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**REMEDIES FOR UNFAIR DISMISSAL UNDER THE EMPLOYMENT ACT OF
MALAWI**

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Abstract

Employment law is one of the most important aspects of law because it affects the lives of people in a direct way. The employment Law discusses how employee-employer relationship is created, how it is brought to an end together with the rights and duties of each of them during the period within which the relationship exists.

One of the most important aspects of the aforementioned relationship is the notion of dismissal from employment. The law has discusses dismissal from two points of view; dismissal which is lawful and the employer is entitled, taking account the circumstances, to effect such dismissal. The other view is dismissal which is unfair. Our article will focus on the second view; unfair dismissal from employment and in particular the focus will be on the remedies which are available to an individual who has been unfairly dismissed from work and the enforcement machinery which ensures that the remedies are enforced.

Key Words: Unfair Dismissal, Employee-Employer Relationship, Enforcement Machinery

Özet

İş hukuku, insanların hayatlarını oldukça doğrudan bir şekilde etkilediği için hukukun en önemli yönlerinden biridir. İş Kanunu, işçi-işveren ilişkisinin nasıl oluşturulduğunu ve ilişkinin bulunduğu dönemde her birinin hak ve görevleriyle birlikte nasıl sona erdiğini tartışmaktadır.

Sözü edilen ilişkinin en önemli hususlarından biri de istihdamdan çıkarma kavramıdır. Kanun, işten çıkarılmayı iki açıdan görüşür. Yasal olarak kanun tarafından kabul edilen işten çıkarılma ve işveren, gereken şartları göz önünde bulundurarak, işten çıkarılma işlemini yapma hakkına sahiptir. Diğer görüş, yasalar tarafından haksız sayılan bir işten çıkarmadır. Makalemiz ikinci görüş üzerine odaklanacaktır; İstihdamdan haksız yere işten çıkarılma ve özellikle de iş yerinden haksız yere uzaklaştırılan bir kişinin yararlanabileceği çözüm yolları ve çözümlerin uygulanmasını sağlayan uygulama makineleri üzerinde odaklanılacaktır

Anahtar Kelimeler; İşten Haksız Çıkarma, işçi-işveren ilişkisi, uygulama makineleri

1. Sources of Employment Law in Malawi

Due to the importance of the laws related to employment, there are several sources of law which govern employment. These sources will be discussed below;

1.1. Constitution

The primary source of employment law just like any other law of a country is the constitution of a particular country. This also applies in Malawi, the constitution is the primary source of employment law in Malawi, any laws which are contrary to the constitution are considered to be void.

In the Constitution of Malawi 1994 it is provided under that;

- (1) Every person shall have the right to fair and safe labour practices and to fair remuneration.
- (2) All persons shall have the right to form and join trade unions or not to form or join trade unions.
- (3) Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on basis of gender, disability or race.¹

In affirming the constitution as the applicable in employment matters the court in the case of *Malote vs. Automotive Products Malawi Limited*² stated that;

“That the applicable law is the Constitution which in section 31 provides that every person has the right to fair labour practices. Fair labour practices entail the right to know the reason for dismissal and the right to have an opportunity to explain one’s side and defend oneself. The respondent violated the applicant’s right to fair labour practices by terminating his services on grounds of incapacity without providing the applicant with the opportunity to be heard.”

¹ Section 31.

² (2008) MLLR, 452.

The constitution among other issues that are related to law provided for administrative justice for those whose freedom and rights under the constitution have been affected or are under threat.

1.2. Statutory Law

There are several statutes which govern the relationship between employer and employee, industrial actions and all other aspects related to employment. The most primary statute in this regard is the Employment Act,³ followed by other Acts like The Labour Relations Act,⁴ The Pension Act (2010), The Workers' Compensation Act,⁵ Occupational Safety, Health and Welfare Act,⁶ Technical, Entrepreneurial and Vocational Education and Training Act⁷ and the Public Service Act.⁸

1.3. Common Law

The laws of Malawi are mostly derived from the common law due to the fact that the country was once a colony of Britain. With this background in mind it comes as no surprise that the common law forms part of the sources of labour law in Malawi. Some of the principles of common law have been adopted and codified under the Occupational Safety, Health and Welfare Act. For example the court in the case of *Kachiwanda vs. Eastern Produce Malawi Limited* where the court reaffirmed the applicability of the neighbour principle of common law stated that “*it is a principle of common law that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would cause injury to persons who are so closely and directly affected by one's act that one ought reasonably to have them in contemplation.*”⁹

1.4. International Treaties

Malawi is a signatory of some of the international treaties that are related to labour law, as such the treaties form part of the sources of the labour law of Malawi. For example the court in the case of *Kachinjika vs. Portland Cement Company Limited*¹⁰ confirmed that ILO

³ Cap 55:02 Laws of Malawi.

⁴ Cap 54:01 Laws of Malawi.

⁵ Cap 55:03 Laws of Malawi.

⁶ Cap 55:07 Laws of Malawi.

⁷ Cap 55:06 Laws of Malawi.

⁸ Cap 1:03 Laws of Malawi.

⁹ (2008) MLLR, 183.

¹⁰ (2008) MLLR, 161.

conventions on fair labour practice provide a useful guide as to what amounts to fair labour practices.

1.5. Equity

Equity is also considered to be a source of labour law in Malawi. Section 62(2) of the Employment act provides that an employer should act within the bounds of justice and equity hence making the laws of equity applicable to the labour law in Malawi. The section states that an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.

1.6. Foreign Case Law and Statutes.

Wherever there appears a gap in the law the courts make use of the foreign cases in order to help with the interpretation of the law or to fill the gap. In the case of *Malawi Telecommunication Ltd v Makande and another*¹¹ held that foreign decisions based on foreign statutory provisions may be considered in determining a matter as long as the Judge is aware of the fact that the decision did not have any binding force but expressly observes that the decision merely had persuasive force or authority.

2. Dismissal

The Employment Act has not defined the term Dismissal however it carried the connotation of an employment relationship between employer and employee coming to an end by reason of the employer terminating the relationship without the consent of the employee. In order for a claim of dismissal to be established the applicant must prove that he was indeed dismissed from work. Dismissal cannot be claimed where an employee resigns from work by his own volition or he leaves his employment without being forced to do so. In addition if the employment has come to an end by reason of lapse of time of the contract.

For an applicant to be successful in a claim for dismissal he has to prove that the dismissal was indeed unfair. Section 58 of the Employment Act provides for litmus test for unfair dismissal. The section provides that a dismissal is unfair if it is not in conformity with section 57 or is a constructive dismissal pursuant to section 60.

The Section which is being referred to in the above mentioned section

¹¹ (2008) MLLR, 36.

states that;

- 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.¹²

Section 60 which has been referred to as one of the sections which cause rise for unfair dismissal states that; An employee is entitled to terminate the contract of employment without notice or either less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it reasonable to expect the employee to continue the employment relationship.¹³

In addition to what has been mentioned in section 58 as constituting unfair dismissal, legal commentators have also made additions to what is regarded as forming part of reasons for unfair dismissal. If people are dismissed from work without being afforded a notice as required by section 29 of the Employment Act then they can make a claim for unfair dismissal.

The provision of section 57 which deals with unfair dismissal, give birth to two factors which ought to be given proper attention when dealing with unfair dismissal. These are procedural fairness and substantive fairness.

2.1. Procedural Fairness

This refers to the right of the employee to be given a chance to explain himself by being given audience before termination is effected even though the employee is guilty of a misconduct. In the case of *Ernest Mtingwi vs. Malawi Revenue Authority*¹⁴ commenting on the issue of right to be heard stated as follows;

¹² Section 57.

¹³ Section 60.

¹⁴ Civil Cause No. 3389 of 2004 (unreported).

“By Sub- section (2) of the same section 57, however, the Employment act has put in store further taxing demands on the employer when he embarks on the exercise of terminating services of his employee. This provision requires that where the contemplated termination is for reasons connected with the employee’s capacity or conduct, then before it is effected, it ought to be preceded with the provision of an opportunity to the concerned employee to defend himself against the allegations made, unless the employer cannot be reasonably expected to provide that opportunity.”

The right to be heard has several aspects which determine whether there a person seeking relief was heard when he was dismissed from employment, however this particular work will not dwell much into that.

2.2. Substantive Justice

This is also derived from section 57 of the Employment Act. It is provided that an employee may be dismissed when there is a valid reason connected with his employee’s capacity or conduct and with the operational requirements of the undertaking.¹⁵

With regards to conduct of an employee, there cannot be an exhaustive list of acts of misconduct. However, they include dishonesty, fraud, habitual absenteeism and refusal to take lawful orders among many others.¹⁶ While capacity of the employee refers to the ability of the employee to discharge the duties assigned to him. For example the court in the case of *Phiri v Sunbird Lodge* it was held that ill-health is not a valid reason for termination unless the employer can show that the employee was so incapacitated that he could not perform any duties.¹⁷ On the other hand operational requirement, although it has not been defined in the Employment Act, refers to occasions where there is retrenchment and redundancy as was provided in the case of *Gladys Matiki vs. Cure International*¹⁸ that;

“The operational requirements under the Act are retrenchment and redundancy. Retrenchment is workforce reduction due to economic rundown. Redundancy is workforce reduction as a result of technological innovation.”

¹⁵ Section 57.

¹⁶ Allan Hans Muhome, Labour Law in Malawi, Blantyre, 2012, p. 70.

¹⁷ Matter No. IRC 232/2002 (unreported).

¹⁸ Matter No. IRC 234 of 2004.

3. Remedies for Unfair Dismissal

The remedies that are available to the employee who claims to have been unfairly dismissed have been provided under section 63 of the Employment Act. The section states as follows;

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 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)¹⁹

The remedies that are provided in the section will be discussed separately in detail in order to show how an aggrieved employee may make best use of them when there is a claim of unfair dismissal against the employer.

3.1. Reinstatement

When the court has given an order for the reinstatement of the employee, the employee will be treated as if he had not been dismissed in the first place. Therefore when an employee has been reinstated the employer will take him in the same position and with the same benefits that he enjoyed prior to being dismissed from work. Over and above that, the employee must be paid whatever is due to him during the time that he was absent from work due to being dismissed. This has been provided in the case of *Chakhaza vs Portland Cement Company*²⁰ where the court stated that;

“That re-engagement under section 63(1)(b) is that it does not entail the employee returning to his old job but that he should be engaged in work reasonably suitable and comparable to his previous job from such date and on such terms of employment as

¹⁹ Section 63

²⁰ [2008] MLLR, 122

the court may order or be agreed by the parties. The obvious problem with an order of re-instatement is that it may not be practicable where the employee's previous position has been filled in the course of time while its advantage is that it results in and ensures full restoration of the employee's lost status both in terms of position and attendant benefits. Re-instatement is not possible where the position has since been filled, more so considering the duration of time between the date of dismissal and the date of the order of re-instatement."

In the above case, the court went further to explain that, when presented with a claim for unfair dismissal, the court must first take into consideration the options of reinstatement or re-engagement of the dismissed employee before deciding to award compensation as this is a last reason. In the case of *Jumbo vs Banja La Mtsogolo*²¹, the court order that an employee who had been unfairly dismissed due to pregnancy was to be reinstated.

Another important factor which the court must consider is the wishes of the employee together with the circumstances of the dismissal, this includes whether the plaintiff was the reason for or has in one way or the other, contributed to his dismissal. The court in the case of *Chakhaza vs Portland Cement* mentioned above stated that what is important is that the order of reinstatement or re-engagement cannot be made against the wishes of an employee and by extension, it can also be said that it cannot be made if it has not been asked for by the employee.²²

The Employment Act discusses the situation where the employee is responsible for contributing to the dismissal by stating that where the Court finds that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.²³

The Court will not make an order for reinstatement where doing so is impracticable for example where the position of the plaintiff in the company has been filled by someone else.

²¹ [2008] MLLR, 410.

²² [2008] MLLR, 121.

²³ Section 63.

3.2. Re-engagement

According to the Employment Act, the Court may order an employee to be re-engaged in work comparable to that 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.²⁴

Where reinstatement is impracticable the court will grant re-engagement rather than proceed straight to award compensation.

3.3. Compensation

Section 63 of the Employment Act provides some guiding principles for the Court to consider when making an award for compensation. The section states that An award of compensation shall be such amount as the Court considers 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 action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.²⁵

The section confers upon the Court a wide discretion to determine the compensation which must be paid to an employee who has been unfairly dismissed. The discretion which is conferred upon the court is one which must be exercised judicially. The court in the case of *Tourism Development and Tourism Company and another vs Mhango* the court held that;

*“Unfair dismissal is a statutory wrong and in assessing compensation a court has a wide discretion. That discretion however must be exercised judicially and in accordance with principles.”*²⁶

²⁴ Section 63(1) (b).

²⁵ Section 63 (4).

²⁶ [2008] MLLR 315

In determining the amount of compensation payable to the plaintiff who has successfully made a claim for unfair dismissal the court will be guided by the following principles;

3.3.1. Determination of Loss

The court must, before making any award for compensation, determine the actual loss that has been suffered by the plaintiff due to the unfair dismissal. Since the aim of awarding the compensation is to put the plaintiff back, as much as possible, in the same position he would have been had it not been for the unfair dismissal, it makes it necessary for the court to make an actual determination of the loss suffered by the plaintiff.

In determining the actual loss suffered by the plaintiff the court will look at the loss which can be attributed to the employer. The compensation will then reflect the extent of loss that is occasioned due to the doing of the employer attributable to the dismissal. Commenting on compensation payable to the plaintiff, the court in the case of *Grainger Nkhwazi v Commercial Bank of Malawi Limited* said:

“Fair labour practice, to my mind, entails that the compensation the Constitution expects for violation of a right must be just and equitable. The Constitution entails that the compensation must be effective, adequate and full. The Court must not give bonus or make payments beyond compensating the person whose rights are violated. The compensation must be fair and equitable in all circumstances of the case and considering the loss suffered.”²⁷

Under the heading of determination of loss, the loss may further be divided into two categories, namely immediate loss and future loss. Immediate loss is that loss that a plaintiff has suffered from the date of the dismissal up to the date where the Court makes assessment of his damages. This type of loss is much easier to compute as the court is well informed of all the necessary facts which they must rely in order to make the assessment of the loss suffered.

²⁷ Civil Cause No. 233 of 1999.

On the other hand Future loss is that which the employee was expected to loss in the future due to the dismissal. The case of *Tourism Development and Tourism Company and another vs Mhango* mentioned above provides for these two categories of loss by stating that the respondent's loss should include the salary and benefits which he would have been paid and which he might reasonably be expected to have received but for the dismissal. However, it should be mentioned here that the category of future loss tends to rise difficulties for the court in computing the loss due to the fact that perhaps in the future a lot of other things would have happened which would, if taken into consideration, influence the assessment of loss for example the employee would have perhaps left his job for another or receive a demotion or even a promotion at work.

3.3.2. Loss Attributed to the Employer

The Court when assessing the loss suffered by the plaintiff, will be guided by section 63(4) in that will take into account only the loss that is attributable to the employer and any loss suffered which is cause by the employee himself or another person or factor not attributable to the employer will not be taken into consideration.

In the case of *Mbale vs National Bank of Malawi limited*²⁸, the plaintiff was unfairly dismissed from work however the dismissal was due to the plaintiff's prosecution due for fraudulent activities connected to his work as a bank clerk. The Court found that the plaintiff had made contribution to his own dismissal therefore the award made reflected this fact and the amount award was made less that what the plaintiff would have obtained had it not been for his contribution to the dismissal.

3.3.3. Duty to Mitigate

The employee who approaches the court for a relief for unfair dismissal, is also under duty to show to the court that they mitigated the loss suffered. The plaintiff will not be awarded for the loss the he neglected to mitigate when he could have reasonable mitigated. This was also mention in the case of *Kachinjika vs Portland Cement Company* that whether or not the plaintiff tried to mitigate his losses is another relevant consideration when determining an assessment of compensation for unfair labour practices. Similarly in the case of *Malawi*

²⁸ IRC Matter no. 23 of 2002.

*Environmental Endowment Trust vs Kalowekamo*²⁹ the plaintiff failed to show that he had mitigated the loss occasioned due to the dismissal, therefore the court while awarding a lesser amount stated as follows;

“On this aspect there was no evidence on the basis of which the court could have found that the respondent had successfully mitigated his loss. The respondent did not demonstrate through employment application letters and negative responses thereto to show that he had tried in vain to seek alternative employment in order to mitigate the loss resulting from the non-renewal of his contract. The court therefore would agree with the appellant that the respondent did not mitigate his loss.”

3.3.4. Contractual Terms

The Court, when considering the amount of compensation payable to the plaintiff who has successfully made a claim for unfair dismissal, will take into account the terms of the contract of employment which were agreed between the employer and the employee. The terms of the contract give a guideline or a basis for which the court can make immediate and future loss assessment.

3.3.5. Additional Compensation for Unfair Dismissal on the grounds of Discrimination

Where an employee has been unfairly dismissed due to discrimination of any sort whether it be sex, race, creed or religion the Court will award additional compensation for the dismissal. The Employment Act provides the grounds that are considered discriminatory as follows

The following reasons do not constitute valid reasons for dismissal or for imposition of disciplinary action -

- (a) an employee’s race, colour, sex, language, religion, other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities.³⁰

²⁹ [2008] MLLR, 242.

³⁰ Section 57(3) (a).

The Court after reinstating an employee who had been unfairly dismissed in the case of *Jumbo vs Banja la Mtsogolo* went further to caution the employer on the additional repercussions that may arise pursuant to a dismissal of such a nature. The court said;

“I would further caution the respondents that pursuant to section 49(1) of the Employment Act, terminating a woman’s employment because of pregnancy amounts to an offence, punishable with a fine of K20 000-00 and imprisonment of five years. Thus the respondent should be aware here that further legal pursuit might be following them at their doorsteps.”³¹

Similar to the above, the Court in the case of *Phiri vs Smallholder Coffee Farmers Trust* made the following remark when dealing with a case where the plaintiff was unfairly dismissed;

“The law in section 63(5) also provides that where the reason for dismissal was a prohibited ground under section 57(3) which includes discrimination, the court may make an additional award. The award for cases of discrimination are not stipulated, it is in the court’s discretion to come up with a just and equitable compensation.”³²

4. Enforcement

The above mentioned remedies are enforced through a court process. The process of enforcement will be explained below along with the relevant court will be explain below.

4.1. Labour Office

The first step in enforcement of labour law related grievances is through the Labour Office as provided under the Employment Act. The section provides as follows;

- (1) Any person having a question, difference or dispute as to the rights or liabilities of any person, employer or employee under this Act or a contract of employment may bring the matter to the attention of a labour officer who shall attempt to resolve the matter.

³¹ [2008] MLLR 412.

³² [2008] MLLR, 488.

(2) Any person alleging a violation of a provision of this Act may file a complaint with the District Labour Officer who may institute or cause to be instituted a prosecution in order to enforce the provisions of this Act.³³

4.2. Industrial Relations Court (IRC)

This Court is established under the Constitution of Malawi in the following manner;

“There shall be an Industrial Relations Court, subordinate to the High Court, which shall have original jurisdiction over labour disputes and such other issues relating to employment and shall have such composition and procedure as may be specified in an Act of Parliament.”³⁴

Further to the Constitution, the Labour Relations Act provides for the jurisdiction of the Industrial Relations Court as follows;

“The Industrial Relations Court shall have original jurisdiction to hear and determine all labour disputes and disputes assigned to it under this Act or any other written law.”³⁵

4.3. The High Court

The Constitution provides that there shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.³⁶ The provision makes it possible for the High Court to hear matters related to Labour Law. The argument that is raised is whether the High Court should hear the labour matters at the first instance since it has original jurisdiction or that since there is the IRC which has also jurisdiction to hear labour matters then the High Court should act as an appellant Court hearing matters after they were first brought to the IRC. This argument has divided many judges and legal commentators as reflected in many cases.

³³ Section 64 (1) and (2).

³⁴ Section 110(2).

³⁵ Section 64.

³⁶ Section 108 of the Constitution.

Whatever the opinion is adopted by a particular judge regarding the original jurisdiction of the High court in labour matters, it is well settled that the High Court has appellant jurisdiction as provided under the labour Relations Act which states that;

(1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.

(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered.³⁷

4.4. The Supreme Court of Appeal

The Supreme Court of Appeal only hears labour matters that have been brought to it on appeal and it does not have original jurisdiction. The Constitution provides that;

The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe.³⁸

³⁷ section 65.

³⁸ Section 104(2).

Conclusion and Results

The article has outlined the concept of unfair dismissal together with the remedies of such unfair dismissal and how the remedies may be enforced in the different Courts.

Since there is a wide spread of labour dispute in Malawi, the judiciary should act to resolve any existing legal complications to matters as easy as possible for the aggrieved parties to be able to access Justice. For instance, the courts should make clear the matters regarding jurisdiction between the High Court and Industrial Relations Court. It should be made clear as to whether the High Court or IRC has original jurisdiction in labour matter as this confusion poses as a hurdle for the deliverance of justice.

In addition to the above mentioned, the government, courts, and different stakeholders should come up with programs as an initiative to bring awareness the general masses regarding Employment Law in general and unfair dismissal from work in particular. This is because due to the high illiteracy rate, many people have no access to the relevant information regarding employment laws, this results in grave injustices towards employees which go unaccounted for.

Furthermore, the courts and the ministry of labour have to be active in ensuring that employees who have successfully being awarded relief by the court are compensated in due time without unnecessary delay. The ministry of labour may come up with programs or schemes responsible for making follow ups to ensure that those whose grievances were successfully addressed by the court have been made to enjoy the fruits of their litigation.

It is believed the article has shed light on some of the issues regarding the remedies of unfair dismissal which is the commonest of the disputes in the realm of employment law.

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