IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL APPEAL NO. 4 OF 2013
(Being Matter IRC No 173 of 2009)

BETWEEN
JACOB FULAYE .....APPELLANT

AND

MALAWI LIVERPOOL WELLCOME TRUST
COLLEGE OF MEDICINE ..... RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA
Malijani, Counsel, for the Appellant
Respondent unrepresented
Chitsulo, Official Interpreter

JUDGMENT

The applicant is a former employee of the respondent and was dismissed from its employment on the ground of absenteeism in violation of his terms of employment. He takes issue with the process which led to his dismissal which he asserts to have been procedurally unfair in terms of the provisions of the Labour Relations Act.

The appellant was invited to a formal disciplinary hearing by a written notice which indicated that he was to answer "allegations of gross misconduct ... with regard to unsatisfactory conduct." On the date set down for the hearing the appellant did not show up. When he later availed himself for the hearing, after he had been warned

that if he failed to show up the hearing would proceed in his absence, he was informed that there were three issues to be discussed, namely, absence from work, handling of vehicles plus fuel, and mail found in his locker.

Concerning absence from work the appellant was asked why he had been absent from work as from 17th October and his response was that he had been on sick leave and had called another employee, Maureen. Maureen confirmed this during the hearing saying that the appellant had told her that he had been granted 5 days sick leave. Maureen went further, however, to state that she had asked the appellant to bring the letter granting the sick leave but the appellant had not done so, which fact the appellant confirmed, giving as the reason for the failure, that he had been alone, but had sent an 'sms' to one Elia. The 'sms' message, according to Elia, did not identify the sender. He could not therefore tell that it had come from the appellant. It must be noted here, however, that unlike what the appellant said at the disciplinary hearing that he had been allowed 5 days sick leave, during the hearing before the Industrial Relations Court, he said that he had been granted 10 days sick leave by one doctor, and that after the 10 days he went to see another doctor who granted him another 10 days bed rest.

Regarding the second charge the appellant was informed that management had discovered that some vehicles had been refueled at late hours and that it had been discovered that he was the one who did it because some people at the filling station had mentioned him and the driver, to which the appellant responded by saying that he did not know anything about it, and he was surprised to hear that.

On the third issue the appellant was asked about some letters, dating back to October 2007, 13 months earlier, (this hearing was on 10th November 2008) which were supposed to have been posted but were instead found in his locker. The appellant said it was because he had no money for postage at that time, and that he had been having problems with another staff member to access money for stamps.

Upon being asked if he had anything further to say the appellant raised the allegation that there was a plot against him, and went on to say that he could not stay in an environment which did not like him, where, notwithstanding his having done a lot

of things to serve the institution, he was being treated as if he had done it all for nothing.

The appellant was then informed that he would receive a formal letter declaring him redundant. In response the appellant said he did not care and produced some overtime sheets for which he asked for payment, threatening that if not paid, he would take the matter further. In the course of further discussions the appellant walked out of the room.

Subsequently the appellant received a letter summarily dismissing him on grounds of absenteeism, citing Appendix 4 of the respondent's Terms and Conditions of Service, which provide that absence without permission or valid excuse for more than seven consecutive days warrants summary dismissal.

At the hearing at the IRC the appellant complained that he was not prepared for the absenteeism charge, and therefore claims that the dismissal was unfair. The IRC nevertheless held that under the circumstances of the case the termination of the appellant's employment was not unfair as the appellant was given an opportunity to explain his absence but he walked out of the hearing. Further that his excuse that the charge of absenteeism was not included was not valid as he was aware that he was absent from work and had not handed over the medical certificates as was required under his conditions of service.

The present appeal is against that finding. It is submitted for the appellant that by reason of the respondent's failure to warn the appellant in advance that he would face the charge of absenteeism, the dismissal was unfair procedurally. Several case authorities have been cited for the position. The principle is correct, but it is not without exception. In *Polkey v A.E. Dayton Ltd* [1988] I.C.R. 142 The House of Lords held that the correct question to be answered in considering whether an employer had been reasonable or unreasonable in deciding that the reason for dismissing the employee was a sufficient reason was whether the employer could reasonably have concluded that consultation or warning would be useless so that the failure to consult or warn would necessarily render the dismissal unfair was a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time of the decision to dismiss. Lord Mackay of Clashfern L.C. who

delivered the main judgment of the court adopted the following analysis by Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] I.R.L.R. 91 at 97:

> "The only test of fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time the dismissal takes effect. An industrial tribunal is not bound to hold that *any* procedural failure by the employer renders the dismissal unfair; it is one of the factors to be weighed by the industrial tribunal in deciding whether or not the dismissal was reasonable in terms of section 57(3) [on procedural fairness]. The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of the dismissal, not on actual consequence of failure. Thus in the case of failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an industrial tribunal would be likely to hold that the lack of 'equity' inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it would make no difference … Where, in the circumstances known to the employer at the time of the dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but the facts subsequently discovered or proved before the industrial tribunal show that dismissal was in fact merited, compensation would be reduced to nil."

At page 96, Browne-Wilkinson J said (which Lord Bridge of Harwhich) in *Sillifant's case* cited with approval):

> "There is no need for an 'all or nothing' decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

I would respectfully follow this approach, considering it good law. In the cases determined in this court and below, the scales have tended to unduly tip in favour of procedural considerations at the expense of substantive considerations. There has to be a fair balance between the two. I would be of the view that if the scales may tip one way as against the other, it ought to be for substantive justice. An employee who misconducts himself or herself ought not to escape, let alone benefit by being paid off, on the mere ground that the employer made a slip in conducting the disciplinary hearing. That, in my view, is unjust to the employer and would unduly reward the

recalcitrant employee. The law and its technicalities are intended to serve the overall interests of justice.

It is my view that weighing all the circumstances of the present case, and taking into account the overall conduct of the appellant, the respondent was entitled to dismiss him as it did. I am of the view that the procedural flaw should not be outweighed by the appellant's own misdeeds. I accordingly dismiss the appeal with costs.

Pronounced in open court at Blantyre this 14th day of August 2018.

R. Mbvundula
JUDGE