1 conceded that there was no agreement between him and the Defendant that he would always work at the head office. He confirmed that he was not the only one who was transferred from the head office to other branches but he said that his case was different because of the undercurrents.
- 4.2.8 CW1 confirmed that, according to the terms and conditions of service, the penalty in respect of the charge levelled against him was dismissal. He also told the Court that he did not give investigator any list of people who sent similar messages as he did.
- 4.2.9 On the issue of bonus, CW1 stated that he was claiming bonus for 2014 since he was charged in 2015: by the time of his suspension, bonus had been earned but not paid. He admitted that in terms of clause 5(b) and (c) of terms and conditions of service he was not entitled to be paid bonus.
- 4.2.10 In re-examination, CW1 confirmed that the meeting he attended on 19th December, 2014 was not a JCC meeting: it was different from the one covered under Clause 5 of the JCC Constitution.

He stated that the one under the Constitution was a JCC meeting but the one in issue was a meeting called by a representative to discuss grievances.

4.2.11 On the whatsapp message that he sent, he said the meeting had resolved to inform others of the resolution but no specific wording for the message was given.

4.2.12 On the reasons for the dismissal, the Q and A went as follows:

Q: How many reasons appear in BN9?

A: Three

Q: Look also at BN10, what is the date of appeal?

A: Date of corrected version is 22nd July 2015

Q: The corrected version came after the appeal?

A: Yes

Q: What reason was in the letter of dismissal?

A: paragraph (c) which reads:

"Misconduct as per as per Section 11.06 of the Bank's Terms and Conditions of Service for making false statements to the investigation team that the meeting resolved that those who wanted to go to the party should do so, and those who did not wish to could stay away, when in fact the meeting resolved that members of staff should boycott the Christmas Party to express their collective discontentment with the Bank's decision not to pay interim bonuses and the dress code."

Q: Were you charged with this particular allegation?

A: No! Paragraph (c) talks of two resolutions. This means I also told the members of staff of their freedom not to attend

4.2.13 On the transfer, CW1 said that it was done in bad faith in that he was transferred to Karonga and, then within two days, to Chitipa, to undertake tasks that he had never done before and was not given any training on the new job. He also explained that his transfer followed an allegation that he was the one who

generated a list of love affairs amongst members of staff and the list included top management.

4.2.14 With respect to the hearing, CW1 stated that he was not given any report of the investigations conducted by the Defendant and was not accorded an opportunity to cross-examine the people who made statements against him.

4.2.15 CW1 concluded his evidence in re-examination by insisting that he had earned the bonus. He argued that as at 1st January 2014, he had no case to answer and whatever happened thereafter should not detrimentally affect his earned bonus.

4.3 Testimony of the Tonnex Kazembe (CW2)

4.3.1 CW2 adopted his witness statement and this constituted his evidence in chief. He stated as follows:

“5.1 I was employed by the Defendant (National Bank of Malawi) herein and at the material time I was working as Team Leader Money Marketing in the Treasury Department. I know the Plaintiff as he was my workmate.

5.2 At National Bank of Malawi, in order to facilitate organized communication between the staff members as a whole and management, the bank established a group of staff representatives which is called Joint Consultative Committee (JCC). All staff members were/are members of the JCC and the representatives from the different departments are mandated to call for meetings whenever there was either communication to be made to staff members or issues to be discussed among the staff members. The staff members usually channeled their grievances through the JCC.

5.3 Sometime in the year 2014 management announced a change of policy with respect to payment of bonuses. Previously the bank would make payment of bonuses twice, in December and in April after the accounts were out. This had been happening for sometime. Management then announced that it would only be paying bonuses in April after the accounts were out. This did not go well with the staff members. We therefore through the JCC requested management not to implement this policy abruptly but to do it slowly so that we could also adjust our budgets since

members of staff always budgeted for the bonuses in December and April.

- 5.4 *The concerns were sent to management but all management said at the time was that it would come back to the members of staff. However management took long without reverting. This caused discontent among staff members.*
- 5.5 *While members of staff were awaiting feedback, it came to be known that the bank was preparing a Staff Christmas Party. This heightened the discontentment among staff members. So I guess realizing this discontentment among staff members, a member of the JCC, Cecilia Kuluwani, on 19th December 2014 called for a meeting through an e-mail which was copied to many staff members and indicated that the meeting was for all Head Office Division. I was personally copied and we were to tell the others. I attach copy of the e-mail marked "TKI".*
- 5.6 *The e-mail did not say what the meeting was about. So, I together with the Plaintiff and many other staff members over thirty (30) in total, attended the meeting. At the meeting it came to be known that the issue was to do with the bonuses in view of the impending party. The party was set for 20th December 2014. Members felt that it was wrong or unfair for the bank to call the members of staff for celebrations when in actual fact the members of staff were not happy.*
- 5.7 *After deliberations it was decided that we should boycott the party in order to send strong message to management. Since not all staff members attended the meeting we agreed to communicate to the others through any means of communication including whatsapp. Members communicated but owing to the fact that I had no airtime on the day I never communicated the resolution. However I contributed a lot at the meeting. We agreed that the members who were willing to attend the party should not be forced not to attend.*
- 5.8 *The party was indeed held on 20th December 2014. Some members of staff attended the party and others did not. I did not attend the party but I learnt that the Plaintiff attended the party.*
- 5.9 *Subsequently I, together with the Plaintiff and if I am not mistaken three (3) other members of staff were called for a disciplinary hearing. I, among other things was accused of*

attending an "unlawful meeting". Fortunately I was not dismissed. However I later opted for early retirement.

5.10 *As I have explained the meeting was called by a JCC representative who, as far as I know, was authorized to call for the meeting. The meeting was for all Head Office Departments, staff members and the Plaintiff belonged to one of the Head Office Departments hence was entitled to attend. Further the meeting authorized all those who attended to circulate the agreement so there was nothing wrong with the Plaintiff's sending whatsapp messages to those that did not attend the meeting.*

5.11 *In my view the Plaintiff was wrongly dismissed."*

- 4.3.2 In cross-examination, CW2 stated that the composition of the JCC Committee was per clause 5 of the Constitution and that not every employee of the Defendant was a member of the JCC. He also said that the procedure for calling meetings for the JCC committee was per clause 10 of the Constitution but he did not know if the clause was complied with as he was not the one who called for the meeting. He said he just received an email calling for the meeting.
- 4.3.3 When referred to paragraph 5.4 of his witness statement, CW2 stated that management took too long to revert on the staff members' grievances and, as a result, staff members were impatient. He also confirmed that Christmas parties were an annual event and did not depend on receipt of bonus.
- 4.3.4 As regards paragraph 5.6 of his witness statement, CW2 explained that the grievance by the members of staff was that the Defendant was keen to organize the Christmas party before resolving issues raised by members of staff. When asked to confirm if the grievance about the bonus had been communicated to management, he responded that he was not aware since he was not party to the organizing of the meeting.
- 4.3.5 CW2 reiterated that the meeting agreed to inform those that were not present at the meeting to boycott the party but without forcing them. He also said that they did not agree on the content of the message to be sent to the people who did not attend the meeting.

- 4.3.6 Asked if the boycott would have embarrassed the Defendant, CW2 said that he did not know about embarrassment but that it would have sent a strong message to the Defendant. He also refused that it would have caused shame to the Defendant because this was an internal matter whereby no outsider was involved. DW2 added that the boycott actually never took place: in fact, some of the people who were at the meeting, including the Claimant attended the party. He said there was no harm done to the Defendant as everything went on as planned.
- 4.3.7 CW2 stated that he was not aware that the message the Claimant sent out did not include the part of the resolution concerning not forcing the others to boycott the party. He, however, admitted that the reason for the Claimant's dismissal emanates from the message he sent. He said that the meeting was chaired by CW3.
- 4.3.8 CW2 insisted that the punishment given to the Claimant was too harsh. He said he contributed a lot during the meeting but was not treated like the Claimant.
- 4.3.9 In re-examination of CW2 by Counsel Chayekha, the Q and A went as follows:
- Q: You were referred to clause 10 of the JCC Constitution, explain your answer?
- A: Members of staff and management have representatives on the JCC but a representative of staff members on NBM-JCC can hold meetings with staff members as and when issues come up.
- Q: Why was it necessary to hold this meeting at this time?
- A: We wanted to send a strong message as regards our dissatisfaction about issues such as payment of bonus – the way they were being handled
- Q: What did you agree regarding communication of the resolution of the meeting?
- A: Reads paragraph 5.7 of his witness statement

Q: Tell the Court if you had a specific message to be sent out?

A: No specific message other than to boycott the party

Q: Confirm if the boycott was enforced

A: It was not because the party took place and some of the members of staff attended the party including the Plaintiff

Q: Why do you hold the view that the dismissal was unfair?

A: Because the party took place and all the concerned persons attended it, including the Plaintiff. Everything went on well. Thus I feel that the punishment was harsh. I expected that the one who contributed most which I was to be the one to be punished but I was not punished.

4.4 Testimony of Cecelia Kuluwani (CW3)

4.4.1 CW3 adopted his witness statement which reads as follows:

“5.1 I was employed by the Defendant until 2015 when I was summarily dismissed.

5.2 During the period of my employment I became a representative member of the Joint Consultative Committee (JCC) for the bank.

5.3 The Joint Consultative Committee (JCC) was a group of staff members which was aimed at acting like a communication channel between the members of staff and management. Whenever there was an issue to be discussed among staff members for subsequent communication to management staff members would use the JCC. Similarly when there was communication from management to the staff members as a whole management would also use the JCC.

5.4 JCC representatives were mandated to call for meetings to discuss particular issues with the staff members for presentation to the management through the JCC.

5.5 Previously the Defendant had a policy whereby it would pay bonus to staff members in December and April. This policy was there for sometime such that staff members got

used to it and always anticipated to receive bonuses during those periods.

- 5.6 *However in October 2014, may it be noted that this was towards the end of the year, management announced that the policy had changed and bonus was only to be paid in April after final accounts. This was not fully received by members of staff as a result we communicated to management about staff members' grievances. Staff members proposed gradual implementation of the policy and also that may be we should be given vouchers for December. Management assured us that it would respond to the grievances as soon as possible.*
- 5.7 *However management took some time without responding and this made staff members even more disgruntled. And before responding to the grievances management started to prepare for Staff Christmas Party. This party was unlike the previous parties as this one, staff members from all other branches were called. It involved big expenses for accommodation and transport. This increased the discontentment. As a result of this members started talking about boycotting the staff party. This prompted me, in my capacity as a JCC representative to call for a meeting for staff members for Head Office to discuss the issues. I therefore circulated e-mails to various staff members and encouraged them through Administration Assistants, per tradition, to inform others about the meeting.*
- 5.8 *A number of staff members attended the meeting. This was on 19th December 2014. Over 30 people attended the meeting and made various contributions. At the end of the meeting we agreed to boycott the Staff Christmas Party but we said those that were willing to attend should not be stopped. We then agreed to communicate to the other members of staff who did not attend the meeting through whatever means of communication as the party was set for the 20th December 2014.*
- 5.9 *Those who were able to communicate the agreement did. Others did not for various reasons. The Staff Christmas Party went on. Other staff members attended the party and others stayed away.*
- 5.10 *After all that nothing happened. January passed but in February 2015 investigations started and on 18th February 2015 only the Plaintiff and I were suspended. Later a few of the people who attended the meeting were called for*

disciplinary hearing. Out of those who were called only me and the Plaintiff were dismissed.

5.11 *As earlier stated, I and not the Plaintiff called the meeting. The Plaintiff had no influence whatsoever on me. I called the meeting as a JCC representative. This was therefore a properly called meeting. The Plaintiff in communicating the resolution of the meeting did what had been agreed. As it is there is nothing wrong that the Plaintiff did to earn a dismissal. If anything everyone who attended the meeting should have been dismissed."*

- 4.4.2 In cross-examination, CW3 stated that she was dismissed by the Defendant because of the meeting she called. She confirmed suing the Defendant bank because she wants to get justice.
- 4.4.3 When referred to paragraph 5.4 of her witness statement, CW3 confirmed that JCC representatives were mandated to call for meetings to discuss particular issues with the staff members for presentation to the management through the JCC. She also confirmed that she is the one who called the meeting and management knew about the meeting because she sent an e-mail to all members of staff.
- 4.4.4 Counsel Mwangomba drew CW3's attention to clause 10 of the JCC Constitution and asked her if the procedure laid out therein was followed. CW3 explained that the procedure therein is for JCC meetings but the meeting that she called for was not a meeting of JCC and consequently the procedure was not governed by the stipulations in JCC Constitution.
- 4.4.5 CW3 agreed that the meeting discussed the issue regarding the Christmas party organized by management. She also confirmed that prior to the meeting she had not communicated to management any complaint about the party. She confirmed that the meeting agreed to boycott the Christmas party but those willing to attend were not to be forced to boycott it. She told the Court that she organized the meeting to hear the members' views about the party.
- 4.4.6 CW3 told the Court that she had worked for the Bank for 23 years and knew its grievance procedure. When asked to confirm that the terms and conditions of service do not allow members

of staff to boycott events organised by the Defendant, CW3 said that none of the conditions touches on such an issue. She also told the Court that she did not see the message sent out by the Claimant.

4.4.7 In re-examination by Counsel Chayekha, CW3 drew a distinction between the meeting that she called and the meeting covered under the JCC Constitution. She explained that as a JCC representative, she had mandate to call staff members to discuss issues which had arisen. She said the meeting provided for in the JCC Constitution is called by management to meet JCC representatives and JCC executive.

4.4.8 CW3 confirmed that they resolved to boycott the party and to communicate to the others about the resolution. She told the Court that there was no specific wording for the resolution to be sent to the others. She stated that she called for the meeting because she wanted to gather information after hearing that people did not want to attend the party due to the outstanding grievances.

4.5 The Claimant closed his case.

4.6 The Defendant called one witness, namely, Fyson Thomas (DW).

4.7 Testimony of Fyson Thomas (DW)

4.7.1 DW adopted his witness statement which states:

"6.1 I am Investigation Manager for the Defendant Bank.

6.2 I am the one who investigated this matter together with Mr Daniel Jere and as such I make this statement based on information with my knowledge.

THE BACKGROUND

6.3 As one way of motivating staff the bank (where possible) pay bonuses to members of staff.

6.4 The bonuses are not obligatory but are paid at the discretion of management.

6.5 The practice had been that an interim bonus (a quarter of estimated bonus) would be paid to members of staff from grade C downwards in December just before Christmas.

The remaining three quarters would be paid the following March/April after approval of final accounts by the board.

- 6.6 *The payment of the interim bonus in December was premised on the assumption that some assumed profit would be made at the end of the financial year and confirmed by auditors.*
- 6.7 *In March/April, 2013 there had been a huge adjustment on bonuses that had been paid to members of staff. The final figures were determined by the profit that the Bank made which in turn determined the pool of funds in the bonus plate.*
- 6.8 *The adjustment caused a lot of confusion in the Bank as junior members of staff were of the opinion that senior members of staff received a big chunk of the bonus compared to junior officers. However, what they forgot was that for them they had already received part of the bonus in advance in December and what was being paid at the end of financial year was a balance on their total bonus less what they had already received.*
- 6.9 *To avoid such confusion in the future, management of the Bank decided that effective 2014 there was going to be no payment of interim bonus to any member of staff in December and instead all employees would be considered for payment of bonus at the end of the financial year and after approval of final audited financial statements. This decision was communicated to members of staff around September/October 2014.*
- 6.10 *Another reason for this change was that it was not prudent to be paying a bonus in December on the assumption that the Bank would make a profit at the end of the financial year. Management appreciated that assuming that bonuses are paid in December and at the end of financial year the Bank make a loss, it would be very difficult to recover money already paid to members of staff.*

THE JOINT CONSULTATIVE COMMITTEE

- 6.11 *To ensure harmony between employees and employer the Bank established a Joint Consultative Committee (JCC) to facilitate effective management of employer/employee relationship. I hereby exhibit a copy of the Constitution of the Committee and mark it "D1".*

- 6.12 *The JCC comprise 15 elected employee representatives to represent employees and 6 nominated managers to represent the Bank. Each group has its own Chairman.*
- 6.13 *Each branch or division has its own JCC representative who is part of the 15 elected employee representatives. The representative is responsible for his or her constituency. Overstretching ones boundary is prohibited.*
- 6.14 *Exhibit marked “DI” also establish Division/Branch Work Committees chaired by the JCC representative from the Division/Branch.*
- 6.15 *The grievance procedure at NBM is that employee are supposed to channel grievances through the Division/Branch Works Committees.*
- 6.16 *Any grievance which cannot be resolved at Divisional/Branch level may be referred to JCC and any grievance which cannot be resolved by the JCC is supposed to be referred to the Chief Executive Officer.*
- 6.17 *A duly convened meeting of the JCC is supposed to have a proper notice, and agenda that is supposed to be sent to the Secretary not less than 5 days before the date of the meeting. The agenda is supposed to be circulated to members of the JCC three (3) days before the meeting.*
- 6.18 *In the event that there is need for a special meeting such meeting is supposed to be called on written request of the Chairman for either group (i.e. employees or employer groups). Such special meeting may be held within 7 days from the date of calling the meeting.*

CHRISTMAS PARTY

- 6.19 *Every year the Bank organizes a Christmas Party for its members of staff and their families.*
- 6.20 *Such a party was organized for employees of the Bank on 20th December, 2014 and all employees were duly informed and invited.*
- 6.21 *Employees were informed that they needed to dress formally and were expected to behave in a dignified manner.*

THE IMPROMPTU STAFF MEETING

- 6.22 *During a management meeting held prior to 19th December 2014 management got news that some members of staff were planning to sabotage the Christmas Party set for 20th December 2014 on the ground that management had decided not to pay interim bonuses in December 2014.*
- 6.23 *Indeed some members of staff gathered and held the meeting within Head Office premises of the Bank.*
- 6.24 *The Bank did not do anything to disrupt the meeting and the members of staff met without any hindrance by management.*
- 6.25 *It is not true that this was a JCC meeting. It was not as it was not convened in line with the procedures on JCC meeting as stated above. There was no due notice for the meeting. In fact there was only less than two hour notice given and there was no agenda for the meeting. Employer members of the JCC were not even invited to the meeting. Even from the employee side there were only two JCC members present. Some of the employee representatives for example Tuntufye Singogo from Finance Department within Head Office told me that he didn't even know that there was a JCC meeting.*
- 6.26 *Further any grievances from employees in business units are channeled through their respective JCC representatives and Division/Branch Committees chaired by this representative before being submitted to the larger JCC for discussion. There was no record whatsoever that any member of staff had raised such a grievance through their JCC representatives.*
- 6.27 *The Bank later became aware of the fact that after this meeting the Plaintiff sent out a message via whatsapp to members of staff that were not present at this meeting inciting them not to attend the Christmas Party. The message stated: **"We are not coming tomorrow for party. Agreed members of staff. Tell your neba pipo are saying we cant go to a party while crying inside ndi maluzi Ndalama zimenezi akanatha kutipatsa voucher This is the only opportunity to send a message to them that pipo are not happy"**.*

- 6.28 *I managed to get this message from the phone of one members of staff and it showed that the message originated from the Plaintiff.*
- 6.29 *During my interview with the Plaintiff he admitted that he indeed sent the text message quoted above. Even during the disciplinary hearing the Plaintiff admitted that he indeed sent this text message to some members of staff. I hereby exhibit a copy of minutes of the disciplinary hearing and mark it "D2".*
- 6.30 *I later discovered during my investigation that in fact this meeting (which I maintain was not a JCC meeting) did not make the resolution communicated by the Plaintiff in this text message. So the message in this communication was the Plaintiff's own creation. Even if it were to be found that what he wrote was agreed at this meeting everyone disseminating it would still have been liable to disciplinary action as such conduct would be in breach of staff terms and conditions of service.*
- 6.31 *I also saw the Plaintiff behaving in a disorderly manner at the Christmas Party. He did not dress properly as per the communication from the Chairperson of the organizing committee and was rude and disorderly. During my interview with him he admitted that he indeed did not dress properly as expected.*

DISCIPLINARY HEARING

- 6.32 *Management got to know about what the Plaintiff did in inciting staff members to boycott the Christmas Party and his conduct or behavior at the party and instituted an investigation since if proven it constituted a disciplinary offence.*
- 6.33 *I conducted the investigation which essentially was an interview with the Plaintiff. I recorded the interview and the Plaintiff admitted that he indeed disseminated a message inciting members of staff not to attend the Bank's Christmas Party on 20th December 2014. I hereby exhibit a copy of the recording and mark it "D3".*
- 6.34 *After establishing the facts and upon noting that the Plaintiff had breached terms and conditions of service NBM suspended the Plaintiff from employment on 18th February 2015. One of the reasons for the suspension was that the Plaintiff incited members of staff to boycott the*

2014 Christmas Party. I hereby exhibit a copy of the letter of suspension and mark it "D4".

- 6.35 *The Bank had charged the Plaintiff with several disciplinary offences over and above one that he incited members of staff to boycott the Christmas Party. I hereby exhibit an enquiry form sent to him and mark it "D5".*
- 6.36 *The Plaintiff filed a statement form where he denied all the charges. The enquiry form also clearly stated that the Plaintiff had a right to access any documentation pertaining to his case to assist him in defending himself.*
- 6.37 *The Plaintiff was duly called to a disciplinary hearing and the same took place on 9th July 2015.*
- 6.38 *On 13th July 2015 the Plaintiff was dismissed from employment upon being found guilty of (inter alia) encouraging members of staff not to attend the bank's Christmas Party on 20th December 2014 and behaving in a disorderly manner. I hereby exhibit a copy of the letter of dismissal and mark it "D6". The letter was revised by letter dated 22nd July 2015 after the Service Centre manager included a finding of guilty on the charge of giving false information to investigators which was not one of the charges in the charge sheet. I hereby exhibit a copy of the revised letter and mark it "D7". In this letter the "third charge was duly withdrawn and the Manager clearly stated that this was inadvertently included in the letter dated 13th July 2015.*
- 6.39 *On 21st July 2015 the Plaintiff lodged an appeal against the dismissal. I hereby exhibit a copy of the appeal and mark it "D8".*
- 6.40 *The Appeals Committee duly considered the Plaintiff's appeal and upheld the dismissal on ground (a) contained in the letter of dismissal. The reason under paragraph (b) of the letter of dismissal was quashed by the Appeal Committee for want of evidence. I hereby exhibit a copy of minutes of the Appeal Committee and mark it "D8a".*
- 6.41 *The outcome of the appeal was duly communicated to the Plaintiff. I hereby exhibit a copy of the letter communicating the decision of the Appeal Committee and mark it "D9".*

- 6.42 *The Plaintiff was not dismissed for attending the staff meeting but because of what he did after that meeting namely; inciting people to boycott the Christmas Party and behaving in a disorderly manner.*
- 6.43 *I am the one who investigated this matter and gave evidence. The Plaintiff was aware of this fact and he was free to cross-examine me if he so wished. In fact the Plaintiff was advised at the onset of the Disciplinary hearing that I was not part of the Disciplinary Committee and that he was free to ask me any questions if he so wished.*
- 6.44 *Further, I did not produce a specific report for the investigation the only evidence I had was the recording of the interview I had with the Plaintiff. The Plaintiff was allowed to have access to this recording. I hereby exhibit a copy of my email to him giving him access to the recording and mark it “D10”.*
- 6.45 *It is clear from the evidence that the Plaintiff was duly given an opportunity to be heard and there was a valid reason for his dismissal. Therefore, the dismissal was fair.*
- 6.46 *The Plaintiff's case was handled according to the Bank's laid down procedures. According to the terms and conditions of service the charge on which the Plaintiff was convicted warranted a dismissal. I hereby exhibit a copy of the terms and conditions of service and mark it “D11”.*

NO DISCRIMINATION

- 6.47 *The Plaintiff was not discriminated in any way. In fact the Plaintiff did not at any stage provide evidence to the effect that another person (apart from him) also indulged in the misconduct in respect of which he was dismissed. Had he done so, action could have been taken against such person.*
- 6.48 *Telling people to boycott the Christmas Party was very disruptive behavior and the Bank was entitled to discipline the Plaintiff in respect of the same. Such behavior cannot be justified and could not be a remedy to the alleged grievances anyway.*
- 6.49 *Apart from him the following employees were also charged on various grounds in respect of their conduct during the said meeting held on 19th December 2015 and appeared before the Disciplinary Committee; Cecilia Kuluwani,*

Tomex Kazembe, Grace Chiwalo, John Chalera and Christopher Chigona

- 6.50 *Each case of any person involved in this matter was handled independently and in line with evidence against individual persons.*

TRANSFER NOT RELATED TO DISCIPLINARY MATTER

- 6.51 *Any employee of the Bank can be transferred to any unit within the Bank where his or her services are required.*
- 6.52 *Therefore, there was nothing wrong with transferring the Plaintiff to Karonga Services Centre. Chitipa Agency is under Karonga Service Centre. That is why when the Plaintiff got to Karonga the Service Centre Manager assigned him to Chitipa Agency where there was shortage of staff.*
- 6.53 *The fact that the Plaintiff was transferred to Karonga Service Centre did not mean that he could not be disciplined for his previous acts. The disciplinary procedure had to apply nevertheless.*
- 6.54 *It is wrong for the Plaintiff to conclude that just because he was transferred to Karonga and Chitipa then it means that the Bank did not want him.*
- 6.55 *In fact the fact he was transferred meant that the Bank still considered him to be its employee.*

PLAINTIFF NOT ENTITLED TO BONUS

- 6.56 *It is not true that the Plaintiff was entitled to any bonus. By the time the Plaintiff was suspended on 18th February 2015 no bonus had been declared in favour of any members of staff.*
- 6.57 *In fact according to the terms and conditions of service someone who is on suspension is not entitled to payment of a bonus. Further, any person undergoing disciplinary proceedings is not paid a bonus (where there is one declared by management) unless they are cleared.*

NO DEFAMATION

- 6.58 *The Plaintiff has not adduced any evidence whatsoever to prove the claim of defamation. This confirms the Bank's position that this is a labour matter and should have gone*

to the IRC where each party pays its own legal costs. It is clear that the Plaintiff only included the claim for defamation just to create a wrong impression that there is claim for defamation in his matter over which the IRC has no jurisdiction thereby creating a false justification for commencing this matter in the High Court instead of the IRC.

6.59 *In view of the facts in paragraph 6.55 I plead that this is a proper case in which the Court should award costs to the defendant in any event.*

PRAYER

6.60 *In the premises, I pray that all claims in this matter be dismissed."*

4.7.2 In cross-examination, DW confirmed that he, together with Mr. Jere, conducted investigations and that at the time of investigation he had been employed in the job for less than a year. He told the Court that they interviewed more than fifteen people and some made statements and others did not do so. Asked if he gave a report of the investigations to the Claimant before the hearing for the Claimant to know what was said against him in order to fully prepare his defence, DW admitted that the Claimant was not given any report except a CD comprising a recording of an interview that he had with the Claimant. He admitted that there was no report. He also conceded that none of the people interviewed was called to give evidence against the Claimant. The concession led to the following Q and A:

Q: you attend the disciplinary hearing?

A: Yes! I attended as a witness for the Bank

Q: I put it to you that by the Bank not calling people that you interviewed, you denied the Claimant the right to cross-examine them?

A: That is not right

Q: But why did you not call them for hearing?

- A: Because the charges against him were based on the interview that I had with him
- Q: Go to page 19 of the Claimant's Trial Bundle (BN6 – Enquiry Form). In relation to charge No.1, did you find out that the Claimant is the one who organized the meeting?
- A: He agreed that he informed others
- Q: Is organizing a meeting and informing others about a meeting the same thing?
- A: That is what we felt as investigators
- Q: Did you find out as a fact as to how the meeting was called?
- A: Yes, from the people that we interviewed
- Q: But you did not call these people?
- A: We raised charges on the basis of what he told us
- Q: Was it not Cecilia who called the meeting?
- A: The Plaintiff was party to the calling
- Q: Look at page 8 of the Claimant's Trial Bundle (BN1 – E-mail dated 19 December 2014), did you come across this e-mail?
- A: No!
- Q: What does the e-mail say?
- A: That Cecilia is the one who called for the meeting.
- Q: If you know that there is a meeting and you pass on the message about the meeting, are you the one calling for the meeting?

A: It depends on whether you are part of the organisers or not

Q: Look at Charge No. 1, how did the Claimant organize the meeting?

A: He was advising others to attend the meeting

Q: How did he organize it?

A: He advised other people to attend it

Q: Who are these other people that were instructed by the Claimant?

A: I cannot recall their names off-hand?

Q: Not even one?

A: No! Not at this moment

Q: Did the people that were instructed come to the hearing?

A: No!

Q: How then was this charge proved?

A: He was found with no case to answer on charge (a)

4.7.3 When taken through the charges (b) and (c), DW told the Court that the Claimant was not found guilty of charge (c) and part of count (b) relating to encouraging employees to boycott a Christmas party. He said the Claimant was only found guilty of the part of count (b) relating to conducting himself in a disorderly manner in terms of demeanor and dressing during the Christmas party on 20th December 2014.

4.7.4 DW confirmed that the 1st Dismissal Letter is the one that effectively dismissed the Claimant and it contained three reasons for the dismissal. Asked about the reasons for the dismissal per the 1st Dismissal Letter, DW repeatedly told the

Court that the same were wrong and the 1st Dismissal was wrong. He also admitted that the 1st Dismissal Letter contained a reason which did not appear on the charge sheet.

- 4.7.5 DW also confirmed that the Claimant appealed on 21st July 2015 and that among his grounds of appeal was ground (e) in which he complained about the fact that he was not charged on one of the reasons for the dismissal. DW then stated that upon receipt of the letter of appeal, the Defendant realized that the 1st Dismissal Letter had a mistake because it contained a reason that was not part of the charges levelled against the Claimant. He stated that this was a genuine mistake and that when the Defendant noted the mistake, the Defendant corrected the mistake by writing the 2nd Dismissal Letter. When it was put to him that the 2nd Dismissal Letter also contained reasons that were wrong, DW had nothing to say.
- 4.7.6 DW stated that, at the end of the day, the Claimant was dismissed for one reason as contained in the letter of 25th September 2015 [Exhibit BN 12] which related to encouraging staff members to boycott the Staff Christmas Party on 20th December 2014 which would have caused public embarrassment and damage the bank's image.
- 4.7.7 DW admitted that the meeting was attended by over thirty people. He also admitted that the Defendant did not call for hearing all the thirty people despite attending the meeting. He told the Court that only five people were called for a hearing.
- 4.7.8 On the transfer of the Claimant to Karonga and Chitipa, DW told the Court that the Claimant was transferred to be a bank clerk and that such transfers are normal within the bank. Asked if the Defendant posts its staff to positions such as bank clerk without training, the witness struggled for an answer.
- 4.7.9 Regarding the calling of the meeting, DW stated that during the investigation he did not get to see the email that CW3 wrote (Exhibit BN1). He as such admitted that he did not know that the meeting was called by CW3 through an email. He insisted, without a good reason, that the meeting was called by CW3 and the Claimant. He said that the Claimant called the meeting by

telling people to attend the meeting. He was, however, unable to mention even a single person that the Claimant told to attend the meeting.

4.7.10 On the issue of bonuses, DW stated that in terms of clauses 5 (b) and (c) of the terms and conditions of service, the Claimant was not entitled to receive a bonus.

4.7.11 In re-examination, DW reiterated that the Claimant was charged with three charges and these charges were similar to those appearing on the summary of report of hearing. With respect to the reasons given for the dismissal in the 1st Dismissal Letter, DW said that two of the reasons related to the charges but one reason did not appear on the charge sheet and, as a result of the mistake, the 1st Dismissal Letter was revoked and the 2nd Dismissal Letter was issued which gave two reasons for the dismissal.

4.7.12 DW restated that Claimant was found guilty because of the message he sent. He said both the Disciplinary Committee and the Appeal Committee found the Claimant guilty for sending message advising fellow employees not to attend a party. He confirmed interviewing over fifteen people and said he did not call any of them to the hearing because after reviewing the interviews, they decided not to call witnesses but relied on the recording of the claimant's evidence.

4.8 The Defendant closed its case.

5.0 ISSUES FOR DETERMINATION

There are essentially four issues for the Court's determination and these are whether or not:

- (a) the Claimant had misconducted himself leading to the dismissal?
- (b) the Claimant was accorded a fair hearing?
- (c) the Claimant acted with justice and equity in all circumstances of the matter?

(d) the Claimant is entitled to the reliefs he seeks.

6.0 SUBMISSIONS BY THE CLAIMANT

6.1 It is the case of the Claimant that he has adduced more than enough evidence to prove all the elements of the unfair dismissal as particularized in his statement of case.

6.2 *Opportunity to cross examine whoever made a report or statement against the Claimant*

6.2.1 The Claimants contends that the cases of **Francis Komwa v. Chloride Batteries, MSCA Civil Appeal No. 50 of 2010 (unreported)**, **The State v. Nurses and Midwives Council of Malawi ex-parte Rhoda Jamu, HC/PR Civil Cause No. 51 of 2009 (unreported)** and **Jawadu v. Malawi Revenue Authority 2008 MLLR 397** stand for the proposition that (a) failure to provide an opportunity for an accused employee to cross-examine those who made statements against the employee during investigations tantamounts to breach of the principles of natural justice and (b) an accused employee does not necessarily have to ask for the opportunity to cross-examine his accusers. The employer must create a situation in which the accused must face and question his or her accuser if he or she so wants.

6.2.2 The Claimant seeks to apply the stated propositions to the present case as follows:

“6.2.1.2 It is in evidence that the Defendant conducted investigations. During these investigations the Defendant interviewed over fifteen people. Obviously some of these people made allegations against the Claimant. For instance in paragraph xxviii (5.2.1.30 herein) the Defendant’s witness states that he found during the investigations that the meeting did not make the resolution communicated by the Claimant in the text so the message was his own creation. This when considered against the evidence before the Court, is clearly contradictory to what exactly happened. Thus whoever made such a statement against the Claimant ought to be cross-examined. However the Defendant decided not to bring such people

for cross examination but heavily relied on their information against the complainant. This was against principles of natural justice hence the hearing was unfair."

6.3 Failure to provide the Claimant with copy of the investigation report for the Claimant to be fully aware of what was said against him in order to fully prepare his defence

6.3.1 Counsel Chayekha submitted that it is commonplace that the Defendant conducted investigations and clearly relied on the finding of the said investigations in charging the Claimant. That being the case, Counsel Chayekha contends that a report of the investigations ought to have been given to the Claimant for him to know what people said about him.

6.3.2 The authorities on which Counsel Chayekha principally relied on are the cases of **The State v. Nurses and Midwives Council of Malawi Ex-parte Rhoda Jamu**, supra, and **Francis Komwa v. Chloride Batteries**, supra. In the said cases, the Court found the Defendants liable for unfair dismissal for failing to give reports of investigation to the accused employee before a hearing.

6.3.3 The full arguments on this alleged element of unfair dismissal are to be found in paragraph 6.2.2 of the Claimant's Final Submissions which reads:

"6.2.2.2 In this case, the Defendant's witness admitted that the Defendant conducted an investigation. He told the Court that he interviewed over fifteen people. Surely these people made various statements. Possibly some for the Claimant and some against the Claimant. By the requirement of the law the Claimant ought to be informed as to what the various people said. It is without doubt that the Defendant used some of the information gathered through the investigations against the complainant. Even if the Defendant may not have used the information, the law requires that the Claimant be given the report before the hearing.

6.2.2.3 The Defendant's witness actually said he did not produce any report and only relied on the interview he had with the Claimant. But does this help the Defendant's case? Your Lordship we submit that this must be treated with a pinch of salt. We submit thus because when one looks at exhibit

“BN6” the “enquiry form” it will be noted that the Defendant accused the claimant of

- (i) taking part in convening a staff meeting without following proper procedures.*
- (ii) taking a leading role in the deliberations of the meeting.*
- (iii) Arriving belatedly in a drunken state.*
- (iv) Deliberately choosing not to observe the dress code as advised by the organizing committee.*

6.2.2.4 Further the Defendant in paragraph 2 of the same exhibit “BN6” states “our independent investigation established that the invitation to the meeting had no agenda It has been further established that you took part in convening the meeting ”

6.2.2.5 In paragraph 5 of the same exhibit “BN6” the Defendant states that it was further established that the Claimant conducted himself in a disorderly manner during the Christmas Party It was established that you were heard mocking some members of staff at the main gate entrance You further labeled them uncooperative for gracing the party contrary to the resolution of the meeting held on 19th December 2015.

6.2.2.6 Your Lordship, the contents of exhibit “BN6” alluded to in the above paragraphs formed the basis of the charges leveled against the Claimant. From the wording of the said paragraphs it is clear that all that was established from the Defendant’s independent investigation was taken into account in formulating the charges. Clearly therefore the Defendant’s witness would not be correct to state that the Defendant only relied on the interview with the Claimant. Exhibit “BN6” is so clear on what the claimant said and what the independent investigation established. Furthermore if the Court looks at all the charges it will be clear that the charges include aspects of what the defendant states to have been established from its independent investigations as stated herein. This for sure does not support the defendant’s assertion that it did not give a report of the investigations because it relied on the Claimant’s own interview”.

6.4 *The Defendant dismissed the Claimant on charges which were not proved*

The Claimant's submissions on this alleged element of the unfair dismissal are brief and they will be quoted in full:

“6.3.1 Your Lordship the reasons for the claimant's dismissal are stated in exhibit “BN6” letter dated 13th July 2015. The defendant's witness admitted in Court that this letter is the letter that effectively dismissed the claimant. Now, going through the reasons given for the dismissal in light of the evidence before the Court, the evidence before the Court clearly shows that the meeting was called by Cecilia Kuluwani through an e-mail. The claimant got word about the meeting and told others but there is nothing before the Court that proves that the Claimant encouraged others to boycott the staff Christmas party. Further there is nothing that proves that he coerced fellow members of staff to attend the wrongfully convened meeting or is there anything proved that the claimant advised members of staff at a meeting to boycott the Christmas party. Additionally ground (c) was not on the charge sheet hence not proved at all.

6.3.2 Does the letter of 22nd July 2015 (exhibit D7) help matters? Surely not. The said letter contains similar reasons as exhibit “BN9” except ground (c) hence the above arguments apply. It actually is not surprising that all the grounds except one were dismissed on appeal.

6.3.3 Does the fact that the complainant appealed and some of the reasons for the dismissal were dismissed cure the anomalies shown? We would firstly urge the Court to mark the fact that the effective letter that dismissed the Claimant is the one of 13th July 2015 and the Defendant itself admitted it was wrong and we have shown that all the reasons for the dismissal there in were not proved.

6.3.4 Turning to the reason for the dismissal given in the letter of dismissal after appeal, it should be noted that it is the same as contained in reason (a) in the letter of 13th July 2015. However the Defendant's witness said the claimant was not guilty of that charge.”

6.5 *The Defendant dismissed the Claimant based on his attending a meeting called by a duly recognized group of workers' representative to discuss grievances and for sharing with others agreements reached at a meeting called by the said representative*

The Claimant contends that it was unfair for the Defendant to dismiss him for attending a meeting of a duly recognized group of workers. The full arguments on this alleged element of unfair dismissal are to be found in paragraph 6.4 of the Claimant's Final Submissions which is couched in the following terms:

- "6.4.1 Your Lordship, it is not in dispute that the genesis of the Claimant's troubles is the meeting called by Cecilia Kuluwani a JCC representative. From the charge sheet exhibit "BN6" it is again clear that the Defendant picks issue with the Claimant's attendance of the meeting in question. It is also clear from the charge sheet and the grounds of dismissal in exhibit "BN9, "D7" and "BN12" that the defendant picks issue with the claimant's communication of the resolution of the meeting. The question that arises is was the Claimant wrong in any way?*
- 6.4.2 Your Lordship, the evidence before the Court proves that as a JCC representative, Cecilia Kuluwani had authority to call members of staff for a meeting to discuss issues. This must be differentiated from the JCC committee meeting under the Constitution. The mode of calling for the meeting used by Cecilia also speaks volumes. Could she instruct the Administrative Assistant if she did not have that authority? Doubtful.*
- 6.4.3 Cecilia Kuluwani as a JCC representative having called a meeting for staff members from the department the Claimant belonged, could it be wrong for the Claimant to attend the said meeting? Your Lordship, the working climate at the material time should always be called to mind. It is not disputed that there were grievances. It is not disputed that management communicated to staff members and likewise staff members communicated to management through JCC. So a JCC representative having called for the meeting, it surely was all reasonable for the Claimant to attend the said meeting. Therefore, we submit that the attendance of the meeting cannot be faulted.*
- 6.4.4 Was it wrong for the claimant to communicate the resolution of the meeting? Your Lordship, there is no dispute that the meeting in question resolved that staff members should boycott the staff Christmas Party set for the following day. It is again not in dispute that the meeting agreed that that resolution should be communicated to the other staff members who did not attend the meeting through whichever way of communication. Was the claimant wrong to oblige with the agreement and send messages through "whatsapp"? Was the Claimant sending his own resolution? It is our submission that since the claimant only did what the meeting agreed he must not be blamed for it. We invite*

the Court to consider the message the claimant sent. He clearly alludes to an agreement by members of staff. We thus further submit that for dismissing the claimant for this reason the Defendant acted unfairly."

6.6 The Defendant dismissed the Claimant for a charge he was not charged with at the disciplinary hearing hence did not defend himself

The Claimant's submissions on this alleged element of unfair dismissal are as follows:

"6.5.1 Your Lordship, we restate that the Claimant's effective date of dismissal was 13th July 2015 as a result of the letter written by the Defendant on that date. It has been admitted that the said letter contained reason no (3) for dismissal and that reason was not part of the grounds on the charge sheet. Our submission is that that reason contributed to the claimant's dismissal as it showed that the claimant committed more misconducts thereby condemning him to dismissal and not any other lenient punishment. In actual fact the Defendant's witness in answering a question from the Court indicated that if the claimant was guilty of all the charges he would receive the highest punishment. This proves the fact that the more charges one is guilty of the higher the punishment. This was unfair.

6.7 The Defendant did not act with justice and equity

6.7.1 The Claimant submits that the Defendant did not act with justice and equity for the following reasons:

"6.6.2.1 The Claimant had worked with the Defendant for over five (5) years and at the time of his dismissal the claimant did not have any warning. Could the Defendant deal with the Claimant in any other way other than a dismissal considering the wrong he is said to have committed? Probably to answer this question it would be proper to set out the final reason the claimant was dismissed for. According to exhibit "BN12" letter of 23rd September 2015, the reason given was "Misconduct of conducting yourself in a disorderly manner on the Bank's premises, or where disorderly behavior outside the Bank shall cause public embarrassment, as per Section 11.06 of the Bank's Terms and Conditions of Service for encouraging members of staff to boycott the staff Christmas Party on 20th December 2014, which would have caused public embarrassment and damage the Bank's image. (emphasis supplied).

6.6.2.2 *Did the claimant conduct himself in a disorderly manner?*

According to Oxford Advanced Learner's Dictionary (7th Edn) to "conduct oneself" means to behave in a particular way. This means that for the Claimant to be said to have conducted himself he must have behaved in a particular way. And that behavior according to the reason given by the Defendant for the Claimant's dismissal, must have been "disorderly." Again according to Oxford Advanced Learner's Dictionary (7th Edn) "disorderly" means showing lack of order or control; publicly violent or noisy or untidy". However, exhibit "BN12" says the defendant's conduct was "encouraging members of staff to boycott the staff Christmas Party". The letter does not suggest that the Claimant had been disorderly (showing lack of order, of control or being publicly violent). According to evidence before the Court the claimant is alleged to have encouraged members of staff by sending a whatsapp message of the resolution of the meeting attended by the claimant.

6.6.2.3 *The question that arises is, did the Defendant prefer a correct charge according to what happened? Our submission is that the Defendant preferred a wrong charge because as we will show later the Defendant was geared at having the claimant dismissed. With this in mind the Defendant chose this particular charge so that it should be a charge with no lesser punishment but dismissal. Surely if the defendant were to act with justice and equity it would have preferred a less serious offence. The Defendant's conditions of service have a very long catalogue of offences. It must be recalled that the claimant was also accused of dressing contrary to the code but the Defendant did not pick on this offence. In addition the list of offences is not exhaustive hence giving the Defendant more room to find suitable charges."*

6.7.2 To buttress his submissions on this point, Counsel Chayekha cited s. 61(2) of the Employment Act (Act), which calls upon employees to act with justice and equity. He also referred the Court to the case of **Steven Mahowa v. National Bank of Malawi, HC/PR Civil Cause No 461 of 2012 (unreported)** [hereinafter referred to as the "**Mahowa Case**"] which held that even if an employer may have a valid reason for dismissing an employee, the dismissal may be annulled if the employee did not act with justice and equity.

6.8 *Was the dismissal pre-mediated?*

The Claimant strongly urged the Court to find that the dismissal was pre-mediated. Paragraph 6.7 of the Claimant's Final Submissions is relevant and I will reproduce it in full:

"6.7.1 Your Lordship per the evidence before the Court which was not disputed, prior to the claimant being transferred to Karonga, there had been rumour that the Claimant was responsible for the list of love affairs in the Defendant's bank which went viral. Immediately after this the claimant was transferred. It is common knowledge that the bank being responsible for handling big sums of customers' money its staff members are supposed to be trained more especially those that handle money. It should be surprising that in the claimant's case the claimant was being transferred from a non money handling post to a money handling post but without training. This was despite the Claimant's protestation. Again the urgency with which the Claimant had to go to Karonga should raise an eye brow. In addition the manner he was treated upon arrival in Karonga and the whole process leading to the suspension is clearly indicative of the fact that the claimant was not wanted. The climax of it all is, as demonstrated herein and through the evidence before the Court, the Defendant charged the claimant with things he did not do and even include a ground for dismissal for something that was not charged. Finally as just argued above the Defendant chose charges whose punishment was only dismissal. All this to ensure that he does not survive. We therefore submit that the Defendant clearly intended to have the claimant dismissed from word go. The hearing was only a smoke screen. This is no doubt unfair labour practice and unlawful."

7.0 SUBMISSIONS BY THE DEFENDANT

In the interest of parity of treatment, the arguedo by the Defendant will also be set out in full:

"7.0 LAW AND SUBMISSIONS

7.1 Whether the meeting of 19th December, 2014 was a lawfully constituted JCC meeting.

My Lord, all witnesses in this matter have confirmed in their evidence that the meeting called by Cecilia Kuluwani on 19th December, 2014 was not a JCC meeting.

Further all witnesses confirmed that in the calling the meeting the Grievance procedure of the Bank was not followed.

7.2 **Whether the Claimant encouraged members of staff to boycott the Christmas party organised by the Bank.**

The evidence is so clear that in his message sent to staff (see paragraph 6.27 of DW 1's witness statement the Claimant encouraged members of staff not to attend the Christmas party. He admitted this fact when he was interviewed by Investigators (clear from CD recording of interview. The court may listen to the recording at its own time) and also admitted this fact during cross examination. He encouraged staff members not to attend Christmas party organised by the Bank.

His intention in sending the message was clearly malicious. Although PW2 and PW3 told the court that the staff meeting agreed to boycott the party and that those who wanted to attend the party were free to do so, in the message that the claimant sent he completely left out the part that stated that those who wanted to attend the party were free to do so. His intention as admitted during cross-examination was clearly to make sure that people should not attend the party and that it should flop. This could have greatly injured the Bank. The Bank could obviously have been embarrassed and its image damaged.

7.3 **Whether the Bank followed procedure in conducting the disciplinary hearing.**

My Lord, the Bank should be commended for religiously following disciplinary procedure in this matter. This is clear from the evidence. The plaintiff also confirmed this fact in cross-examination.

He was given charges in writing; he was given evidence of the Bank (i.e. CD recording); he responded to the charges in writing; he was called for disciplinary hearing; he also oral representations; after dismissal he was allowed to appeal; he attended appeal and made his representation (quite apart from his written submission). It is clear my Lord that the Bank duly followed procedure in this matter.

An investigation report could not be presented to the Claimant as alleged because the investigators did not produce any report. They relied on the interview they had with the Claimant whose copy was

given to him. My Lord, at no point in this trial did the Claimant disown the recorded interview.

7.4 **Whether there was a good reason to warrant dismissal of Claimant.**

The disciplinary committee and the appellate panel found that the reason of the Claimant encouraging members of staff not to attend the Christmas party was made out.

Indeed my Lord, even during the trial the evidence presented clearly prove that the Claimant indeed encouraged members of staff not to attend the Christmas party. No sane employer can condone this lawless act. Section 57 of Employment Act recognizes an employee's conduct as a basis for dismissal.

7.5 **Whether the Bank was entitled to dismiss the Claimant.**

My Lord, the charge on which the Claimant was dismissed is one of misconduct as described in the charge sheet. The Bank's position is that the plaintiff conducted himself in a disorderly manner on Bank's premises in encouraging members of staff to boycott the Christmas party, or if this disorderly behaviour was done outside the Bank's premises it was such behaviour as would cause public embarrassment or damage to the Bank's reputation.

The terms and conditions of service have clearly laid out disciplinary offences and penalty or disciplinary action to be meted out in any given case. The Claimant's behaviour (as with all the disciplinary offences under the terms and conditions of service) was a **misconduct** (see subheading of change 11:06 on page 37) and its category falls under item on line 8 on page 39 of the terms and conditions of service. According to the terms and conditions of service the penalty for such type of misconduct is dismissal. There is no alternative penalty provided.

This case is distinguishable from civil cause no. 461 of 2012 **Steven Mahowa v National Bank of Malawi** where the disciplinary offence under which the plaintiff was dismissed provided for other lower sanctions apart from dismissal.

Terms and conditions of service are part of employment contract. Parties are bound to this. The court may not rewrite the contract by subsisting any term of the contract.

7.6 **Whether the dismissal was fair**

We submit that the dismissal was fair. There was a good reason to warrant dismissal and the Bank followed rules of natural justice including giving the plaintiff opportunity to be heard.

7.7 **Whether the Claimant was entitled to any bonus**

My Lord, we submit that in terms of clauses 5(b) and (c) of terms and conditions of service the Claimant was not entitled to any bonus.

7.8 **Whether the claimant is entitled to damages for defamation**

We have touched on this issue in paragraph 1.0 above. Suffice to say that there was no defamation. The Claimant did not even attempt to prove this claim.

7.9 **Whether the Claimant is entitled to damages for discrimination.**

Although the Claimant concludes in the reliefs paragraph of the statement of claim that he wants damages for discrimination. He has not provided in the body of the statement of claim material facts on which that claim is based.

Even during trial he did not give any evidence to prove the claim of discrimination."

8.0 ANALYSIS AND DETERMINATION

- 8.1 The case of the Claimant, as defined by the Re-Amended Statement of Case, is that he was unfairly dismissed by the Defendant.
- 8.2 The Defendant levelled three disciplinary charges against the Claimant and these are set out in Enquiry Form (Exhibit BN6). For reasons which will become clear in due course, the Enquiry Form (Exhibit BN6) will be reproduced *in extenso*:

"SUBJECT: CHARGE

You are hereby suspected to have committed the following breach(es) of the terms and conditions of your employment:

1. *On December 2014, while working as a Reconciliation Clerk in Finance Division you took part in convening a staff meeting held in the Pose room on NBM Towers Fifth floor without following proper procedure and guide lines. You also took a leading role in*

deliberations of the meeting whose agenda was to sabotage the Staff Christmas party scheduled for 20 December 2014 by discouraging employees and their spouses from attending it. You also conducted yourself in a disorderly manner during the said Christmas party on 20 December 2014 by arriving belatedly in a drunken state and deliberately chose not to observe the dress code as advised by Organizing Committee.

2. *Our independent investigations established that the invitation to the meeting had no agenda; hence, most attendees only got to know the subject of the meeting at the venue. It has been further been established that you took part in convening the meeting discouraging your fellow members of staff from attending the Christmas party as a way of showing discontentment with the Bank's decision not to pay interim performance related bonuses in December 2014.*
3. *In your explanation in a recorded interview with the Investigation team of 17 February 2015, you stated that you attended the meeting having received an invitation for the meeting convened by Joint Consultative Committee (JCC) Employee representative Cecelia Kuluwani who is responsible for the Treasury and Investment Banking Division and not Finance Division where you were stationed. Prior to the meeting you also spread the news about the said meeting, thereby inviting them.*
4. *You also stated that despite every employee having received invitations, the meeting resolved that members of staff should boycott the Christmas party. However those who wished to go were free to do so bearing in mind that as a group you agree not to attend the party. You went on to state that the meeting also agreed that the members of staff within Blantyre, i.e., service centres and those who did not attend the meeting should be informed of the resolution. You therefore took it upon yourself to circulate "Whatsapp" text messages which read **"We are not coming tomorrow for party. Agreed members of staff. Tell your neba pipo are saying we cant go to a party while crying inside ndi maluzi. Ndalama zimenezwo akanatha kutipatsa voucher This is the only opportunity to send a message to them that pipo are not happy"***
5. *It was further established that you conducted you conducted yourself in a disorderly manner during the Christmas party in terms of your dressing and demeanor. Your dressing was not in accordance with the dress code adopted and advised by the organizing committee. It was also established that you were heard mocking some members of staff at the main gate entrance to NBM Towers as they made their way to the party venue. You further*

labeled them as uncooperative from gracing the party contrary to the resolutions of the meeting held on 19th December 201

6. *As a former JCC representative you should be quite aware of the JCC constitution which clearly stipulates that staff grievances shall be handled in accordance with the Bank's terms and conditions of service. It further states that employees may channel their grievance through the Division or Branch's Works Committee. The works committee shall examine the grievances and determine whether or not to present it to the Division/ Branch Management. Any grievance which cannot be resolved at Division/Branch level may be referred to the JCC, and any grievance which cannot be resolved by the JCC shall be referred to the Chief Executive. The grievances you are alluding to did not follow any of these procedures.*
7. *We find your explanations to be lacking in merit and your behavior deplorable and demeaning. As a well-versed employee with vast experience in the Bank and being a former JCC Employee representative whom the Bank looks up to, you were expected to act with due diligence by not flouting the Bank's conditions of service.*

You are therefore charged with misconduct as follows:

- a) ***Violation of service rules and regulations as per Section 11: 06 of the Bank's Terms and Condition of Service for being party to the organization of a meeting in disregard of procedure and guidelines as stipulated in the Bank's Terms and Conditions of Service and Section 10 of the Joint Consultative Committee Constitution which was in force at the material time.***
- b) ***Conducting oneself in a disorderly manner on the Bank's premises or where disorderly behavior outside the Bank shall cause public embarrassment or damage to the Bank's image as per Section 11.06 of the Bank's Terms and Conditions of Service for encouraging employees to boycott the staff Christmas Party on 20th December 2014, which would have caused public embarrassment and damage the Bank's image. You also conducted yourself in a disorderly manner in terms of demeanor and dressing during the Christmas party on 20 December 2014.***
- c) ***Sabotage as per as per Section 11.06 of the Bank's Terms and Conditions of Service for coercing fellow members of staff to attend the wrongfully convened meeting advising members of staff at the meeting that you called to boycott the Staff Christmas party scheduled for 20 December 2014 and disseminating text messages via "WhatsApp" to fellow employees to influence them to boycott the Christmas party.***

Statement of circumstances (continuation sheet to be attached if necessary). Having heard the accusation, you are hereby requested to submit a written statement to this division/service centre with a copy to the Head of Human Resources to exculpate yourself within 10 working days of this Charge.

You have the right to access all documentation pertaining to your case that gave rise to this/these charge(s) in order to assist you in preparing your defense. – Emphasis by underlining supplied

- 8.3 Having denied the charges in their entirety, the Claimant appeared before a Disciplinary Committee. The Defendant tendered Minutes of the Disciplinary Hearing and the same consists of seven subparagraphs headed “Charges”, “Summary of case against Bannet”, “Summary of Bannet’s response”, “Concerns raised by Bannet”, “Lessons Learnt”, “Summary of Committee’s findings” and “Conclusion” respectively. For reasons which will be clear in a moment, I will quote at length from the Minutes of the Disciplinary Hearing:

“3.6.1 SUMMARY OF CASE AGAINST BANNET

It was alleged that on 19th December, 2014 Bannet took part in convening JCC staff meeting without following proper procedures and guidelines. It was also alleged that he took a leading role in the deliberations at the meeting whose main agenda was to sabotage the staff Christmas Party. Further, he conducted himself in disorderly manner at the Christmas Party held on 20th December by arriving late in drunken state and did not conform to the dress code. It was further alleged that Bannet circulated Whatsapp text messages to some members of staff advising the not to attend the party.

The charges against Bannet were read out to him and he confirmed denying all three charges.

3.6.2 SUMMARY OF BANNET’S RESPONSE

Charges (a)

Bannet said that he was not party to the organization of the meeting. He received a verbal invitation to the meeting through the Personal Assistant in Financial Division. He might have indeed extended the invitation to others but he found that as normal and that should not have been construed as though he was

the one who convened the meeting. He could not remember how many people he had extended the invitation to. The meeting did not have an agenda, but Bannet explained that even when he was a JCC representative for Financial Division, he would call for a JCC meeting and advise of the agenda whilst already at the meeting.

Charge (b)

Bannet indicated that he personally did not encourage anyone to boycott the party. This was a collective decision not to attend the party. It was further agreed that those who wanted to attend should do so. The meeting further agreed to relay the message to others who did not attend the meeting. He personally chose not to attend the party. However, during the evening of the party he received phone calls from colleagues that rumours circulating was that he was the one who was inciting staff members to boycott the party. He felt therefore that he should show up at the party to dispel the rumour. However he was not home the time he received the phone call and it was too late for him to go home and change into decent evening attire hence his casual dress at the party. Bannet however regretted his lack of proper dress because after the party, his Head of Division reprimanded him verbally on his inappropriate dress code.

Charge (c)

Bannet denied coerced anyone to boycott the party. He admitted having sent the Whatsapp text message, however the other text message that he sent communicating that those who wanted to attend the party could do so was missing. The text message was mere communication of part of the resolutions of the meeting as it was agreed that they should communicate the same to members of staff that did not attend the meeting.

Bannet indicated that he raised the issue of the missing text messages with the investigators.

3.6.3 Concerned Raised by Bannet

Bannet expressed concerned that he felt he had been victimized because he was treated as though he was not wanted in the Bank. He was transferred to Karonga Service Centre yet he was

responding to charges. As soon as he was transferred, he was suspended. He found this treatment rather unfair.

3.6.4 Lessons Learned

His bitter lesson was the failure to comply with the dress code that ended up with a verbal reprimand by his Head of Finance.

3.6.5 Summary of Committee's Finding

The Committee's findings were that:

- a) Bannet attended the meeting on 19Th December 2014 but there was no evidence that he took part in organizing the same. He received the verbal invitation and responded to the invitation by attending the meeting. The fact that he extended such invitation to fellow colleagues was not evidence that he took part in convening the party.*
- b) Bannet encouraged employees to boycott the party by sending out the text message which he owned as his. There was no evidence that Bannet had advised the investigators that the other text message conveying the resolution that those wanted to attend the party could do so was indeed sent. His recorded interview did not indicate that there was another text message. Further it was confirmed by the investigators that when Bannet was shown the text message during the investigations, he owned it but did not at the time state that there was another text message missing.*
- c) Bannet conducted himself in a disorderly manner at the party in terms of his demeanor. Bannet did not dispute the allegations that he mocked fellow members of staff at the main gate entrance to the Bank (NBM Towers) as they made their way to the party venue for having attended the party despite the resolution to boycott it.*

3.6.6 Conclusion

In view of the above finding, the following disciplinary actions were taken against Bannet:

Charge (a) - No case to answer

Charge (b) - Dismissal

Charge (c) - Dismissal."

- 8.4 The findings of the Disciplinary Committee were communicated to the Claimant through a letter dated 13th July 2015 (Exhibit BN9), written by the Manager for Karonga Service Centre [hereinafter referred to as the "1st Dismissal Letter"]. The body of the 1st Dismissal Letter states as follows:

"Following the disciplinary hearing that you attended on 9th July 2015, the Disciplinary Committee found you guilty of the following acts of misconduct:

- a) Misconduct for conducting yourself in a disorderly manner on the Bank's premises or where disorderly behavior outside the Bank shall cause public embarrassment or damage to the Bank's image as per Section 11.06 of the Bank's Terms and Conditions of Service for encouraging employees to boycott the Staff Christmas Party on 20th December 2014, which would have caused public embarrassment and damage the Bank's image.*
- b) Misconduct for sabotage as per as per Section 11.06 of the Bank's Terms and Conditions of Service for coercing fellow members of staff to attend the wrongfully convened meeting, advising members of staff at the meeting to boycott the Christmas Party scheduled for 20 December 2014, and disseminating text messages via "WhatsApp" to fellow employees to influence them to boycott the Christmas party.*
- c) Misconduct as per as per Section 11.06 of the Bank's Terms and Conditions of Service for making false statements to the investigation team that the meeting resolved that those who wanted to go to the party should do so, and those who did not wish to could stay away, when in fact the meeting resolved that members of staff should boycott the Christmas Party to express their collective discontentment with the Bank's decision not to pay interim bonuses and the dress code.*

In view of the gravity of the acts of misconduct committed, and in line with the Bank's disciplinary rules and articles of agreement, the Disciplinary Committee decided to summarily dismiss you from service with immediate effect.

Details of your terminal dues and liabilities will be communicated to you later under separate cover"- Emphasis by underlining supplied

8.5 By his letter dated 21st July 2015 (Exhibit BN 10), the Claimant filed a notice of appeal against his dismissal [hereinafter referred to as the “Notice of Appeal”] wherein he sets out the following grounds of appeal:

- “(a) I was never given an opportunity to question or examine whoever made a report or statement against me during the investigations.*
- (b) I was not furnished with the investigation report for me to be fully aware of what was said against me.*
- (c) There was no proof that I was one of the organizers of the meeting in view of the fact that there is evidence that the meeting was organized by someone else.*
- (d) I have been victimized for sharing a decision that was arrived at a JCC meeting.*
- (e) I was never charged with an offence relating to making false statements to the investigation team hence I was not given an opportunity to defend myself and as such, it is wrong for me to be dismissed on a charge I never responded to at the disciplinary hearing.*
- (f) The punishment is harsh because I have never received any warning.”*

8.6 Hardly had the Defendant received the Notice of Appeal when the Defendant issued the following letter dated 22nd July 2015 [hereinafter referred to as the “2nd Dismissal Letter”]:

“Following the disciplinary hearing that you attended on 9th July 2015, the Disciplinary Committee found you guilty of the following acts of misconduct:

- a) Misconduct for conducting yourself in a disorderly manner on the Bank’s premises or where disorderly behavior outside the Bank shall cause public embarrassment or damage to the Bank’s image as per Section 11.06 of the Bank’s Terms and Conditions of Service for encouraging employees to boycott the Staff Christmas Party on 20th December 2014, which would have caused public embarrassment and damage the Bank’s image.*
- b) Misconduct for sabotage as per as per Section 11.06 of the Bank’s Terms and Conditions of Service for coercing fellow members of staff to attend the wrongfully convened meeting, advising members of staff at the meeting to boycott the Christmas Party scheduled for 20 December 2014, and for disseminating text messages via*

“WhatsApp” to fellow employees to influence them to boycott the Christmas party.

Please note that the third charge which was about making false statement to the investigation team was inadvertently included in your letter and has therefore been withdrawn. The contents of this letter therefore supercede those of the earlier one which was issued on 13th July, 2015.

In view of the gravity of the acts of misconduct committed, and in line with the Bank’s disciplinary rules and articles of agreement, the Disciplinary Committee decided to summarily dismiss you from service with immediate effect.

Details of your terminal dues and liabilities will be communicated to you later under separate cover” – Emphasis by underlining supplied

- 8.7 The Appeals Committee sat on 14th August 2015 to hear the appeal by the Claimant and it upheld the dismissal of the Claimant on one ground only. It is necessary to quote the relevant part of the Report of the Appeals Committee (Exhibit BN11):

“4.4 Committee’s Deliberations.

The Committee observed that:

- i. Bannet attended the alleged JCC meeting which in his own words said passed a resolution that members of staff should boycott the Christmas Party.*
- ii. Bannet proceeded to disseminate a resolution with an aim of coercing members of staff to boycott the Christmas party. The Committee observed that this was against the norms of the bank.*
- iii. Bannet’s dismissal related to coercing members of staff not to attend the Christmas Party.*
- iv. The first part of reason b for his dismissal which reads “Misconduct for sabotage as per as per Section 11.06 of the Bank’s Terms and Conditions of Service for coercing fellow members of staff to attend the wrongfully convened meeting,” appears to be unsupported by any evidence. The available evidence only showed that the meeting was called by someone else and not Barnett*
- v. There was no report or no witness whose names could be given to Bannet and furthermore that all the evidence which was relied upon was contained in the CD which the investigators had disclosed to Bannet.*

5.5 Verdict

The Committee:

Upheld the decision of the Disciplinary Committee dismissing Bannet

Recommended that the ground for dismissing Bannet should be confined to the reason numbered (a) in the dismissal letter dated 22 July, 2015 for the reason mentioned in 4.4. (iv) above.” – Emphasis by underlining supplied

8.8 With due respect to the Appeal Committee, the Appeal Committee’s deliberation and the verdict are difficult to read together. There is circulus inextricabilis! How has this muddle (for it is no less) come about?

8.9 As already discussed hereinbefore, misconduct in paragraph (a) in the 2nd Dismissal Letter states as follows:

“Misconduct for conducting yourself in a disorderly manner on the Bank’s premises or where disorderly behavior outside the Bank shall cause public embarrassment or damage to the Bank’s image as per Section 11.06 of the Bank’s Terms and Conditions of Service for encouraging employees to boycott the Staff Christmas Party on 20th December 2014, which would have caused public embarrassment and damage the Bank’s image.” – Emphasis by underling supplied

8.10 The catchwords in this charge is that the Claimant is alleged to have “*encouraged employees to boycott the Staff Christmas Party*”. In terms of the verdict of the Appeals Committee, this charge is supported by reason mentioned in paragraph 4.4. (iv) which reads:

“The first part of reason b for his dismissal which reads “Misconduct for sabotage as per Section 11.06 of the Bank’s Terms and Conditions of Service for coercing fellow members of staff to attend the wrongfully convened meeting,” appears to be unsupported by any evidence.

The available evidence only showed that the meeting was called by someone else and not Barnett”

8.11 I have read and re-read the Committee’s deliberation and the verdict and it does not take much wit to see that verdict is fallacious. Actually, I am completely at a loss how paragraph 4.4 (iv) can be said to support the charge that the Claimant encouraged employees to boycott the Staff Christmas Party. Paragraph 4.4(iv), viewed from a most liberal construction, contains two findings, namely, that (a) there

was no evidence to prove that the Claimant coerced fellow members of staff to attend the meeting and (b) it is not the Claimant who called for the meeting. Clearly, the reasons given for dismissal of the Claimant cannot be sustained. In the premises, it is my holding that the Claimant was unfairly dismissed by the Defendant.

8.12 It is important to observe that the holding of unfair dismissal is buttressed by several other equally compelling substantive grounds.

8.13 Flawed Investigations

8.13.1 The conduct of investigation in this matter leaves a lot to be desired. Investigation is the subject matter of Chapter 5 of the Defendant's Disciplinary Procedures (Exhibit BN 14) and the relevant part thereof provides as follow:

"5.1 The investigations shall include an interview with the employee, any witnesses and others as necessary, as well as examination of any documents.

5.6 At the conclusion of investigations, investigation reports shall be copied to the concerned unit and Human Resources Division." – Emphasis by underlining supplied

8.13.2 In the present case, the Defendant alleges that (a) there were no witness statements and no investigation report and (b) the charges against the Claimant were based exclusively on the interview that the investigators had with the Claimant: see paragraph 4.3 of the Report of the Appeals Committee (Exhibit BN11):

"On grounds (a) and (b) Bannet submitted that:

- (a) Prior to the hearing he had requested that he be furnished with a copy of either the investigation report or names of the witnesses whom the investigator had relied upon to come up with the Investigation Report.
- (b) He believed that it would have been fair if he had been given a chance to examine witnesses or sources of information against him.

In response to the above submission Fyson stated that:

- a) *It was correct that prior to the hearing Bannet had indeed requested that he be furnished with Investigation Reports and Witness Statement.*
- b) *Prior to the disciplinary hearing Bannet was furnished with a CD which recorded what transpired when he was being interviewed by the investigators.*
- c) *In framing the disciplinary charges that were leveled against Bannet the investigators only relied on the interview which was recorded on the CD that was given to him.*

As there was nothing else apart from the CD recording, disclosure of witness statements was out of question.” – Emphasis by underlining supplied

8.13.3 This issue was not dealt with in the Defendant’s Final Submission. I was not surprised by the omission. It will be recalled that DW conceded that he interviewed about fifteen people but did not give a report of the investigations to the Claimant because none was prepared. DW also admitted that none of the fifteen people was called to the disciplinary hearing for the Claimant to be able to cross-examine them.

8.13.4 Going on the basis of DW’s answers during his cross-examinations, it would appear that the Defendant believed that it was enough that the Claimant was given a CD comprising a recording of an interview that DW had with the Claimant since *“In framing the disciplinary charges that were leveled against Bannet the investigators only relied on the interview which was recorded on the CD that was given to him.”*

8.13.5 With due respect, the requirement for the making of an investigation report is not just for the framing of disciplinary charges: the investigation report has to be used throughout the disciplinary process, including during hearings before the Disciplinary Committee and Appeal Committee.

8.13.6 In any case, the CD did not contain statements by the fifteen people or reports thereon. If the right to be heard is to be a real right which is worth anything, it must carry with it in the accused employee the right to know the case which is made

against him or her. He must know the evidence given against him or her and he or she must be given an opportunity to correct or contradict the evidence. The need to carry out meaningful investigations is lucidly explained in **Polkey v. AE Dayton Services Ltd [1987] 3 All ER 974** as follows:

“In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair the court must decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.” - Emphasis by underling supplied

The three elements were not proved in the present case.

8.13.7 I, therefore, fail to understand how the CD could be a substitute for giving the Claimant an opportunity to cross-examine the fifteen people, particularly when Defendant used some of the information gathered through the investigations against the Claimant. This is clear from several documents with the key document being the Enquiry Form (Exhibit BN6) which states, in part, as follows:

- “2. Our independent investigation established that the invitation to the meeting had no agenda ... It has been further been established that you took part in convening the meeting
5. It was further established that you conducted yourself in a disorderly manner during the Christmas party ... It was also established that you were heard mocking some members of staff at the main gate entrance to NBM Towers as they made their way. – Emphasis by underlining supplied

8.13.8 A perusal of the charges levelled against the Claimant shows that the contents of the Enquiry Form (Exhibit BN6) formed the basis of the charges. The charges include aspects of what the Defendant states to have been established from its independent investigations. This for sure does not support the Defendant's assertion that it did not give a report of the investigations because it only relied on the Claimant's own interview.

8.13.9 One thing emerges from all this with sufficient clarity. For reasons only known to the Defendant, it decided against using the evidence obtained from the fifteen witnesses (the position of the law regarding failure to call, or reveal the names of, relevant witnesses is discussed below) but opted to rely on allegations by DW who purported to act on his own personal knowledge of the matter: see paragraph 6.31 of his witness statement which states:

"I also saw the Plaintiff behaving in a disorderly manner at the Christmas Party. He did not dress properly as per the communication from the Chairperson of the organizing committee and was rude and disorderly."

8.13.10 One other aspect merits attention. In paragraphs 6.27 and 6.32 of his witness statement, DW states that *"The Bank later became aware of the fact that after this meeting the Plaintiff sent out a message via whatsapp to members of staff"* and *"Management got to know about what the Plaintiff did in inciting staff members to boycott the Christmas Party"* respectively. Apart from these statements being hearsay, the statements confirm that there were people who reported to the Defendant about the alleged misconduct. DW, as an investigator, should have made it his business to get statements from these people before interviewing the Claimant. How can a considered investigation be done before gathering the relevant information?

8.13.11 In the premises and by reason thereof, in so far as the Defendant conducted investigations and clearly relied on the finding of the said investigations in charging the Claimant, a report of the investigations ought to have been given to the

Claimant for him to know what the interviewed people said about him.

8.13.12 The object of giving an employee an opportunity to be heard is to ensure that his or her employment is not terminated except in a manner that is procedurally and substantially fair. For this reason, the law requires disciplinary procedures to be strictly construed. By not providing the Claimant with the investigation report, the Defendant failed to comply with the requirements of the law and, as a result, the hearing was unfair.

8.13.13 I am fortified in my view by the cases of **The State v. Nurses and Midwives Council of Malawi Ex-parte Rhoda Jamu**, *supra*, and **Jawadu v. Malawi Revenue Authority**, *supra*.

8.13.14 In **The State v. Nurses and Midwives Council of Malawi Ex-parte Rhoda Jamu**, *supra*, Kamwambe J., made the following instructive and illuminating observations:

“This opportunity to correct or contradict any evidence or statement affecting the accused must be demonstrated through creating a situation in which the accused must face and question his or her accuser if she so wants. She must not necessarily ask for it. It must be embedded into the practice of fulfilling principles of natural justice. If there are any documents the accused must be granted them before hearing. So looking at the three heads to the right to be heard, ie:-

1. *The right to know charges leveled against you – this the accused may have known but she did not have the particulars of the charge, hence, initially she was only told to make a report as to what happened. However I should hasten to say that the time at which charges are laid out is at the time of the notice of inquiry hearing in accordance with Section 58(2) of the Act, and not at the time of the committee’s investigations. Investigations may not be there to lay charges but to establish facts on the ground in aid of a coming hearing. Since the applicant says that she did not receive the notice of inquiry hearing which is alleged to have been sent much earlier on 15th November 2007 it may not be easy to make a determination as to unfairness due to short notice. If the matron made an affidavit she would have indicated, probably, that the applicant complained to her of short notice.*

2. *The right to know the evidence against him.... I do not think she knew the evidence against her as the copy of the complaint was given to her after the hearing; and the investigation committee report does not appear to have been given to her. She should have been made aware of its findings.*
3. *The right to cross-examine witnesses The respondent miserably failed to fulfill this right and no wonder its counsel has avoided explaining this right in their lengthy submissions. The applicant did not face her accuser at the hearing."*

8.13.15 In the same vein, the case of **Jawadu v. Malawi Revenue Authority**, supra, is authority for the following propositions:

- (a) that without calling accusers or the complainant to the oral hearing to give evidence in the presence of the applicant and to be confronted, the right to fair hearing was not satisfied;
- (b) the right to confront witnesses becomes imperative where facts are in dispute; and
- (c) a fair hearing becomes the employer's justification for termination of employment.

8.13.16 In light of the foregoing, it is my finding that the Defendant did not accord the Claimant an opportunity to cross-examine the fifteen people who are alleged to have made statements against the Claimant during investigations. In short, there was breach of the principles of natural justice: see **Francis Komwa v. Chloride Batteries**, supra, **Jawadu v. Malawi Revenue Authority**, supra, and **The State v. Nurses and Midwives Council of Malawi ex-parte Rhoda Jamu**, supra.

8.14 Duplicity

8.14.1 The charges leveled against the Claimant were also bad for duplicity. Duplicity is an error committed when a charge (known as a count) on an indictment describes two different

misconducts. An indictment may contain more than one count, but each count must allege only one misconduct.

8.14.2 The general rule is that a charge will be bad for duplicity where it contains more than one misconduct, whether such misconducts are coupled cumulatively or in the alternative. Compliance with this rule enables an accused employee to know precisely the allegation made against him or her so that he or she is not confused or misled. In addition, and perhaps more importantly in the present case, it ensures that the verdict is clear on every point.

8.14.3 The charges in the present case are the worse examples of charges bad for duplicity. By way of illustration, one of the charges in the Enquiry Form (Exhibit BN6) is couched in the following terms:

“b) Conducting oneself in a disorderly manner on the Bank’s premises or where disorderly behavior outside the Bank shall cause public embarrassment or damage to the Bank’s image as per Section 11.06 of the Bank’s Terms and Conditions of Service for encouraging employees to boycott the staff Christmas Party on 20th December 2014, which would have caused public embarrassment and damage the Bank’s image. You also conducted yourself in a disorderly manner in terms of demeanor and dressing during the Christmas party on 20 December 2014.”

8.14.4 The charge is plainly bad for duplicity. No wonder (a) both the Disciplinary Committee and the Appeals Committee had great difficulties in framing the “verdicts” on this charge and (b) even Counsel for the Defendant could not tell whether this charge related to alleged misconduct by the Claimant within or without the Defendant’s premises: see paragraph 7.5 of the Defendant’s Final Submission which reads, in part:

“The Bank’s position is that the plaintiff conducted himself in a disorderly manner on Bank’s premises in encouraging members of staff to boycott the Christmas party, or if this disorderly behaviour was done outside the Bank’s premises it was such behaviour as would cause public embarrassment or damage to the Bank’s reputation.” – Emphasis by underlining supplied

8.14.5 This is mind boggling: charges are being leveled when the investigations had not established where the alleged misconduct took place. Clearly, the Defendant was on a fishing expedition.

8.14.6 Related to the issue of duplicity is the fact that the charges were generally ambiguous and lacked specificity.

8.15 Flawed Proceedings before the Appeal Committee

8.15.1 The proceedings before the Appeals Committee were also fraught with irregularities. It will be recalled that DW was adamant in alleging that he attended the hearing before the Disciplinary Committee not as a member thereof but as a witness for the Defendant.

8.15.2 Chapter 10 of the Disciplinary Procedures (Exhibit BN14) deals with the right to appeal and paragraphs 10:3, 10.7 and 10.8 are pertinent. These paragraphs provide as follows:

“10.3 The Chief Executive shall appoint the Appeals Committee to preside over the appeal hearings whose members shall consist of an experienced operations person from the service centre, a lawyer and any other Head of Division as the Chief Executive may decide. Members of the Disciplinary Committee whose decision is being appealed against shall be excluded from being members of the Appeals Committee.

...

10.7 One member from the original hearing committee shall attend the Appeal hearing to present findings and reasons for the disciplinary action/decision.

10.8 The Appeals Committee shall not hear any new evidence that was not adduced or tendered at an earlier hearing. The appealing member of staff shall therefore ensure that his/her appeal refers only to issues that were raised at the initial hearing.” – Emphasis by underlining supplied

8.15.3 The record of the Appeals Committee (Exhibit BN11) shows that the Appeals Committee comprised Mr. Brian Bobby (Chairman), Mr. Jarvis Nkango (Member) and Mr. Jones Dziwani (Secretary).

8.15.4 The record states that DW was in attendance but it does not state why he was in attendance and in what capacity. The record also shows that DW took part in the hearing. This is captured under paragraph 4.3 of the Report of the Appeals Committee (Exhibit BN11) as follows:

- "a) Fyson raised the point that there were minutes which were produced. However, Bannet maintained that no minutes were produced for that meeting and this fact was confirmed by the e-mails he exchanged with Fyson.*
- b) Fyson maintained that according to the record the minutes were produced on 4th February a fact which Bannet denied and maintained that he did not see the alleged minutes."*

8.15.5 Needless to say, DW finds himself between a rock and a hard place. On one hand (the rock), in terms of paragraph 10.7 of the Disciplinary Procedures, DW was not legally allowed to present findings and reasons for the disciplinary action/decision. The presentation had to be done by a member of the Disciplinary Committee. On the other hand (the hard place), being the person who conducted investigations into this matter, DW could not have sat as a member of the Disciplinary Committee.

8.15.6 Further and on a related note, the Report of the Appeals Committee (Exhibit BN11) does not show that a member of the Disciplinary Committee attended the appeal hearing. The Report is also silent as to the person who presented the findings and reasons for the disciplinary action/decision taken by the Disciplinary Committee.

8.15.7 Furthermore, it is essential, as a consequence of the provisions of paragraph 10.8 of the Report of the Appeals Committee (Exhibit BN11), that when an appeals body sits to consider an appeal, it should have a record (separate and distinct from minutes) of the proceedings being appealed against. I am, therefore, greatly shocked that the Appeals Committee proceeded to hear the Claimant's appeal without having access to a record of the proceedings before the Disciplinary Committee. This is not just a moot point and two examples will suffice.

8.15.8 The first example relates to the 1st and 2nd Dismissal Letters. The author of the 2nd Dismissal Letter is at great pains to explain how the third charge found its way into the 1st Dismissal Letter. To my mind, such a problem would not have arisen if there was a record of the proceedings of the Disciplinary Committee.

8.15.9 The dispute alluded to hereinbefore between the Claimant and DW regarding whether or not minutes had been produced in respect of the meeting called by CW3 affords a second example. How would the Appeals Committee resolve this dispute without having the benefit of perusing a record of the proceedings of the Disciplinary Committee?

8.15.10 Lastly, and perhaps more damning, is the fact that the Appeals Committee had no point of reference for its decision. The Report of the Appeals Committee (Exhibit BN11) consists of five paragraphs. Paragraph 4.1 (Background to the Appeal) states that the Claimant was found guilty of two misconducts set out therein. Paragraph 4.2 lists grounds of appeal. Paragraph 4.3 contains submissions by the Claimant. Paragraph 4.4 (Committee's Deliberations) and paragraph 5.5 (Verdict) have already been quoted verbatim hereinbefore. In the final analysis, there were no counter-arguments: all that the Appeals Committee had before it were the submissions by the Claimant.

8.15.11 I momentarily pause to observe that DW's testimony regarding the minutes contradicts his assertion that the charges leveled against the Claimant were solely based on a recording of an interview that he had with the Claimant.

8.16 Sanction Regime

8.16.1 This ground has to do with the sanction regime. The Defendant argues that it was entitled to dismiss the Claimant for encouraging members of staff to boycott the Christmas party because dismissal was the one and only penalty laid down for such an offence: see paragraph 7.5 of the Defendant's Final Submission.

8.16.2 I must commend Counsel Mwagomba for trying his best in seeking to redeem an otherwise hopeless case. Unfortunately,

his submissions lack merit and merely help to confirm my conviction that both the Disciplinary Committee and the Appeals Committee operated under the misapprehension that the sanction regime under the Disciplinary Procedures Handbook (Exhibit BN14) lays down mandatory penalties. With due respect, nothing could be further from the truth.

8.16.3 Chapter 11 of the Defendant's Terms and Conditions Handbook (Exhibit BN 11) deals with discipline and grievances. Instances warranting disciplinary action are contained in paragraph 11.06 of the Handbook and the relevant part thereof provides as follows:

"The following are instances which shall warrant disciplinary action being served on a member of staff:

MISCONDUCT	DISCIPLINARY ACTION
<i>Improper dress</i>	<i>Reprimand</i>
<i>Conducting oneself in a disorderly manner on the Bank's premises or where disorderly behavior outside the Bank shall cause public embarrassment or damage to the Bank's image</i>	<i>Dismissal</i>

8.16.4 Paragraph 11.08 of the Defendant's Terms and Conditions Handbook (Exhibit BN 11) states that disciplinary procedures are fully covered in the Disciplinary Procedures Handbook. Paragraph 9 of the Disciplinary Procedures Handbook is headed "*GROSS MISCONDUCT*" and it is necessary that the material part thereof be quoted in full:

"9.1 The Bank shall be at liberty to take serious disciplinary action such as a dismissal where an employee has been found guilty of gross misconduct.

9.2 Gross misconduct shall include:

...

9.2.5 Violent, offensive or other intimidating conduct or language

...

9.2.6 Incapacity at work through the use of alcohol or drugs.

...

9.2.17 *Issuing illegal instructions*

...

9.2.21 *Misconduct so incompatible with the employee's duties and responsibilities that the employee's continued presence within the Bank is unsupportable.*" – Emphasis by underlining supplied

8.16.5 A proper reading of the two Handbooks leads to the conclusion that the disciplinary actions listed in Paragraph 9 of the Disciplinary Procedures Handbook are maximum penalties and not mandatory penalties. In almost all disciplinary cases, there will be some circumstances which tell in favour of severity and others which point to leniency: see s. 56 (5) of the Act. This entails that, in exercising its powers, the Disciplinary Committee and the Appeals Committee must strive to come up with a penalty that strikes a proper balance between mitigating and aggravating factors. This accords with the requirements of s. 61(2) of the Act which enjoins an employer to "*show that in all circumstances of the case, he acted with justice and equity*". We will revert to discussion of ss. 56 (5) and 61(2) of the Act in a moment (see paragraphs 8.19 and 8.20 respectively).

8.16.6 In conclusion on the issue of sanctions, one or two comments may not be out of order. The first observation relates to the suggestion that an employer and an employee can agree to contract out of the requirements of s. 61(2) of the Act. The suggestion lacks merit. Actually, one of the objectives of the Act was to do away with unfairness that arises out of unfettered freedom of contract in employment matters. The long title to the Act is instructive:

"An Act to establish, reinforce and regulate minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice and for matters connected therewith and incidental thereto." – Emphasis by underlining supplied

8.16.7 An example may not be out of place. Take the case of A, a branch manager, employed by B, a marketing company. After working for 39 years and with less than one month to

retirement, A is found guilty of failure to account for cash in the sum of K1,000.00. A has an impeccable previous record having faced no disciplinary action (not even a warning) at all during the 39 years of employment. According to the Defendant and Counsel Mwagomba, the fact that A had a clean record and the fact that the amount unaccounted for is nominal counts for nothing. To them, all that matters is that A has committed a disciplinary offence which, per his terms and conditions of service, attracts dismissal. He must therefore “hang”: there is no room for lenience despite the mitigating factors. Needless to say, dismissal in such circumstances would be a harsh penalty: see s. 61(2) of the Act.

8.16.8 My other observation pertains to Part VIII of the Act (Discipline and Dismissal). This Part can be broadly divided into two categories. The first category consists of s.56 which deals with disciplinary action. Section 56 of the Act provides, in part, as follows:

- “(1) *An employer shall be entitled to take disciplinary action, other than dismissal, when it is reasonable to do so considering all the circumstances.*
- (2) *For the purposes of this Part, a “disciplinary action” includes-*
 - (a) *a written warning;*
 - (b) *suspension; and*
 - (c) *demotion.*
- ...
- (5) *In deciding whether the employer has acted reasonably, regard shall be had to the nature of the violation, the employee's duties, the penalty imposed by the employer, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.*” – Emphasis by underlining supplied

8.16.9 Sections 57 to 63 of the Act fall into the second category which makes provisions regarding dismissal. It is clear from a perusal of this Part that dismissal is taken as a very serious matter and

as such the Act has deliberately put in place a more robust procedure with regard to imposition of dismissal as opposed to the meting out of disciplinary action, as defined by the Act. Any entity that comes up with a sanctions regime relating to employment matters without fully appreciating this distinction is bound to face legal challenges in the implementation of its sanctions regime.

8.17 Charges not Proved

8.17.1 The Defendant dismissed the Claimant on charges which were not proved. All the reasons given by the Defendant for the dismissal of the Claimant, including those in the 2nd Dismissal Letter (issued in purported attempt to revoke the 1st Dismissal Letter), were not proved to the required standard of proof. In the first place, the evidence shows that the meeting was not organized by the Claimant: it was called by CW3 through an e-mail dated 19th December 2014 (Exhibit BN1). The Claimant got to know about the meeting and told others about it but, consistent with the determination the Appeals Committee, there is nothing before the Court that proves that the Claimant encouraged others to boycott the staff Christmas party. To the contrary, there is massive evidence before the Court that it is the meeting that was called by CW3 that resolved that members of staff should boycott the Christmas party and members of staff present thereat were asked to communicate the resolution to other members of staff.

8.17.2 Further, the Claimant is entitled to plead double jeopardy. Double jeopardy is a procedural defence that prevents an accused employee from being tried again on the same charges of misconduct in respect of which punishment has already been imposed. According to paragraph 5.10 of the Claimant's witness statement and paragraph 3.6.4 of the Minutes of the Disciplinary Hearing, the Claimant was verbally reprimanded by his Head of Finance. This assertion went unchallenged. In the premises, it was not open to the Defendant to charge the Claimant again for the alleged failure to comply with the dress code.

8.17.3 Furthermore, as was rightly decided by the Appeals Committee, there is nothing in the evidence that proves that the Claimant

coerced fellow members of staff to attend the meeting called by CW3. Furthermore, as was rightly argued by Counsel Chayekha with respect to charge (c), the Defendant has failed to adduce evidence to show that the Claimant conducted himself in a disorderly manner. The fact that a person is poorly dressed or drunk does not, of itself, mean that he is conducting himself in a disorderly manner. At no time did the Claimant admit that he conducted himself in a disorderly manner. There being no independent evidence in support of the Defendant's case, the Court has to choose between the testimony of the Claimant against that of DW

8.17.4 Between the Claimant and DW, I am inclined to believe the Claimant. The Claimant was consistent in his evidence which was fully supported by the respective testimonies of CW2 and CW3. Throughout his testimony, the Claimant stood by what he averred in his witness statement and he emerged firm in spite of the vigorous cross-examination he went through. The same is not, however, true of the DW. As already observed herein, DW contradicted himself on several times. His contradictions reached a climax when he strenuously denied having knowledge of Exhibit BN1 (E-mail by CW3 calling for a meeting) during investigation stage. This could not be true as evidenced by paragraph 3 of Exhibit BN 6 (The Enquiry Form):

“3. In your explanation in a recorded interview with the Investigation team of 17 February 2015, you stated that you attended the meeting having received an invitation for the meeting convened by Joint Consultative Committee (JCC) Employee representative Cecelia Kuluwani ...” –Emphasis by underlining supplied

8.17.5 This means that the Defendant, including DW, was put on notice about Exhibit BN1 (E-mail by CW3 calling for a meeting) well before the disciplinary hearing. In the premises, I hold that none of the charges were proved to the required standard.

8.18 1st Dismissal Letter

8.18.1 In his evidence, DW stated that the 1st Dismissal Letter was revoked because it contained mistakes. DW sought to explain the mistakes but clearly his purported explanation was pure

hearsay in that neither of the Dismissal Letters was authored by DW. Both Dismissal Letters were authored by Mr. Franklin Banda. No reason whatsoever was given as to why the Defendant opted not to call Mr. Banda as a witness.

8.18.2 It is trite that where a witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who fails to call him. In **Maonga and others v. Blantyre Print and Publishing Co. Ltd** 14MLR240, the defendant failed to call the company secretary who wrote the letter of complaint to the police. It also failed to call the police officers who effected the plaintiff's arrest. All these witnesses were available. The court also quoted Banda J in the case of **Leyland Motors Corporation Malawi Ltd v. Mohamed Civil Cause No. 240 of 1983(unreported)** as follows:

"Failure to call a material witness to testify on a material point may damage the case of the party who failed to do so as that failure may be construed that the story is fictitious."

8.18.3 The dicta in **Maonga and others v. Blantyre Print and Publishing Co. Ltd**, supra, and **Leyland Motor Corporation Limited v. Mahomed**, supra, were quoted with approval by the Supreme Court of Appeal in **BP Malawi Limited v. NBS Bank Limited** [2009] MLR 39 as follows:

"We think the court was indeed entitled to attach significance to the absence of the company secretary, who was available to the appellant, to give evidence at the trial."

8.18.4 The foregoing submissions with respect to Mr. Banda apply with equal force to the fifteen witnesses that the Defendant interviewed but failed to produce their witness statements.

8.19 Breach of s.57 of the Act

8.19.1 For an employment to be validly terminated, there must be a valid reason connected with the claimant's capacity or conduct: see s. 58 of the Act. Further, in accordance with s. 61 of the Act, the onus to prove that the reason for terminating the employment was valid lies on the employer.

8.19.2 In terms of s. 58 of the Act, a dismissal is unfair if it is not in conformity with s. 57 of the Act. Subsections (1) and (2) of s. 57 of the Act are relevant:

“(1) The employment of an employee shall not be terminated by an employer unless 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.

(2) The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.”

8.19.3 My understanding of the quoted provisions are thus: even if an employer may have a good reason for dismissing an employee, the dismissal would only be fair if the employee is accorded a fair hearing and if he complies with the requirements of the law. In the absence of a fair hearing and compliance with the requirements of the law, the dismissal will be unfair even if the reason was valid. To make a fair hearing, the employer must ensure that all the principles of natural justice and requirements of the law have been complied with.

8.19.4 On the basis of reasons already given in this judgement, including the Defendant's breach of its own Disciplinary Procedures (see Chapter 5 of the Defendant's Disciplinary Procedures (Exhibit BN 14) regarding conduct of investigations and the Enquiry Form [Exhibit BN6] with regard to the Claimant's *“right to access all documentation pertaining to your case that gave raise to this/these charge(s) in order to assist you in preparing your defense”*, neither subsection (1) and (2) of s. 57 of the Act were complied with. In the premises, the Claimant's dismissal was unfair.

8.20 The test of “justice and equity”

8.20.1 It is important to bear in mind that in addition to the requirements of s. 57 of the Act, s. 61(2) of the Act enjoins an employer to *“show that in all circumstances of the case, he acted with justice and equity”*.

8.20.2 The Act does not provide any test to be applied in determining whether or not the employer has fulfilled the test of “*justice and equity*”. To my mind, the question whether or not the employer complied with s.61(2) of the Act will require an examination of the whole list of relevant events that culminated in the end of the employment relationship. The essence of the Court’s task was summarised by the House of Lords in **Polkey v. AE Dayton Services Ltd [1987] 3 All ER 974** when it held that:

“Where an employee is dismissed for alleged misconduct and he then complains that he was unfairly dismissed, ... the industrial tribunal will usually need to consider (a) the nature and gravity of the alleged misconduct, (b) the information on which the employer based his decision, (c) whether there was any other information, which that employer could or should have obtained or any other step which he should have taken before he dismissed the employee.” – Emphasis by underlining supplied

8.20.3 Clearly, the Court has to determine whether, having regard to all circumstances of the whole matter, the employee had to be dismissed or could have been treated differently. If the Court finds that the employee did not have to be dismissed, it has the power to annul the dismissal and order his re-instatement or re-engagement: see **Mahowa Case**.

8.20.4 It will be recalled that the Appeals Committee determined that the ground for dismissing the Claimant should be confined to the reason numbered (a) in the 2nd Dismissal Letter, that is, “... for encouraging employees to boycott the Staff Christmas Party on 20th December 2014...”. For arguments sake, we will pretend that this charge had been proved. This has to be weighed against, on the other hand, the undisputed facts that the Claimant (a) had served the Defendant for six years, (b) had a clean record prior to matters giving rise to the charge, and (c) was always appraised highly. It is also significant that the proposed boycott failed to materialise.

8.20.5 In the circumstances, even if it were correct that the Claimant had encouraged other employees to boycott the Staff Christmas Party, which is not the case here, a warning would have been an appropriate penalty to impose. As a matter of fact, this was actually the penalty that was initially imposed on the Claimant

by his Head of Division. Viewed from that perspective, the disciplinary action meted out by the Defendant is clearly too harsh. In the premises, it is my finding that the Defendant did not act with justice and equity in dismissing the Claimant. In other words, the Claimant's complaint of unfair dismissal is well founded.

9.0 PRAYER FOR RELIEFS

9.1 It will be recalled that the reliefs sought by the Claimant in the Re-Amended Statement of Case are re-instatement, damages for unfair dismissal, withheld annual bonus, damages for discrimination, damages for defamation and costs of this action. The Claimant later on opted to drop the claims for defamation and discrimination: see paragraph 8.1 of the Claimant's Final Submissions.

9.2 Re-instatement

9.2.1 Section 63 of the Act makes provision in respect of remedies for unfair dismissal and subsections (1) and (2) are relevant:

“(1) If the Court finds that an employee's complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies-

(a) an order for reinstatement whereby the employee is to be treated in all respects as if he had not been dismissed;

(b) an order for re-engagement whereby the employee is to be engaged in work of comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties; and

(c) an award of compensation as specified in subsection (4).

(2) The Court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the

circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.” – Emphasis by underlining supplied

- 9.2.2 It should be stated by way of preliminary observation that by s. 63(1) of the Act employing the phrase “*one or more of the following remedies*”, it is possible to order more than one remedy in appropriate cases as exemplified by **Chakhadza v. Portland Cement Ltd [2008] MLLR 118 (HC)**. In this case, the applicant was awarded re-engagement and compensation and the award was explained thus:

“The remedies provided for by section 63 (1)(a), (b) and (c) are essentially three, that is, re-instatement, re-engagement and compensation. These remedies may stand alone or together as section 63(1) states that the court can award to an offended employee one or more of the remedies. Since the remedies provided for in section 63 are not mutually exclusive, the court can award one or more of them”

- 9.2.3 It is also common cause that s. 63(2) of the Act enjoins the court to first consider the possibility of awarding re-instatement or re-engagement. According to s.63(1)(a) of the Act, an employee who has been re-instated has to be treated in all respects as if he had not been dismissed. In other words, the employee has to be put back into the position he or she occupied before the dismissal and get back all the benefits that he or she enjoyed at that time and be compensated for those that he or she lost in the interim.
- 9.2.4 Thus, re-instatement involves not only returning the employee to his or her job but also payment to him or her of his or her back pay and restoration of all his or her rights and privileges such as those relating to his or her seniority and pension and pension benefits. Consequently apart from ordering his or her re-employment, the court will also have to work out and specify the amount payable to him or her by the employer in respect of those rights and privileges between the effective date of the dismissal and the date of the order. For that reason, the order of re-instatement entails preservation of the continuity of service.

- 9.2.5 Re-engagement, on the other hand, entails the employee being engaged by the employer in work reasonably suitable and comparable to his or her previous job from such date and on such terms of employment as the Court may order or be agreed by the parties.
- 9.2.6 The legislative intent behind s. 63 (2) of the Act is unmistakable. An employee who has been unfairly dismissed should get back his or her job and he or she should only be relegated to statutory compensation as a last resort. In this regard, the apt observations by the learned author (Dr. Cassim Chilumpha, SC) of Labour Law 2004, published by Commercial Law Centre, at page 507, are instructive:

"...the concept of unfair dismissal and its remedy of reinstatement were introduced into our law not to give a wrongfully dismissed employee the right to a monetary award; he already had that right at common law. Rather the change was made to ensure that on top of that right, the courts would also have the right to order reinstatement in some cases of wrongful termination of employment. In other words, the rights to fair dismissal and to reinstatement became part of our law to ensure that in appropriate cases courts are able to reverse a dismissal and order that the employee goes back to work. Clearly the object is to promote human dignity through job security. As Juan Samavia, Director General of the ILO, recently observed,

'Work, after all, is more than a source of income. Work is a source of individual dignity, family stability... Work is rights for labour. Work is social protection for families and communities.'

- 9.2.7 In this context, s. 63 (2) of the Act puts to rest the common law notion that once effected, a dismissal, even if established to be substantively and procedurally unfair, cannot be reversed by any court. In the same vein, it is important to bear in mind that following the enactment of the Act, awarding the remedy of reinstatement or re-engagement has to be the general rule with the award of monetary compensation being more or less an exception to the general rule. In the premises, s. 63 (2) of the Act calls for courage on the part of courts, at all levels (Industrial Relations Court, High Court and Supreme Court of Appeal respectively), to ensure that an employee who is unfairly dismissed is reinstated or re-engaged unless it is established that (a) he or she has not specifically sought re-

instatement or re-engagement and (b) that granting such an award would be unreasonable in the circumstances of the particular case.

9.2.8 As already alluded to hereinbefore, the Claimant seeks re-instatement, among other reliefs. What then are the relevant factors that the Court ought to take into account in considering whether or not to award re-instatement? In my opinion, upon the authorities I have come across in my research, the Court has to pay attention to the following matters (and I hasten to add that this is by no means an exhaustive list).

9.2.9 Firstly, s. 63(2) of the Act requires the court to take into account the wishes of the employee. The employee cannot be reinstated against his or her wishes nor can re-instatement be ordered if he or she does not apply for it. In other words, the Court cannot order his or her re-instatement unless he or she expressly requests it to do so.

In **Chiume v. SS Rent-A-Car Matter Number IRC 149 of 2000 (unreported)**, the applicant did not wish to be re-instated because he feared possible negative repercussions from the employer. What was material in that case for purposes of s. 63(2) of the Act is the fact that the applicant did not wish to be re-instated and not the reason that was given for the decision. In my judgment, any action by an employer meant to frustrate re-instatement must be met by the full force of the law.

In the present case, there is an explicit prayer by the Claimant for re-instatement and there is no evidence before the Court that continuing the employment relationship will create an unworkable situation between the Claimant and the Defendant.

9.2.10 Secondly, the wishes or feelings of the employer do not matter when considering the re-instatement of a dismissed employee. In the same vein, for reasons already discussed hereinbefore, an argument by an employer that a dismissed employee should not be re-instated merely because the employee's former position has since been filled lacks merit. Such an argument would have the effect of rendering s. 63(2) of the Act useless in that an employer, intent on forestalling an award of re-instatement,

would make sure that the dismissed employer's position is filled immediately.

In the present case, the consideration of this factor is for academic purposes only. What do I mean? It is trite that a court's decision has to be based on evidence. There is no evidence before this Court as to whether the position that was being held by the Claimant has since been filled.

9.2.11 Thirdly, the Court will be slow to order re-instatement where re-instatement is likely to cause serious industrial strife or profound disruption in the working relationship between the employee and employer. No evidence having been led one way or the other in the present case, this factor is only being mentioned for academic purposes.

9.2.12 Fourthly, it is not advisable to order re-instatement where the relationship between the employer and the employee has seriously broken down. Forcing the two parties to work together would be enforcing a contract of servitude. As was aptly put by Tambala J. in **Mbewe v. Agricultural Development and Marketing Corporation [1993] 16(2) MLR 593**, at page 603:

"the relationship of master and servant pivots on mutual trust and confidence and once that element is undermined, the relationship cannot be saved"

Here again, as was the case with the previous factor, no evidence having been led one way or the other in the present case, this factor is only being mentioned for academic purposes. Further, this factor has to be approached with great caution. In the words of the learned author of Labour Law, supra, at page 509:

"Similarly, insisting on the fact that reinstatement should not be granted without proof that there is still mutual trust and confidence in general terms between the parties also undermines the very essence of providing that relief. By its very nature, an allegedly unfair dismissal and the ensuing litigation will always generate acrimony and ill-will between the parties so that if the court were to set proof of their absence as a condition precedent for ordering the employee's reinstatement, no case of unfair dismissal will ever end in reinstatement"

9.2.13 Fifthly, an employee claiming constructive dismissal cannot thereafter seek re-instatement. The point is lucidly explained by the learned author of Labour Law, supra, at page 512:

“... That would be a contradiction in terms as he would effectively be approbating and reprobating at the same time. Besides, as shown by Banda v Dimon (Malawi) Ltd², often an employee will invoke the concept of constructive dismissal when all good will and mutual trust between the parties has completely disappeared. Consequently any order of specific performance would not serve any practical purpose. As a result, the only effective remedy available to the employee in those circumstances will be an award of compensation under Section 63(4).”

The issue of constructive dismissal is not relevant in the case under consideration.

9.2.14 Having carefully examined the above-mentioned factors and all the circumstances of this case, including the manner of dismissal and the relationship between the parties, it is my considered view that this is an appropriate case in which an award of the remedy of re-instatement ought to be granted. It is so ordered.

9.2.15 For the sake of completeness, it will be recalled that re-instatement involves not only returning the employee to his or her job but also payment to him or her of his or her back pay and restoration of all his or her rights and privileges such as those relating to his or her seniority and pension and pension benefits.

In this regard, the parties have to work out the amount of money due to the Claimant for the period between the date of the Claimant's dismissal, that is, 13th July 2015, and the date of this judgement. If the parties fail to do so within 7 days hereof, the amount of money will have to be assessed by the Registrar of the High Court. It is so ordered.

9.3 Compensation

9.3.1 The Claimant strongly urged the Court to also award compensation over and above re-instatement. The relevant submissions were couched as follows:

“8.1.2.1... From the evidence before the Court it is our submission that the Defendant treated the claimant very unfairly. It is clear from the Evidence that the defendant premeditated the dismissal and looked for reasons to dismiss the claimant. The Defendant subjected the claimant to unfair treatment by transferring him at a very short notice to a department he had no training in and tossed him further around by sending him to Chitipa and quickly calling him to come to Blantyre on suspension. This was torture. It is therefore our submission that for the claimant to be fairly and equitably compensated in line with Section 63(4) of the Employment Act, he should also be awarded compensation over and above the reinstatement.”

9.3.2 I cannot agree more with the submissions by Counsel Chayekha. The evidence herein and the analysis thereof speaks for itself: the Defendant was hell-bent on ensuring that the Claimant was dismissed from the service at any cost. From the word go, the Defendant made sure that the Claimant's conduct of his defence on the disciplinary charges was frustrated.

9.3.3 In terms of the Enquiry Form [Exhibit BN6], the Claimant was entitled to access all documentation relating to the charges against him. However, when the Claimant sought to exercise his right to access the statements made by the witnesses on the basis of which the Defendant founded the suspicion that the Claimant had breached his terms and conditions of service (see paragraph 1 of the Enquiry Form), he was told that the Defendant had no witness statements. How could this be so when the Enquiry Form [Exhibit BN6] makes it clear that the Defendant conducted “independent investigations” which led to the laying of the charges against the Claimant?

9.3.4 Further, the Defendant went out of its way to feign ignorance of any document which was detrimental to its case. The e-mail message by CW3 [Exhibit BN1] provides an instructive example. The e-mail message by CW3 [Exhibit BN1], which is

dated 19th December 2014 and is addressed to 32 members of staff, reads:

"Team be advised that there is a JCC meeting in the pose room today at 4.30pm. Please let us all attend the meeting as it is not going to take long.

"Kindly note that the meeting is for all H/Q Divisions." –
Emphasis by underlining supplied

- 9.3.5 DW was adamant that he was not aware of Exhibit BN1 during the investigation. With due respect, DW's story cannot be believed. For starters, the Claimant from the outset explained that the meeting was called by CW3 through Exhibit BN1. Upon close examination of the evidence, it is not difficult to fathom why DW had to feign ignorance of the e-mail message by CW3 [Exhibit BN1]. In paragraph 3 of the Enquiry Form [Exhibit BN6], the Claimant is accused of having imposed on himself to attend the meeting which was only meant for the Treasury and Investment Banking Division and not Finance Division where the Claimant was stationed. Needless to say, the accusation is patently false: the e-mail message by CW3 [Exhibit BN1] makes it clear that the meeting was for all Divisions.
- 9.3.6 Furthermore, much as an employer is entitled to transfer an employee to any duty station on account of exigencies of duty, I fail to understand why an employer who seeks to effect a transfer in good faith would refuse to explain to the employee the basis of the transfer. The Defendant contends that there was shortage of cashiering clerks in Karonga and/or Chitipa. Granted that the Defendant has other service centres in Northern and Central Regions, the all-important question becomes why transfer a reconciliation clerk from as far away as Southern Region who, in any event, was not trained as cashiering clerk.
- 9.3.7 On a related note, it will recalled that one of the Claimant's complaints against the sudden transfer was that it would make it difficult for him to get another school for his children in good time: see paragraph 5.13 of the Claimant's witness statement.

The Defendant paid no heed to this complaint: it simply opted to plead its entitlement to transfer its staff anyhow regardless of the adverse effects that such a transfer would have on the Claimant and his immediate family. To my mind, a good human resource manager should be able to cogently explain to employee A why it is necessary or expedient that he be the one to be transferred as opposed to employee B, unless of course the transfer is actuated by ulterior motives.

9.3.8 In light of the foregoing, I agree with the Claimant that the transfer was not done in good faith.

9.3.9 Lastly, there is the issue of selective justice. It will be recalled that in his testimony, DW mentioned CW2 and Grace Chiwalo as being among the employees that were also charged in respect of their conduct during meeting that was called by CW3: see paragraph 6.49 of DW's witness statement. Part of the evidence adduced by the Defendant are minutes of the hearing in respect of CW2 and Grace Chiwalo.

9.3.10 With respect to CW2, the Disciplinary Committee's findings and conclusion are to be found on page 14 of the minutes:

"3.5.4 The Committee's findings were that:

- a) Tomex indeed attended the meeting which in as far as he was concerned was a lawfully constituted JCC meeting.*
- b) There was no direct incriminating evidence against Tomex that he was not the one who incited staff members not to attend the staff Christmas party nor did he conduct himself in a disorderly manner.*
- c) The selective nature of the attendees of the meeting being charged created a problem of justification of any wrong doing. The Committee had opportunity to listen to the recorded interviews of those that had been questioned by investigations. Some of the attendees expressed similar facts as to what transpired at the party and yet they were not charged.*

3.5.5 **CONCLUSION**

*In view of the above findings, the committee did not find a case to answer against Tomex on both charges.” –
Emphasis by underlining supplied*

9.3.11 There is no mistaking the basis of the Disciplinary Committee’s conclusion: the Disciplinary Committee could not tolerate selective justice.

9.3.12 The minutes relating to Grace Chiwalo are to be found on pages 18 and 19 and the same will, for reasons that will become clear in a moment, be quoted in full:

“3.7 GRACE CHIWALO

Misconduct as per Section 11.06 of the Bank’s Terms and Conditions of Service for making false statement to the investigation team that the meeting resolved that those who wanted to go to the party should do so that those who did not wish to could stay away, when in fact the meeting resolved that members of staff should boycott the Christmas party to express their collective discontentment with the Bank’s decision not to pay interim bonuses and the dress code.

3.7.1 Summary of Case against Grace Chiwalo

It was alleged that on 19th December, 2014 Grace attended a meeting organized by Cecilia Kuluwani, a JCC representative for Treasury and Investment Banking Division. Investigations established that the resolution at the meeting was that the employees should not attend the staff Christmas party on 20th December 2014. However, it was alleged that Grace gave false information during investigations by stating that the resolution at the party was that those who wanted to attend the party were free to do so and those who wanted to boycott could do so as well.

3.7.2 Summary of Grace’s Response

Grace explained that she did indeed attend the meeting. At the meeting, some people openly stated that they could not boycott the party. From such explanations, she concluded

that the resolution was that those who wanted to attend the party were free to do so and those who wanted to boycott were equally free to do so. She also explained that there was a resolution that attendees of the meeting should inform other staff members who did not attend the meeting of the resolutions. Grace further explained that she had requested for statements by other attendees of the party from the investigations. She stated that the reading through the statements one was exactly like hers and another statement expressed something different. She stated to the committee that this was proof that people who attended the same meeting had different understandings of the deliberations and resolutions. Therefore, the fact that she recollected the deliberations differently from somebody else should not amount to giving false information.

3.7.3 Concerns Raised by Grace

Grace expressed concern that not all the attendees of the meeting were interviewed and that not all were charged and invited to a disciplinary hearing. There was therefore selective justice.

3.7.4 Summary of Committee's Findings.

The Committee's findings were that:

- a) There was no evidence before the committee that the only resolution at the party was that members of staff must boycott the party.*
- b) Recorded interviews and some written statements of a selected number of the attendees of the meeting all expressed different understanding and resolutions of the meeting.*
- c) There was no finding of fact that Grace provided false information to the investigators by stating the resolution of the meeting as she had done.*
- d) There was selective justice as indeed not all attendees that expressed different statements from Grace were called for a hearing.*

- (c) *three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years;*
- (d) *one months' pay for each year of service for an employee who has served for more than fifteen years,*

and an additional amount may be awarded where dismissal was based on any of the reasons set out in s.57(3)

- (6) *Where the court has made an award of re-instatement or re-engagement and the award is not complied with by the employer; the employee shall be entitled to a special award of an amount equivalent to twelve weeks' wages, in addition to a compensatory award under subsections (4) and (5)."*

9.3.15 In the present case, it is commonplace that the Claimant had been in the Defendant's employment for at least six years at the time of termination of his services. In the premises, the Claimant's case falls within the ambit of s.63(5)(b) of the Act. Accordingly, the Claimant is also awarded two weeks' pay for each year of service. It is so ordered.

9.4 Withheld Annual Bonus

This issue has been overtaken by events, that is, it is redundant. Having held that the Claimant was unfairly dismissed and having ordered his re-instatement, it follows that the Claimant has to be paid any annual bonus that was withheld by the Defendant on account of the Claimant's dismissal. It is so ordered.

9.5 Costs

9.5.1 Regarding costs, the Court bears in mind that these proceedings would ordinarily have been brought before the Industrial Relations Court but for fact that the claims by the Claimant included damages for defamation. The Claimant eventually decided not to pursue the claim for defamation.

9.5.2 Costs in the Industrial Relations Court are by law not recoverable. In the premises, I am satisfied that this is an appropriate case in which each party must pay its own costs. It is so ordered.

3.7.5 Conclusion

In view of the above findings, the committee did not find Grace with a case to answer.” – Emphasis by underlining supplied

9.3.13 I have painstakingly compared the facts pertaining to CW2 and Grace Chiwalo, on one hand, to those relating to the Claimant, on the other hand, and I have great difficulties in understanding how these cases could have been determined differently in so far the issue of witnesses is concerned. In all the three cases, not all the attendees of the meeting were (a) interviewed, (b) taken statements or (c) charged. I do not know why the determination in respect of the Claimant had to be different. This was selective justice.

9.3.14 Section 63 of the Act governs the issue of compensation payable to an employee who has been unfairly dismissed. The section is worded as follows:

“(1) ... [*Already quoted in full above*]

(2)

(3)

(4) *An award of compensation shall be such an amount as the court consider just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.*

(5) *The amount to be awarded under subsection (4) shall not be less than:*

(a) *one week’s pay for each year of service for an employee who has served for not more than five years;*

(b) *two weeks’ pay for each year of service for an employee who has served for more than five years but not more than ten years;*

10.0 CONCLUSION AND DISPOSITION

I have said enough. I think, to show that the Defendant acted unreasonably in concluding that the Claimant was guilty of misconduct and in deciding to impose on him the penalty of dismissal. All in all, it is my holding that the Claimant's complaint of unfair dismissal is well founded. I, accordingly, grant the Claimant (a) an order for re-instatement under section 63 (1)(a) of the Act, whereby he is to be treated in all respects as if he had not been dismissed and (b) an award of compensation under section 63 (1)(c) of the Act.

Pronounced in Court this 15th day of May 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE