STER KINEKOR
v
ATTORNEY GENERAL

HIGH COURT.
DR. MATIBINI, SC, J.
8TH OCTOBER, 2010.
2010/HP/346.

[1] Employment law - Contract of service - Termination of employment -Right of master to terminate at any time for any reason - Liability in damages in case of breach of contract.

[2] Employment law - Dismissal - Non-compliance with disciplinary rules - Effect of.

[3] Administrative law - Judicial review - Purpose thereof.

This matter was commenced by way of judicial review pursuant to Order 53 of the Rules of the Supreme Court (White Book). The facts giving rise to the application are that the applicant who carries on the business of theatrical, and cinema services employed one Kenneth Kambita as its Controller. Sometime in 2005, Mr. Kambita was dismissed from the employment of the applicant for failing to account for unspecified sum of money.

Following the dismissal, Mr. Kambita lodged a complaint with the Ministry of Labour, and Social Security, alleging that he was unfairly dismissed from employment. Mr. Kambita further alleged that certain rules and regulations of the company were not followed.

Upon receipt of the complaint from Mr. Kambita, the Labour Office gave audience to both sides. After hearing Mr. Kambita, the Senior Labour Officer formed the opinion that the dismissal was justified, and advised Mr. Kambita to seek legal redress if he was dissatisfied with the decision of the Senior Labour Officer.

After the determination by the Senior Labour Officer, Mr. Kambita renewed his complaint before the Principal Labour Officer. Thereafter, Mr. Kambita continued to lodge his complaint with various officers, and at different levels within the Labour Department. Ultimately, Mr.

Kambita was advised to seek legal redress if he was not satisfied with the advice he received from the various officials within the Department.

Later, despite the matter having seemingly been concluded, a Mr. Venus Seti, an Assistant Labour Commissioner, directed that Mr. Kambita should be deemed to have been separated from employment, and ordered that he be paid a severance package as follows:

(a) two months salary for each year served;
(b) accumulated leave days; and
(c) one month's salary in lieu of notice.

It is this decision instructing the applicant to pay the severance package that gave rise to this action. The applicant contended that the Employment Act does not confer on the Labour Commissioner power to compel employers to compensate, or reinstate employees in the circumstances of Mr. Kambita. By the action for judicial review, the applicant sought the following reliefs:

(a) an order of certiorari to remove into this Court for the purpose of quashing the decision of the Assistant Labour Commissioner ordering the applicant to pay a severance package to its former employee; Mr. Kambita;

(b) an order of prohibition, proscribing the Assistant Labour Commissioner by himself, or through his agents from further hearing the complaint lodged by Mr. Kambita because the said matter had previously been declared closed, and therefore the office of the Assistant Labour Commissioner was functus officio;

(c) any other relief;
(d) an order for costs; and
(e) any other necessary, and consequential directions.

Held:

1. It is trite law that in a master servant relationship, a master can terminate a contract of employment at any time, and for any reason.

2. If he terminates outside the provisions of the contract, then he is in breach of contract, and is liable in damages for breach of contract.

3. Where however the master dismisses a servant, he can terminate the contract summarily without notice, on the ground of misconduct, negligence, or incompetence. If such grounds are
justified, the servant forfeits the right to any notice whatsoever, and to a number of other benefits.

4. Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, but the employer dismisses him without following the procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow the procedure, and he has no claim on that ground either for wrongful dismissal, or for a declaration that the dismissal was a nullity.

5. Judicial review is essentially concerned with the review of the lawfulness of the powers, and duties of those excising public functions.

6. Judicial review is also concerned with ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their own lawful purposes.

7. In a constitutional democracy, the role of judicial review is to guard the rights of the individual against the abuse of official power.

8. The grounds in which reliefs are sought in an action for judicial review are classically coalesced in three categories; wit, illegality, irrationality, and procedural impropriety.

9. When it is alleged that a decision is illegal, the primary task of the Court is to construe the content, and scope of the instrument conferring the duty, or power upon the decision-maker.

10. A decision is illegal if it contravenes or exceeds the terms of the power which authorizes the making of the decision; pursues an objective other than that for which the power to make the decision was conferred; if not authorized by a power, and contravenes or fails to implement a public duty.

11. The issue under the ground of irrationality is not whether the decision-maker strayed outside the terms or authorized purposes of a government statute, or instrument; the test of legality. But rather whether the power under which the decision-maker acts has been improperly exercised, or insufficiently exercised.

12. The ground relating to procedural impropriety is premised on the presumption that procedural fairness is required to be observed, whenever the exercise of a power adversely affects an individual's rights protected by common law, or created by statute. These include rights in property, personal liberty, status, and immunity from penalties, or fiscal impositions.

13. Section 64 of the Employment Act gives an employer, or employee a right to report to the Labour Officer an employer, or employee, as the case may be, who refuses to comply with the terms of any contract of services; whenever any question, difference, or dispute arises as to the rights or liabilities of any party to such contract; as to any misconduct, neglect, or ill-treatment of any such party, or concerning any injury to the person or property of such party.

14. In that event a Labour Officer is required to take measures to promote a settlement between the parties, the role of a Labour Officer is akin to that of a mediator.

15. Section 64 (1) of the Employment Act does not give a Labour Officer power to adjudicate a dispute.

16. Mr. Kambita was summarily dismissed from employment for failing to account an unspecified amount of cash. This allegation was not challenged, or contested by the respondent.

17. Since the dismissal was warranted, Regulation 12 (3) of Statutory Instrument Number 57, 2006, could not aid Mr. Kambita's case.

18. There is no doubt that section 25 of the Employment Act imposes a duty on any employer whenever an employer dismisses an employee summarily to deliver to a Labour Officer a written report of the circumstances leading to, and reasons for such dismissal.

19. Mr. Kambita did not deny or indeed challenge the allegation that he failed to account for unspecified cash. Mr. Kambita did not put forward any specific defence or justification for his action.

20. So the position would have been that if the applicant had reported the uncontested summary dismissal to the Labour Officer, the Labour Officer would not have in terms of Regulation 12 (3) of Statutory Instrument Number 57 of 2006, found that the case did not warrant summary dismissal. And by extension would not have ordered the payment of severance benefits. Thus, there is no factual basis upon which the applicant's decision to dismiss Mr. Kambita can be impeached.

Cases referred to:

1. Callo v Brouncker [1831] 4 c and p 518.
2. Boston Deep Sea Fishing and ice Company v Anseill [1888] 39 Ch. D 339.
3. Jupiter General Insurance Company v Shroft [1937] 3 ALL E.R. 67.
4. Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223.
5. Edward v Bairstow [1956] A.C. 14.
6. Laws v London Chronicle (Indicator Newspaper) [1959] 2 ALL E.R. 285.
7. Ridge v Baldwin [1963] 2 ALL E.R. 66.
8. Pepper v Webb [1969] 2 ALL E.R. 216.
9. Glynn v Keele University, and Another [1971] 2 ALL E.R. 70.
10. Ross v Aquascatum Limited [1973] I.R.L.R. 107.
11. Chief Constable of North Wales Police v Evans [1982] 1 W.L.R. 1155.
12. Blyth v Scottish Liberal Club [1983] I.R.L.R.245.
13. Council of Civil Service Union, and Others v Minister for Civil Service [1984] 3 ALL E.R. 950.
14. Sinclair v Neighbour [1967] 2 Q.B. 279.
15. Agholar v Cheeseborough Ponds Zambia Limited (1976) Z.R. 1.
16. Contract Haulage Limited v Kamayoyo (1982) Z.R. 13.
17. Zambia National Provident Fund v Chirwa (1986) Z.R. 70.
18. Zinka v Attorney General (1990-1992) Z.R. 73.
19. Chitala v Attorney General (1995-1997) Z.R. 91.
20. Pamodzi Hotel v Mbewe (1987) Z.R. 56.

Legislation referred to:

1. Employment Act, cap 268, ss. 25, 64, 65, and 70.
2. Statutory Instrument Number 57 of 2006.

Works referred to:

1. Harry Woolf, Jeffrey Jowell, and Andrew Le Sueur, De Smith's Judicial Review, (London, Sweet and Maxwell, 2007).

2. N.M. Selwyn, Selwyn's Law of Employment, Fourteenth Edition, (Oxford, Oxford University Press, 2006).

3. Gwyneth Pit, Employment Law, Seventh Edition, (London, Sweet and Maxwell, 2007).

4. Ian Smith, and Gareth Thomas, Smith, and Woods Employment Law, Ninth Edition, (Oxford, Oxford University Press, 2008).

5. W.S. Mwenda, Employment Law in Zambia, Cases, and Materials, (Lusaka, University of Zambia Press, 2004).

S.N. Kateka (Mrs.) of Messrs MNB Legal Practitioners for the applicant.
C. Mulenga (Ms.), State Advocate, Attorney General Chambers for the respondent.

DR. MATIBINI, SC, J.: This matter was commenced by way of judicial review pursuant to Order 53 of the Rules of the Supreme Court (White Book). The facts giving rise to the application (as deposed to by one Willian Takawira Kazoka an employee of the applicant), are that the applicant who carries on the business of theatrical and cinema services employed Mr. Kenneth Kambita as its Controller. However, sometime in 2005, Mr. Kambita was dismissed from the employment of the applicant for failing to account unspecified sum of money. Following, the dismissal, Mr. Kambita lodged a complaint with the Ministry of Labour and Social Security, alleging that he was unfairly dismissed from employment. Specifically, Mr. Kambita alleged that certain rules and regulations of the company were not followed.

On 11th November, 2005, upon receipt of the complaint from Mr. Kambita, the Labour officer gave audience to both sides. After hearing the applicant, and Mr. Kambita, the Senior Labour Officer formed the opinion that the dismissal was justified, and advised Mr. Kambita to seek legal redress if he was dissatisfied with the decision of the Senior Labour Officer.

After the determination referred to above, (by the Senior Labour Officer), on 11th January, 2006, Mr. Kambita renewed his complaint before the Principal Labour Officer. Thereafter, Mr. Kambita continued to lodge his complaint with various officers, and at different levels within the Labour Department, and in total disregard of the laid down procedure. As a result of the various complaints made by Mr. Kambita, the applicant was on divers occasions summoned to appear before the Deputy Minister, and various Assistant Labour Commissioners, who all found no fault with the applicant. On all these occasions, Mr. Kambita was advised to seek legal redress if he was not satisfied with the advice he received from the various officials within the Labour Department.

On 7th December, 2009, despite the matter having seemingly been concluded, to the applicant's shock and amazement, a Mr. Venus Seti, an Assistant Labour Commissioner, directed that Mr. Kambita should be deemed to have been separated from employment, and ordered that he be paid a severance package as follows:

(a) two months salary for each year served;
(b) accumulated leave days; and
(c) one month's salary in lieu of notice.

Essentially it is this decision instructing the applicant to pay the severance package that has given rise to the present cause of action. The applicant contends that the Employment Act does not confer on the Labour Commissioner power to compel employers to compensate, or reinstate employees in the circumstances of Mr. Kambita. The applicant further contends that, that power is the preserve of the Courts of law.

The applicant is seeking the following reliefs:

(a) an order of certiorari to remove into this honourable Court for the purpose of quashing the decision of the Assistant Labour Commissioner, dated 7th December, 2009, ordering the applicant to pay a severance package to its former employee; Mr. Kambita;

(b) an order of prohibition, proscribing the Assistant Labour Commissioner by himself, or through his agents from further hearing the complaint lodged by Mr. Kambita because the said matter has previously been declared closed, and therefore the office of the Assistant Labour Commissioner is functus officio in relation to the same;

(c) any other relief;

(d) an order for costs; and

(e) any other necessary and consequential directions.

This application is opposed. In opposing the application an affidavit was sworn by Mr Venus Seti, an Assistant Labour Commissioner in the Ministry of Labour and Social Security. Mr. Seti recalls in the affidavit that Mr. Kambita a former employee of the applicant reported a case of unfair dismissal to the Labour Department, sometime in 2005, after being dismissed by his former employer. At the material time, the matter was dealt with by a Mr. Kabaso Chola, a Senior Labour Officer. Mr. Chola, on 11th November, 2005, advised Mr. Kambita that he was free to seek legal redress, or alternatively appeal to the Labour Commissioner's office.

Mr. Seti confirmed in the affidavit that at the appeal stage, the matter was dealt with by the Principal Labor Officer, and also by various Assistant Labour Commissioners. Mr. Seti further confirmed that the Deputy Minister also interceded in the matter, and convened a meeting on 21st July, 2009. The purpose of the meeting was to establish whether Mr. Kambita's case was similar to that of the twenty seven employees of the applicant who had lodged a complaint with the line Ministry, that the applicant had breached labour laws; failed to remit statutory contributions to the National Authority Pension Scheme (NAPSA); engaged in causalisation of labour; treated employees unfairly; had no conditions of service, and a disciplinary Code for workers. At the end of the meeting, it was resolved to close Mr. Kambita's case, and the Minister directed that since Mr. Kambita's case, was closed, the line Ministry would only deal with the case for the twenty seven former employees, including Mr. Kambita.

Thus, on 19th October, 2009, Mr. Seti conducted his own investigations based on the complaints made by the twenty seven employees. The investigations conducted by Mr. Seti revealed that the only genuine case was that of Mr. Kambita, for the following reasons:

(a) the provisions of the Employment Act had been violated by the applicant, because the applicant failed to report Mr. Kambita's case to the Labour Department within a period of four days;

(b) a letter of dismissal was not issued to Mr. Kambita; and
(c) Mr. Kambita's appeal was heard by a junior manager.

As a result, on 7th December, 2009, Mr. Seti convened a meeting with Mr. Kazoka, a representative of the applicant, and Mr. Kambita. During that meeting, it was agreed that Mr. Kambita should be paid his terminal benefits comprising two months salaries for each year completed. To this extent, Mr. Seti contends that where a Labour Commissioner, or Labour Officer establishes that the circumstances of the case do not warrant dismissal of the employee, then the employee so dismissed shall be entitled to severance benefits of not less than two months basic pay for each completed year of service. Mr. Seti further contends that the matter was resolved amicably, because the Labour Department did not in fact re-open Mr. Kambita's, case, which had been closed by the Deputy Minister of Labour and Social Security.

Mr. Seti maintains that the Department of Labour has power in terms of section 64 of the Employment Act to deal with disputes referred to it by aggrieved parties. In this regard, Mr. Seti contends that the Department of Labour did not act outside its jurisdiction, or powers.

In the submissions filed on 16th September, 2010, on behalf of the applicant, Mrs. Kateka impeached the decision by Mr. Seti, directing that Mr. Kambita should be paid a severance package on three grounds. First, that it was illegal; second, that it is procedurally improper; and lastly, that it is Wednesbury unreasonable. The applicant's submissions, and arguments will be considered in that order. In the first place, Mrs. Kateka submitted that Mr. Seti acted illegally when, first, he purported to re-hear the case of Mr. Kambita sometime in December, 2009. Second, when he ordered the applicant to pay Mr. Kambita a severance package as directed in his letter of 7th December, 2009.

Mrs. Kateka submits that the powers of the Labour Commissioner to deal with complaints are provided for in section 64 (1) of the Employment Act, chapter 268 of the laws of Zambia. Section 64 is in the following terms:

“Subject to the provisions of subsection (2), whenever an employer or employee neglects or refuses to comply with the terms of any contract of service, or whenever any question, difference, or dispute arises as to the rights or liabilities of any party to such contract or as to any misconduct, neglect, or ill treatment of any such party or concerning any injury to the person or property of such party, the party aggrieved may report the matter to a Labour Officer, who shall thereupon take such steps as may seem to him to be expedient to effect a settlement between the parties, and in particular shall encourage the use of collective bargaining facilities where applicable.”

Section 65 of the Act goes on to provide that:

“Whenever, upon a report made to him under the provisions of section sixty four, a Labour Officer considers that a breach of the provisions of this Act has been disclosed, he may refer the matter to a Court.”

Mrs. Kateka submitted that in terms of section 64 (1) of the Employment Act, the role of the

Labour Officer is similar to that of a mediator. Namely, to assist the parties to reach a settlement that is mutually acceptable to the parties. Mrs. Kateka contends that section 64 (1) does not confer on the Labour Officer the power to adjudicate a matter, and render a judgment, as Mr. Seti sought to do in this case. Mrs. Kateka submitted that Mr. Seti by directing that the applicant should pay Mr. Kambiti a severance package contravened the Employment Act. Mrs. Kateka contends that the only remedy available to a party aggrieved by a decision of a Labour Officer in the exercise of the powers under sections 64, and 65 of the Employment Act, is to apply to Court for an appropriate order. Furthermore, Mrs. Kateka drew my attention to section 70 of the Employment Act. Section 70 provides as follows:

"Notwithstanding the provisions of any other law, a Court to which any matter is referred under the provisions of section sixty five shall have jurisdiction to:

(a) adjust and set off one against the other all such claims on the part of the employer or employee arising out of or incidental to the contract of service as the Court may find to be subsisting, whether such claims are liquidated or unliquidated and for wages, damage to person or property or for any other cause and to direct the payment of such sum as it finds due by one party to the other party;

(b) terminate a contract of service upon such terms as to the payment of damages and otherwise as it thinks fit;

(c) impose any punishment or penalty to which any person is liable under the provision of this Act;

(d) assess the fair value of services rendered by an employee in any case in which such services are to be assessed in accordance with the provisions of this Act, or in any case where the rate of wages or other benefits to which an employee should be entitled have not been agreed between the employer and employee or it is uncertain what was agreed;

(e) decide the relative rights and duties of employers and employees in relation to any matter referred to the Court under the provisions of this Act;

(f) fix the amount of compensation for loss of or damage to the property of any employer where such loss has been occasioned by the wrongful act or omission of his employers;

(g) award damages for wrongful dismissal; and

(h) order reinstatement or re-employment.

Mrs. Kateka argued that it is very clear from section 70 of the Employment Act that the adjudication of the rights of the parties and awarding of compensation under the Act, is the preserve of the Courts. Mrs. Kateka further argued that Mr. Seti should have referred the matter to Court, in accordance with section 65 of the Employment Act; instead of passing a judgment as he attempted to do. In the premises, Mrs. Kateka submitted that Mr. Seti acted outside the scope of his legal powers, and fell into grave error when he issued a mandatory order directing the applicant to pay Mr. Kambita a severance package, when he had no jurisdiction to do so. Mrs. Kateka, therefore submitted that the decision by Mr. Seti is null and void for being illegal.

In advancing the preceding proposition, Mrs. Kateka relied on the dicta of Lord Diplock in the case of Council of Civil Service Union and Others v Minister for Civil Service (13), when he stated that:

"By "illegality" as a ground of judicial review is meant that the decision maker must understand correctly the law that regulates his decision-making power, and give effect to it."

As regards the ground relating to procedural impropriety, Mrs. Kateka submitted that it was improper for Mr. Seti to re-open the matter, after the case had been heard and concluded by a competent officer(s). Mrs. Kateka also argued that when Mr. Seti purported to re-hear the matter, and issue his directive, the applicant was not heard. Thus, Mrs. Kateka submitted that it is trite law that a person who is to be adversely affected by a decision must be given an opportunity to be heard.

With regard to "Wednesbury unreasonableness", Mrs. Kateka submitted that the Supreme Court in the case of Chitala v Attorney General (19), summarised the principle of unreasonableness as a ground for judicial review by referring to the celebrated case of Associated Provincial Picture Houses Limited v Wednesbury Corporation (4). That is to say:

"The decision of a person or body performing public duties or functions will be liable to be quashed or otherwise dealt with by appropriate order in judicial review proceedings, where the decision is such that no such person or body properly directing itself on the relevant law, and acting reasonably could have reached the decision."

In the case at hand, Mrs. Kateka submitted that Mr. Seti directed that Mr. Kambita should be paid a severance package as prescribed, on the following grounds:

(a) that Management erred in law by not complying with the provisions of section 25 of the Employment Act, cap 268 of the laws of Zambia. That is to say, a report was never submitted to the Labour Department explaining the circumstances which led to the dismissal;

(b) that Mr. Kambita was not served with a dismissal letter. But was merely made to sign a termination form after some verbal instructions from South Africa;

(c) that when he appealed to the Director for the review of his case, the matter was reviewed, and heard by a junior manager, when in essence, he was dismissed by a senior manager; and

(d) the investigations further revealed that the offence for the erring employee was not quoted, or cited from the company disciplinary code.

In view of the foregoing, Mrs. Kateka submitted that the reasons advanced by Mr. Seti for directing that Mr. Kambita should be paid a severance package are not justified. And further, Mrs. Kateka submitted that the decision by Mr. Seti to order the payment of the severance package is so unreasonable that a person applying the relevant law could not have come to the decision that Mr. Kambita is entitled to a severance package.

In the course of the submissions, Mrs. Kateka, drew my attention to the case of Agholar v Cheeseborough Ponds Zambia Limited (15), in which it was observed as follows at P.7.

"A master may terminate with or without sufficient notice. In the latter case he is liable for breach of contract. Where however a master "dismisses" a servant he terminates the contract summarily without any notice on the grounds of misconduct, negligence, or incompetence, if such grounds are justified the servant forfeits the right to any notice whatsoever, and to a number of other benefits. Dismissal invariably incurs loss of benefits other than those already earned under the contract."

Mrs. Kateka argued that the dismissal of Mr. Kambiti was reported to the Labour officers. And the Labour Officers found the dismissal to be lawful. However, the decisions of the Labour Officers were reversed by Mr. Seti. Mrs. Kateka contends that Mr. Seti's reasons for awarding Mr. Kambita a severance package are not justified at law, and the decision is Wednesbury unreasonable. Ultimately, Mrs. Kateka urged me to grant the reliefs sought in the Originating Notice of Motion.

The respondents filed their submissions on 21st September, 2010. In their submissions, the respondent has addressed the three grounds under which judicial review was canvassed. Namely, illegality, Wednesbury unreasonableness, and procedural impropriety. In addressing the grounds relating to illegality, Ms. Mulenga submitted on behalf of the respondent that Mr. Seti and the Department of Labour did not act outside their remit in dealing with the matter at hand. Ms. Mulenga contends that Mr. Seti relied on the powers conferred on him by the Employment Act, and statutory instrument number 57 of 2006;
promulgated pursuant to the Minimum Wages and Conditions of Employment Act. In this regard, Ms. Mulenga submitted that, Mr. Seti was guided by section 25 (1) of the Employment Act. Section 25 (1) of the Employment Act provides as follows:

"Wherever an employer shall dismiss an employee summarily and without due notice of payment of wages in lieu of notice, such employer, shall within four days of such dismissal deliver to a Labour Officer, in the District in which the employee was working, a written report of the circumstances, leading to and the reasons for such dismissal."

Ms. Mulenga contends that the applicant in this matter did not report the dismissal to the Labour Department. Instead, this matter was brought to the attention of the Labour Department by Mr. Kambita who had initially reported the matter as a case of unfair dismissal. Ms. Mulenga further contends that in dealing with Mr. Kambita's case, Mr. Seti, exercised his discretionary power vested in him by section 64 (1) of the Employment Act,

In light of the provisions of section 64(1) of the Employment Act, Ms. Mulenga contends that Mr. Seti did not act ultra vires his powers under the Employment Act. Ms. Mulenga further contends that Mr. Seti in any case found the following after conducting his investigations:

(a) that the applicant violated section 25 (1) of the Employment Act because the applicant did not report Mr. Kabita's case to the Labour Department within four days after the dismissal, explaining the circumstances leading to, and reasons for the dismissal;

(b) that Mr. Kambita was not issued with a letter of dismissal,

(c) that Mr. Kambita's appeal was heard by a junior manager, when it should have been heard by senior manager; and

(d) the offences committed by the erring employee were not quoted, or cited in the company disciplinary Code.

In arriving at the severance package, Ms. Mulenga submitted that Mr. Seti was guided by regulation 12(3) of statutory instrument number 57 of 2006, promulgated pursuant to the Minimum

Wages and Conditions of Employment Act, chapter 276 of the Laws of Zambia which provides as follows:

"Where the Labour Commissioner or Labour Officer as the case may be finds that the circumstances of the case do not warrant summary dismissal of the employee, the employee so dismissed shall be entitled to payment of severance benefits of not less than two months basic pay for each competed year of
service." (underlining own and for emphasis)

Ms. Mulenga also submitted that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. Thus, the purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected, and that it is not part of that purpose to substitute the opinion of the judiciary or individual judges for that authority constituted by law to decide the matters in question. Ms. Mulenga submitted that the preceding principle was settled in the case of Chief Constable of North Wales Police v Evans (11), at page 1160. Ms. Mulenga went on to submit that a decision of an inferior Court, administrative, or a public authority, may be quashed where the Court or authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice, where those rules are applicable. A decision may also be quashed where there is an error of law on the face of the record, or the case is Wednesbury unreasonable. Ms. Mulenga contends that Mr. Seti did not act without jurisdiction nor did he exceed his jurisdiction. Ms. Mulenga also maintains that there was no failure to comply with rules of natural justice, and the decision was not Wednesbury unreasonable.

In addressing the ground relating to improcedural impropriety, Ms. Mulenga contends that there was nothing procedurally improper in the manner in which Mr. Kambita's case was dealt with. Ms. Mulenga further contends that the case was not re-opened by Mr. Seti; but rather that there was a fresh case opened, which included Mr. Kambita. Ms. Mulenga reiterated the contention that Mr. Seti acted in accordance with section 64 (1) of the Employment Act which gives him power to settle disputes referred to the Labour office.

As regards the contention that the decision by Mr. Seti to pay the severance package was Wednesbury unreasonable, Ms. Mulenga contends that it is not. Ms. Mulenga maintains that the directive was made pursuant to regulation 12 (3) of statutory instrument number 57 of 2006. Ms. Mulenga also drew my attention to the case of Associated Provincial Picture House Limited v Wednesbury Corporation (supra), and pointed out that Greene M. R. had this to say:

"The Courts can any interfere with an act of an executive authority if it can be shown that the authority has contravened the law. It is for those who alert that the local authority have contravened the law to establish that proposition. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles, the discretion is an absolute one and cannot be questioned in any Court of law. What then are those principles. These are perfectly understood. The exercise of such discretion must be a real exercise of discretion.

If in the statute conferring the discretion, there is to be found, expressly or by implication

matters to which the authority exercising the discretion ought to have regard in exercising discretion, they must have regard to those matters. It is true that the discretion must be exercised reasonably: For instance, a person entrusted with discretion must direct himself properly in law. He must call his attention to matters to which he is bound to consider. If he does not obey these rules he may be said to be acting unreasonably."

Ms. Mulenga contends that Mr. Seti properly exercised his discretion and directed himself properly in law. He called to his attention the matters that he was bound to consider. Further, Ms. Mulenga submitted that Mr. Seti did not contravene any law, and his decision was not irrational. Ultimately, Ms. Mulenga pressed that Mr. Seti acted within the "four corners" of his jurisdiction. As a result, his decision was not illegal; procedurally improper; or Wednesbury unreasonable.

I am indebted to counsel for their spirited submissions, and arguments. The decision by the applicant to dismiss Mr. Kambati is what gave birth to this action. The applicant contends that at common law he was entitled to dismiss an erring employee. What then is the position at common law?

N.M. Selwyn, Selwyn's Law of Employment, Fourteenth Edition, (Oxford, Oxford University Press, 2006) paragraph 16.8, states as follows at page 385:

"In Jupiter General Insurance Company v Shroff (3), the Privy Council stated that summary dismissal was a strong measure, to be justified only the most exceptional circumstance. Nonetheless there are a number of well recognized grounds on which an employer may dismiss an employee summarily; these include gross misconduct, willful refusal to obey lawful and reasonable orders, gross neglect, dishonesty and so forth. (See e.g. Blyth v Scottish Liberal Club (12). Whether the conduct in question is serious enough to warrant dismissal is always a question of fact in each case, and the standards to be applied are those of the current mores, not those which may have become outdated."

Gwyenth Pitt, in Employment Law, Seventh Edition, (London, Sweet and Maxwell, 2007,) states in paragraph 8006, at p 238, that:

"Even if the employer terminates the contract with no notice or with inadequate notice, the employee will not be able to claim wrongful dismissal if the employer is justified in thus summarily dismissing him. When is summary dismissal justified? Essentially, in the same circumstances in which an innocent party would be entitled to terminate any other contract; that is when the other party has committed a fundamental breach. Translated into the language of employment law, an employer is entitled to dismiss an employee summarily if the employee has committed an act of gross misconduct. Generally speaking, things like, disobedience, dishonesty and violence are regarded as gross misconduct, although it seems that the employer may stipulate offences as very serious which would usually be so regarded to take account of the employer's particular circumstances."

Ian Smith and Gareth Thomas, in Smith's and Woods Employment Law, Ninth Edition, (Oxford, Oxford University Press, 2008) at page 431 observe as follows:

"At common law an employer may dismiss any employee summarily (i.e. without notice) if he has sufficient cause to do so. In old cases from the nineteenth century and before, this was viewed as a

natural and necessary aspect of the relationship between master and servant and servant's duty of obedience. The judgment of Parke B in Callo v Brouncker (1), was treated for many years as laying down set rules on summary dismissal which he said could be for moral misconduct (pecuniary or otherwise), willful disobedience or habitual neglect. However, with the move in nineteenth century towards viewing employment in a contractual rights, the emphasis changed so that the right to dismiss summarily became explicable on the ground that the conduct of the employee was such that it showed repudiation by him of the contract of employment, which the employer accepted and treated as terminating the contract immediately." (See Boston Deep Sea Fishing and Ice Company v Ansell (2); Laws v London Chronicle (indicator Newspaper) Ltd (6); and Pepper v Webb (8).

W. S. Mwenda, Employment Law in Zambia: Cases and Materials (Lusaka, University of Zambia Press, 2004) observes at p 41, that:

"An employer has the right to summarily dismiss an employee who has misconducted himself or is guilty of a fragrant breach of contract of employment. However, in such a case, the employer must follow the procedure outlined in section 25 of the Employment Act. The section provides that where an employer dismisses an employee summarily, and without due notice such employer must, within four days of dismissal, deliver to a Labour Officer in the district in which the employee was working, a written report of the circumstances leading to, and the reasons for such dismissal. The Labour officer then enters into a register, maintained for the purpose, details of the report delivered to him. The above provision was obviously meant for the protection of an employee."

Be that as it may, the learned author of Selwyn's Law of Employment, maintains that certain principles are constant. For instance, in Sinclair v Neighbour (14), a manager took £15 from a till and left an IOU in its place. He intended to replace the money a few days later. His conduct was regarded as being dishonest, and his summary dismissal was upheld. In another case between Ross v Aquascutum Limited (10), the employee was a night watchman. He was observed to be absent from the building he was guarding for two hours of each night, and it was held that his conduct constituted a breach of contract so serious as to justify summary dismissal.

In our jurisdiction, a leading case, on summary dismissal is the case of Agholor v Cheesebrough Ponds (Zambia) Limited (15). The facts of the case were that the plaintiff, a Chartered Secretary and Cost Accountant, was appointed as Company Secretary, and Controller of the defendant company, a subsidiary of an international group of companies. A letter containing confirmation of a verbal offer of appointment addressed to a recruiting agency for executives in the United Kingdom set out the terms offered to the plaintiff. The plaintiff who resided in Edinburg, accepted those terms. He commenced duties in Lusaka on 27th August, 1973. No formal contract of employment was ever signed. On 18th September, 1973, the plaintiff's employment was terminated. The plaintiff claimed damages for wrongful dismissal. The defendant took the position that the contract was properly terminated, and alternatively, that the plaintiff was lawfully dismissed on the grounds of incompetence, and misconduct.

Cullinan J, in delivering his judgment observed that he did not see anything in the evidence to indicate that the contract involved anything other than a 'pure master and servant' relationship. Cullinan

J, went on to observe that, is trite law that a master can terminate a contract of employment at any time and for any reason. If he terminates outside the provisions of the contract, then he is in breach of contract, and is liable in damages for breach of contract (See Contract Haulage Limited v Kamayoyo (16). Cullinan J. went on to state that to “dismiss” an employee is altogether a different matter. Cullinan J noted that to speak of a dismissal with insufficient notice is to confuse the issue. A master may terminate with or without notice. In the latter case he is liable for breach of contract. Where however the master “dismisses” a servant, he terminates the contract summarily without notice, on the ground of misconduct, negligence or incompetence. If such grounds are justified the servant forfeits the right to any notice whatsoever, and to a number of other benefits. (See also Pamodzi Hotel v Mbewe (20), where the Supreme Court held that instant dismissal is justified if an employee is drunk).

It is also instructive in the course of this discussion to refer to the case of Zambia National Provident Fund v Chirwa (17). The facts of the case were that Mr. Godwin Kamanga, who prior to the commencement of the action died, (And I will refer to him as the deceased), was employed in the accounts department of the appellant's organisation. In early 1980, a sum of money was found to be missing from the funds for which the deceased was responsible. On the 8th May, 1980, a letter was written to the deceased by the appellant organisation referring to his failure to account for the sum of K 4, 734=85, and stating that he would be suspended pending the outcome of the investigations.

On 14th July, 1980, the appellant organisation wrote to the deceased to the effect that investigations had disclosed that the total discrepancy in his accounts amounted to K 24, 637=26n. As a result, the deceased was found guilty of misconduct under Regulation 10(m) of the appellant's organization's conditions of service. In view of the seriousness of the offence, the appellant organisation decided to terminate the contract of employment in accordance with Regulation 17 (c) (i), with effect from 8th May, 1980; the date of the deceased's suspension. Following the termination of the contract, the personal representative of the deceased caused an originating summons to be issued calling for judicial interpretation of Regulation 16 (a) (b) (c) and (e), of the appellant organization's conditions of service.

In the judgment, the trial judge found that investigations revealed that the deceased had misappropriated K 24, 637=26n. However, no charge of misconduct was preferred against the deceased. And the deceased was dismissed without calling upon him to answer the charge in writing within a stated period. The Director of the appellant organisation did not also in terms of Regulations 16, consider the charge as there was none. And the same Director did not further decide in terms of the conditions of service, whether or not the deceased was guilty of misconduct. The trial judge therefore found that the Director did not make a finding that the deceased was guilty of misconduct, and that the deceased dismissal without giving him an opportunity to be heard was contrary to regulation 17. It is against that finding and the finding that the dismissal was null and void, that the appeal was lodged in the Supreme Court.

On appeal, Ms Mwansa on behalf of the deceased argued that the letter dated 14th July, 1980, indicted that the deceased was dismissed in respect of the total sum of K 24, 637=26n, and that he

never had an opportunity to make representations in respect of the said sum. Conversely, Mr. Matakala on behalf of the appellant organisation argued that the deceased was dismissed for misconduct, and since he was guilty of misconduct, the appellant was entitled to dismiss him.

In the course of the judgment, the Supreme Court referred to the English case of Glynn v Keel University and Another (9). In this case, a student was disciplined by the Vice-Chancellor of the University without complying with the procedure laid down by the University statute before imposing such discipline. It was held in the Glynn's case (supra) that the rules of natural justice had not been complied with in that the student had not been given a chance of being heard before the decision was reached to inflict the penalty upon him. However, Glynn had suffered no injustice in that it was not disputed that the offence had been committed by him. The offence was one which merited a severe penalty, and the penalty was intrinsically the proper one; consequently it was held that Glynn had no redress. It is noteworthy that in reaching the conclusions summarized above Pennycuick V.C. remarked as follows at P. 97.

"..... There is no doubt that the offence was one of the kind which merited a severe penalty according to any standards current even today. I have no doubt that the sentence of exclusion of residence in the campus was a proper penalty in that respect of that offence. Nor has the plaintiff in his evidence put forward any specific justification for what he did. So the position would have been that if the Vice-Chancellor had accorded him a hearing before his decision, all that he, or any one on his behalf could have done would have been to put forward some general plea in any appropriate case, but I do not think the mere fact that he was deprived of throwing himself on the mercy of the Vice-Chancellor in that particular way is sufficient to justify setting aside a decision which was intrinsically a perfectly proper one in all the circumstances. I have come to the conclusion that the plaintiff has suffered no injustice, and that I ought not to accede to the present motion."

40.

In the Chirwa case (supra), the Supreme Court endorsed the principle referred to above in the Glynn case (supra). The Supreme Court in the Chirwa case (supra) went on to crystallize a cardinal or fundamental principle that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, but the employer dismisses him without following the procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow the procedure, and he has no claim on that ground either for wrongful dismissal, or for a declaration that the dismissal was a nullity.

It is also instructive to note that in the Chirwa case (supra), the Supreme Court also pointed that in the case of Contract Haulage Limited v Kamayoyo (supra), it was held that where there is a statute that specifically provides that an employee may only be dismissed if certain proceedings are carried out, or where there is some statutory authority for a certain procedure relating to dismissal, a failure to give an employee an opportunity to answer charges against him is contrary to natural justice and a dismissal in those circumstances is null and void. The Supreme Court was quick to point out in the Chirwa case (supra) that in the Kamayoyo case (supra), the Supreme Court did not take into consideration a situation which would arise where despite a failure to comply with a certain procedure before taking disciplinary

action no injustice resulted. Thus, the Supreme Court in the Chirwa case (supra) qualified its decision in the Kamayoyo case (supra).

It will be recalled that this action was commenced by way of judicial review. Judicial review is essentially concerned with the review of the lawfulness of the powers and duties of those exercising public functions. Judicial review also goes some way to answering the age old question of "who guards the guards" by ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their own lawful purposes. In recent years, it is increasingly being realized that in a constitutional democracy, the role of judicial review is to guard the rights of the individual against the abuse of official power. (See Harry Woolf, Jeffrey Jowell, and Andrew Le Sueur, De Smith's Judicial Review (London, Sweet and Maxwell, 2007) paragraph 1-006, at p6, and 1-010 at p8. It is also trite law that judicial review has supplanted the old proceedings for the prerogative writ of mandamus, prohibition, or certiorari. These orders can now be obtained under Order 53 of the Rules of the Supreme Court (White Book). (See Chitala v Attorney General (supra). The grounds in which reliefs are sought in an action for judicial
review are classically coalesced in three categories; wit, illegality, irrationality, and procedural impropriety. (See Council of Civil Service Union and Others v Minister for Civil Service (supra)).

Thus, when it is alleged that a decision is illegal, the primary task of the Court is to construe the content and scope of the instrument conferring the duty or power upon the decision-maker. A decision is illegal if it is contravenes or exceeds the terms of the power which authorizes the making of the decision; pursues an objective other than that for which the power to make the decision was conferred; it is not authorised by a power; and contravenes or fails to implement a public duty. (See, De Smith's Judicial Review (supra), paragraph 5002 at page 225).

Conversely, the issue under the ground of irrationality is not whether the decision-maker strayed outside the terms or authorized purposes of a governing statute, or instrument; the test of legality. But rather, whether the power under which the decision-maker acts has been improperly exercised, or insufficiently justified. (See De Smith's Judicial Review (supra), paragraph 1103 at p44).

Lastly, the ground relating to procedural impropriety, is premised on the presumption that procedural fairness is required to be observed, whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute. These include rights in property, personal liberty, status, and immunity from penalties or other fiscal impositions. (See De Smith's Judicial Review (supra) paragraph 7-017 at P 365-366); Ridge v Baldwin and Others (7) and Zinka v Attorney General (18).

On the facts of this case it is alleged that Mr. Seti acted illegally when he first, purported to re-hear the case of the applicant in December, 2009. And second, when he ordered the applicant to pay Mr. Kambita a severance package. The provisions that fall to be construed therefore are sections 25, 64, and 70, of the Employment Act. And regulation 12(3) of statutory instrument number 57 of 2006.

Section 25 imposes a duty on an employer whenever an employer dismisses an employee summarily to report such dismissal to a Labour Officer within a period of four days of such dismissal. The report is required to indicate the circumstances leading to, and the reasons for the dismissal.

Section 64 gives an employer or employee a right to report to the Labour Officer whenever an employer, or employee as the case may be, neglects or refuses to comply with the terms of any contract of services; whenever any question, difference or dispute arises as to the rights or liabilities of any party to such contract; as to any misconduct, neglect or ill treatment of any such party; or concerning any injury to the person; or property of such party. In that event, the Labour Officer is required to take measures to promote a settlement between the parties. I agree with the submission by Mrs. Kateka that in this respect, the role of the Labour Officer is akin to the role of a mediator. Namely, to bring the parties to reach a settlement that is mutually acceptable. I also agree with the submission by Mrs. Kateka that section 64 (1) does not give the Labour Officer power to adjudicate a dispute. In this case, various officials in the line Ministry did in fact mediate in this matter. And after the mediation, closed the case, so to speak.

Section 65 simply provides that whenever a report is submitted to the Labour Officer pursuant to section 64, and a Labour Officer considers that a breach of the Act has been disclosed, then he may refer the matter to Court.

Section 70 goes on to provide that a Court to which any matter is referred under the provisions of section 65, has the jurisdiction, or power to decide the relative rights and duties of employers and employees in relation to any matter under the provisions of the Act; and to award damages for wrongful dismissal.

Lastly, regulation 12 (3) of Statutory Instrument number 57 of 2006, stipulates that where the Labour Commissioner or Labour Officer as the case may be, finds that the circumstances of the case do not warrant summary dismissal of the employee, then the employee so dismissed shall be entitled to payment of severance benefits of not less than two months basic pay of each complete year of service.

The crux of the matter in this case in my opinion centers on the interpretation of section 25 of the Employment Act, and regulation 12(3) of Statutory Instrument Number 57 of 2006. The steps in interpreting the two provisions referred to above are as follows. First, the critical factual issue is that Mr. Kambita was summarily dismissed from employment for failing to account an unspecified amount of cash. This allegation has not been challenged or contested by the respondent. I therefore find as a fact that Mr. Kambita was dismissed summarily for failing to account for
unspecified sum of money.

Second, the contentions of Ms. Mulenga are essentially twofold. First, Ms. Mulenga contends that Mr. Kambita's dismissal is unfair or wrongful, because the dismissal was not reported to the Labour Officer as stipulated by section 25 of the Employment Act. And as sequitur, in terms of regulation 12(3) of Statutory Instrument number 57 of 2006, Ms. Mulenga implies that the circumstances of the case of Mr. Kambita did not warrant summary dismissal. Apart from stating that the applicant did not report the

matter to the Labour Officer within four days after the dismissal as required by section 25 of the Employment Act, Ms. Mulenga has not adduced any evidence to show, or demonstrate that the dismissal was unwarranted. I therefore find that on the facts of this case, that the dismissal of Mr. Kambita was warranted. Since the dismissal was warranted, regulation 12 (3) Statutory Instrument Number 57 of 2006, cannot palpably be called in aid of Mr. Kambita's case.

Third, having made the preceding findings, what then is the effect of a failure to report the dismissal to the Labour Officer within a period of four days as required by section 25 of the Employment Act. Succinctly, put, is the failure to report the dismissal of Mr. Kambita to the Labour Officer as prescribed by section 25 of the Employment Act fatal? There is no doubt that section 25 imposes a duty on any employer, whenever an employer dismisses an employee summarily to deliver to a Labour Officer a written report of the circumstances leading to, and the reasons for such dismissal. However, Mr. Kambita has not denied or indeed challenged the allegation that he failed to account for unspecified cash.
Mr. Kambita did not even put forward any specific defence or justification for his action. So the position would have been that if the applicant had reported the uncontested summary dismissal to Mr. Seti, Mr. Seti would not have in terms of regulation 12(3) of Statutory Instrument number 57 of 2006, found that the case did not warrant summary dismissal. And by extension ordered the payment of severance benefits. Simply stated, there is no factual basis upon which the applicant's decision to dismiss Mr. Kambita can be impeached.

In the premises and, on the authority of the Chirwa case (supra), I have come to the conclusion that although the applicant did not comply with section 25 of the Employment Act, Mr. Kambita did not suffer any injustice by the failure by the applicant to abide by section 25 of the Employment Act.

Fourth, in view of the conclusion that I have reached above, it is otiose for me to consider whether the decision by Mr. Seti to order the payment of the severance package is Wednesbury unreasonable, or and procedurally improper.

Thus, the net result is that the applicant has succeded in persuading me to quash the decision by Mr. Seti that the applicant should pay Mr. Kambita a severance package or benefits of not less than two months basic pay of each completed year of service. I have further been persuaded to order that Mr. Seti by himself, or through his agent(s) should desist from hearing the complaint that has been determined by this litigation, because Mr. Seti is in the circumstances, functus officio. Costs follow the event.

Leave to appeal is granted.

Application allowed.