Chisomo Kaphuka v Kelfoods Limited

Judgment

Court:	Industrial Relations Court
Bench:	Austin B. B. Msowoya, Chairperson
Cause Number:	Matter No. IRC (BT) 857 of 2020
Date of Judgment:	April 11, 2023
Bar:	Tembo (Ms.), for Applicant Jiva, for Respondent

On October 20, 2022, I entered judgment in default in applicant's favor under r. 26 (1) (b) of the Industrial Relations Court (Procedure) Rules. Following that judgment, I ordered the matter be scheduled for assessment of compensation. On March 31, 2023, I conducted the hearing to assess compensation. This is my order of compensation following that hearing.

The facts grounding the suit itself are not particularly relevant at the moment. They will become relevant perhaps later in the course of the order. What is immediately pertinent is whether, given the recent ruling in Chikondi Chioko & 59 Others - v- First Capital Bank (Successors to Opportunity International Bank

Limited), Matter No. IRC (Mz) 10 of 2020 (Unrep.), it is necessary to determine liability first and only thereafter + undertake a separate hearing to assess compensation. To cast it more bluntly, after a finding of unfair dismissal under Cap. 55:01 of the Laws of Malawi, the Employment Act (henceforth in this opinion, the Employment Act), is it really necessary to schedule an assessment hearing separately? Can the assessment of compensation not be conducted simultaneously and be made within the judgment on liability without need for a separate hearing?

In reflecting on these questions, at least in the context of the ruling in Chioko, I formed the very strong conviction that in cases of unfair dismissal before the Industrial Relations Court, there really is no need to conduct a separate hearing after the trial to assess compensation. I firmly believe the assessment of compensation can effectively be done in the course of the trial itself and the award made within the same judgment. Not only is this more practical and efficient, but it would also mitigate against needless delays that significantly contribute to the accumulation of backlog on the court's docket.

Unsurprisingly, and as a necessary digression, it is worth noting that these needless delays, admittedly consequent on a variety of factors, have only been exacerbated by this very practice. I call it the 'two-step' trial litigation syndrome. A practice surreptitiously introduced and currently perpetuated in the Industrial Relations Court over the years, particularly after the court was mandated to sit en banc with panelists when determining questions of fact. That is, routinely conducting a trial to determine whether there was unfair dismissal, and then conducting a separate hearing to assess compensation. A practice, I dare quip,

furtively slipped in from a common practice in the High Court, especially in personal injury cases, where a judge first and routinely determines liability, then remits the case to the Registrar or Assistant Registrar to assess damages. Indeed, I am fortified in my conviction on the inconveniency of this two-step litigation syndrome in the Industrial Relations Court on the happenstance that while applicant obligingly filed a witness statement to on which to ground his claims in the assessment, respondents did not bother filing any, let alone lead any witnesses. They merely desired to cross examine applicant on
his.

In the circumstances, and as a preliminary issue, I sought to hear both parties on whether, given the settlement in Chioko, there really was a need to hear applicant beyond receiving evidence of his remuneration and duration of service, evidence necessary in assessment of compensation. This, because Chioko has perhaps decisively positioned the law and principles applicable in assessments of compensation in cases of unfair dismissal under the Employment Act, which law and principles confirm that all that is needed in order to assess compensation is really evidence of a claimant's remuneration and length of service in employment.

Observably, both an applicant's remuneration and the duration of service in employment can very well be pleaded in the Statement of Claim in IRC Form I. In actual fact, under r. 11 of the Industrial Relations Court (Procedure) Rules, IRC Form I itself
requires that information be provided at initial filing of the Statement of Claim. The evidence of it, if contested, can be led at and within the trial itself. Any other

facts mandating consideration in assessing compensation, and which could influence the award one way or the other, would already be on record, having been determined on the evidence admitted during trial.

Now, Chioko collates and analyzes the leading authorities emerging in the past two decades discoursing the law and principles applicable when assessing compensation under the Employment Act. Of course, I will discuss Chioko, but only to make the point that its conclusions undoubtedly settles that assessment of compensation in the Industrial Relations Court follows an established and precise method diametrically unlike any assessment of unliquidated damages in civil proceedings before the High Court. It is undisputed that assessment of unliquidated damages in the High Court quite often make separate hearings indispensable. The same cannot be said to be hue in the Industrial Relations Court. In the same vein, one could very well hazard that there really is no such thing as stare decisis in making comparable awards of compensation in cases of unfair dismissal. Each case turns on its peculiar facts and circumstances. As such, in cases of unfair dismissal, there really is no complexity in considering the measure of compensation as would necessitate making a finding whether a dismissal was unfair first and then conducting a separate hearing to assess compensation.

In light of Chioko and the authorities it analyzes, the Court can very well make a finding of unfair dismissal and assess compensation at the same time. As pointed out, I hold the view that an applicant need only plead their remuneration at the same time they plead their case in IRC Form 1. Doing so would not only enable the Court assess compensation within the same proceeding a determination

whether a dismissal was unfair or not is made, such practice has an ancillary benefit, the significant reduction in the time within which matters in the Industrial Relations Court are disposed of.

Where the Court finds the dismissal to have been fair, that would be the end of it and there would be no need to assess compensation. On the other hand, where the Court finds a dismissal unfair, it only needs to reference a claimant's remuneration and duration of service, as pleaded and settled in evidence at the trial, to assess compensation. Before I embark on a consideration of applicant's evidence at the assessment, first a precis of Chioko and the conclusions it draws that inform this conviction is only apt.

The trial court in Chioko found unfair dismissal when respondents retrenched part of its staff in a restructuring exercise without following legally sanctioned protocols and procedures. During the hearing to assess compensation for some 60 applicants among the retrenched staff: the Court inquired whether it was necessary for respondents to cross examine all 60 applicants on the ground that each had to lead evidence individually to prove the measure of compensation they were entitled to.

The Court held that it was not. That according to existing authorities' interpretation of s. 63 of the Employment Act, the measure of compensation in cases of unfair dismissal is dependent on a claimant's remuneration and length of service. This, because in determining an award that is just and equitable under

s. 63 (4) of the Act, a court is mandated to first follow the prescribed formula in s. 63 (5) which outlines a graduated scheme for calculating an appropriate award. That scheme in tum apportions a fraction of a claimant's remuneration in a year, grossed over the length of service such claimant had been in employment. So, for service of more than 12 months but not exceeding five years, s. 63 (5) apportions a week's pay; for service of more than five years but not exceeding ten years, it apportions two weeks' pay; three weeks' pay for service of more than ten years but not exceeding fifteen; and one month's pay for service exceeding fifteen years.

Regarding pay as used in s. 63 (5), the authorities have held it to be the same as remuneration and includes wage or salary, meaning all earnings, however designated or calculated capable of being expressed in terms of money and fixed by mutual agreement or by law, which are payable by virtue of a written or unwritten contract of employment by an employer to an employee for work done or to be done or for services rendered or to be rendered (see DHL International Limited - v-Aubrey Nkhata, Civ. App. No. 50 of 2004 (Unrep.), per Twea, J.). In tum, Chioko pointed out that the authorities interpret that wages
or salary includes any additional benefits, allowances or emoluments whatsoever payable, directly or indirectly, whether in cash or kind, payable by the employer to the employee under the contract of employment.

In light of this interpretation, a claimant can and should actually plead their remuneration at the same time they plead their case in the Statement of Claim in IRC Form 1, including any additional benefits, allowances or emoluments whatsoever payable, directly or indirectly, whether in cash or kind, payable by

the employer to such claimant under the contract of employment. Indeed, to buttress this proposition, if doubted at all, para. 3 (d) of IRC Fom1 I expressly and specifically requires a claimant to disclose and state the "remuneration of the Applicant when so employed."

In the assessment at the Bar, applicant stated, having taken oath, that his remuneration was MK933, 860.71 when employed by respondents. That this represented an amalgamated sum of his basic salary, housing allowance, pension and medical contributions. Applicant tendered a copy of his pay slip that was admitted into evidence and marked 'CK4' which confirmed his testimony. Applicant also testified that at the time of dismissal, he had 45 leave days outstanding he prayed be commuted to cash. On this point, applicant testified that he was entitled to 18 leave days in a year. That at the time of dismissal, he had been in employment for 2 complete years and six months. On conclusion of his testimony, respondents opted not to cross examine, upon which applicant rested his case.

Now, as settled in Chioko, when calculating compensation for unfair dismissal under s. 63, a court should always bear in minds. 63 (4) that the award of compensation must be just and equitable, regard being had to the "loss sustained by the employee" as a result of the dismissal, in so far as the loss can be attributed to an employer's conduct and the extent, if any, to which the employee "caused or contributed to the dismissal." In that regard, as a starting point, the court should have recourse to the minimum awards set out in s. 63 (5). The formula in s. 63 (5) requires that the minimum computation for compensation in cases of unfair dismissal be an award of a week's pay, or

number of weeks' pay, for every year of service, depending on the totality of the actual period served (see National Bank of Malawi - v- Benjamin Khoswe, Civ. Cas. No. 718 of 2002 (Unrep.)). Since applicant was in employment for two years and six months, s. 63 (5) provides that he should be awarded a week's pay for each year of service, as he had been in service for more than a year but did not exceed five years.

Given that applicant's remuneration was MK933, 860.71, and he was in employment for two years and six months, I award him one week's pay for each of the two years of service. This translates to MK233, 465.18, a week's pay each year and MK466,
930.36 for the two years.

Next, I have to consider whether these awards are just and equitable under s. 63 (4). This is because, as clarified in Chioko, where a court holds that the compensation under s. 63 (5) does not meet the just and equitable test in s. 63 (4), it has discretion to increase the award beyond the minimum ins. 63 (5) (see Nkhata and Khoswe, above; Stanbic Bank Limited - v- R. Mtukula (# 2) (2008) MLLR 54). According to Twea J. in Nkhata, I have to consider three factors under s. 63 (4): Loss sustained by the employee consequent upon dismissal; whether the loss can be attributed to the actions of the employer; and the extent of the employee's contribution to the dismissal (National Bank of Malawi - v- Benjamin Khoswe, Civil Cause No. 718 of 2002).

In Nkhata, Twea J. (as he then was) held that in such circumstances, a court must always justify why it awarded more than the minimum, sentiments echoed by Chikopa J. (as he then was) in Kachinjika - v- Portland Cement company Limited (2008) MLLR 161 (also see C. Malunga - v-Air Malawi Limited, Civ. Cas. No. 1194 of 2002 (Unrep.)).

In the case at the Bar, applicant was employed by respondents around April 1, 2018, and only served up to 2020. From the pleadings on record, the genesis of his dismissal centered around a series of theft incidences at respondents' shops at Golomoti, Salima, Area 25 in Lilongwe and Mponela, which, for some reason or other, respondents sought to assign responsibility for to applicant.

Applicant intimates that allegations were raised against him regarding the Mponels theft, suggestive that the theft may somehow have been a consequence of his on failure to undertake stock taking within a prescribed fortnight. How respondents could somehow link a theft at one of their shops and applicant's stocktaking schedules is a wonder. To this, applicant contended, and I have no reason to doubt his rendition, that he did conduct stock taking within the prescribed period, specifically, on September 30, 2020. He also pointed out that allegations were made against him of not following banking and administrative procedures which he contended he did. Finally, respondents raised allegations in his letter of dismissal that were not stated in the charges he answered at the disciplinary hearing called for the purpose.

Respondents made no effort to specifically challenge these allegations of conduct, instead, merely opting to put up general denials, and even going to the extent of denying ever having employed applicant at all when there is clear indication that they did employ him as their Area Sales Manager. They merely stated that if they had indeed employed applicant, then they paid him all his terminal dues, or that he was not entitled to any at all.

In my considered opinion, this alone suggests respondents did not even stop for a minute to question whether what they were putting up as defense really had merit at all. As expressed in my order entering judgment, it seems to me all respondents were set on doing is to deny anything applicant alleged, merit or not notwithstanding. The same goes for all their responses to applicant's remaining allegations, outstanding monthly salaries, interest, pay in lieu of notice or accrued leave days. They even deny that he was ever discriminated against or sidelined in the period leading to dismissal, despite the existence of strong suggestions that he was. They deny committing any unfair labor practices, or that applicant is entitled to any of the remedies he claims.

For these reasons, and following Nkhata and Malunga, lam fairly convinced that the minimum award in s. 63 (5) does not meet the just and equitable test in s. 63 (4). I accordingly increase the award. In that regard, I award applicant two months' pay for each year of service, which translates to MK.I, 867, 723.42 for each year. This means that in my exercise of discretion to increase the award over and above the minimum award in s. 63 (5), I award applicant MK.3, 735, 442.84. In that regard, applicant's total award in compensation for unfair

dismissal is, therefore, MK4, 669, 303.55.

On severance allowance, s. 35 (1), makes severance allowance automatically payable upon a determination of unfair dismissal. Now, I am not certain whether applicant was paid a severance allowance upon his dismissal. In the circumstances, I award applicant two weeks' pay for each completed year of service in accordance with the First Schedule as severance, which is MK466, 930.36 for each year. For two years, this translates to MK.933, 860.71. I should make mention here that if respondents already paid applicant a severance allowance, then this amount should be deducted from the total sum of compensation awarded.

Applicant also claimed that he was not paid his salary in lieu of notice. I award him MK933, 860.71 , one month's pay in lieu of notice. Applicant also claims 45 leave days commuted to cash. Respondents did not challenge this claim and did not even cross-examine the applicant on it. In that regard, I award him the 45 leave days commuted to cash.

This translates to MK.46, 693.03 per day and MK2, 101, 186.60 for the 45 days. In all, the total award to applicant is, therefore MK8, 638,211.57. Finally, in the exercise of discretion, I award applicant interest at 1 O¾per annum from the date of dismissal to the date of judgment, which translates to MKl, 727, 642.31.

The total sum payable to applicant is, therefore, MKlO, 365, 853.88. Respondents are ordered to pay applicant this sum within 14 days from today's date.

Any party aggrieved by the judgment in default entered in favor of applicant and this assessment order is at liberty to appeal to the High Court within 30 days from the date of this order. Such appeal, in accordance with s. 65 (2) of Cap. 54:01 of the Laws of Malawi, the Labor Relations Act, can only be a question of law or jurisdiction.

Made in Chambers this 11th day of April 2023.