

**IN THE HIGH COURT FOR ZAMBIA  
AT THE DISTRICT REGISTRY  
HOLDEN AT NDOLA  
BETWEEN: (*Industrial Relations Division*)**

**IRC/ND/66/2021**

**LUNA HARRIET MOYO**

**COMPLAINANT**

**AND**

**CHINA CIVIL ENGINEERING CORPORATION  
(ZAMBIA) LIMITED**

**RESPONDENT**



Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 30th day of June, 2022.

For the Complainant: In Person.

For the Respondent: Mr. J. Chilenga, Messrs Nyirongo and Company

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## **JUDGMENT**

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### **Cases referred to:**

1. Sam Amos Mumba and Zambia Fisheries and BOC Gases PLC v Phesto Musonda (2005) Z.R. 119 (S.C).
2. Moses Choonga v ZESCO Recreation Club, Itezhi-tezhi, Appeal No. 168 of 2013.
3. Mike Musonda Kabwe v B.P. Zambia Limited (1997) S.J. 42 (S.C.)

### **Legislation referred to:**

1. The Employment Code Act No. 3 of 2019.
2. The Employment Act, Chapter 268 of the Laws of Zambia.
3. The Minimum Wages and Conditions of Employment (General) Order, 2011.

**Other works referred to:**

1. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. 2021.

By notice of complaint supported by an affidavit filed into Court on 13<sup>th</sup> December, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. A declaration that the purported transfer notice letter dated 1<sup>st</sup> November, 2021 from Chambishi camp to Lusaka head office is null and void *ab initio*.
2. A declaration that the respondent's unilateral variation of K400.00 monthly bonus pay in the month of October, 2021 was wrongful and unlawful.
3. A declaration that the complainant's employment was terminated by reason of the respondent's business going down and had no project, downsizing and/or redundancy as contained in the letter dated 15<sup>th</sup> November, 2021.
4. A declaration that the complainant be issued with a certificate of service and recommendation letter.
5. An order for payment of five (5) years redundancy terminal benefits package.
6. An order for payment of severance pay.
7. An order for payment of the remainder of 30% housing allowance arrears from December, 2016 to November, 2021.
8. An order for payment of full salaries until the matter is disposed of.

9. Damages for loss of employment and wrongful termination.
10. Interest and costs.
11. Any other remedy the Court may deem fit.

In her affidavit in support of the notice of complaint, the complainant deposed that she was verbally employed by the respondent on permanent basis and she signed a one-year performance contract as Human Resources Officer with effect from 10<sup>th</sup> December, 2016. She produced the said contract, exhibit 'LHM1' to 'LHM4' to that effect. That after serving for one year and on successful probation, she was confirmed in her substantive position of Human Resources Officer and she signed a permanent and pensionable contract, exhibit 'LHM5' to 'LHM10' on 15<sup>th</sup> January, 2019. That on or about 30<sup>th</sup> January, 2019, the respondent issued her with a record management of personal data form, 'LHM11' which she filled in indicating her marital status as a married woman with four children. The complainant deposed that on 19<sup>th</sup> August, 2021 and 17<sup>th</sup> September, 2021, she claimed for monthly arrears of housing allowance at 30% of her basic salary and K180.00 lunch allowance for the period December, 2016 to July, 2021 as shown by the letters, 'LHM12' and 'LHM13'. That on 1<sup>st</sup> October, 2021, the respondent attempted to change her permanent contract of employment by coercing her to sign what it termed as a new six months' fixed term contract of employment and conditions of service, exhibit 'LHM14' to 'LHM22'. That she rejected and opposed the said new proposed contract as the

decision taken by the respondent's senior Management was unilateral. That in that contract, essential clauses such as 30% housing allowance, retirement and redundancy which had been agreed upon verbally were omitted. She averred that the respondent decided to change her contract in retaliation to her claim for housing and lunch allowances which she had insisted on. She also deposed that the said 6 months' fixed term contract was silent on the payment of her previous benefits hence the conflict and she could not accept such illegal and wrongful acts. That on 30<sup>th</sup> October, 2021, the respondent paid the complainant her lunch allowance in full but only paid her housing allowance in part at 10% of her basic salary for the period May, 2019 to September, 2021 in the sum of K26,286.00 as shown by the letter, 'LHM23' and the statement, 'LHM24'. She deposed that the respondent's action to impose a new fixed term contract of employment and its insistence on paying her housing allowance at 10% instead of 30% triggered her dissatisfaction at work owing to a hostile work environment. That she was not given an opportunity to be heard and her grievances were moribund, contrary to the respondent's grievance procedures and the rules of natural justice. That she wrote a follow up letter, 'LHM25' on 8<sup>th</sup> October, 2021 wherein she claimed for the difference of 20% unpaid housing allowance. That during the October, 2021 payroll, the respondent took away her accrued right by cutting off K400.00 bonus allowance which she was entitled to. That this decision was in bad faith and without notice and/or any reasonable or valid cause. In support of this, the

complainant exhibited her July, 2021 payslip to show that she used to earn and received the said K400.00 bonus in the month of July but she did not receive it in October and November, 2021. She deposed that on 1<sup>st</sup> November, 2021, the respondent imposed a transfer on her at short notice whereby she was given three days to move from Chambishi to Lusaka, as shown by the notice of transfer, 'LHM27'. That the same day in the afternoon, the complainant responded to the respondent's letter of transfer by writing the letter, exhibit 'LHM28' in which she defended her accrued right of the K400.00 monthly bonus and refused to accept the unjustified purported transfer. That on 2<sup>nd</sup> November, 2021, the respondent, through its letter, exhibit 'LHM29', indicated to her that she had three days' notice of her transfer' and one week in which to prepare herself to travel to Lusaka. That in paragraph 3 of the said letter, the respondent confirmed to the complainant that the reason for her transfer was because there had been no new construction project in the previous year and the depression and downsizing were still going on. According to her, the letter justified her complaint that her services were no longer required owing to redundancy. She averred that all of the respondent's letters which were addressed to her concerning the transfer notice were neither authentic nor officially signed by her superiors; and they were issued to her by expatriates namely, Zhang Ziwei and Kevin who were both masquerading as the respondent's Branch Human Resource Manager; and Lizixi Echo who was masquerading as the respondent's Country Head Human Resource Manager. That

she pointed out this maladministration to the respondent and pointed it out to them that they were all incompetent and working illegally as Human Resource Managers in the Republic of Zambia as they were not affiliated to the Zambia Institute of Human Resource Management and they lacked the necessary qualifications and competence. That in retaliation, the respondent imposed the disputed transfer on her. She deposed that since the respondent's decision affected her roles and responsibilities, she wrote the letter, exhibit 'LHM30' to the respondent wherein she complained to the respondent about its tendency of not signing official letters and also justified that even though the Chambishi camp was downsizing, she was supposed to be the last person to exit since her position was an essential and integral part of the business. That instead of addressing her grievances, the respondent wrote to her an unsigned letter, exhibit 'LHM31' on 10<sup>th</sup> November, 2021 requesting her to exculpate herself as to why she failed to go to Lusaka. That the respondent requested for her exculpation before charging her with any offence as was provided for. That in response to the respondent's request for her exculpation, she wrote the letter, exhibit 'LHM32' on 10<sup>th</sup> November, 2021 wherein she justified why she rejected and opposed the purported transfer to Lusaka. That on 15<sup>th</sup> November, 2021, the respondent yet again served her with an unsigned letter, exhibit 'LHM33' to 'LHM34' wherein it was stated that its decision was final and that Chambishi camp had no project and as such, the respondent was not able to continue with her as Human

Resource Officer on a long-term contract. That it was also indicated in the letter that the last day of her work was 16<sup>th</sup> November, 2021 and that she should hand over. That the letter also clearly outlined the fact that the respondent's business was going down and/or expected to cease or diminish the requirement for her position. That the aforementioned mode of separation settled and justified her complaint for severance and redundancy benefits. She deposed that on 16<sup>th</sup> November, 2016, she requested the respondent, through her letter, exhibit 'LHM35' to explain the nature of the separation and stated that she qualified for redundancy benefits and severance pay; and that she was ready to hand over to Liu as soon as possible. That surprisingly, on 26<sup>th</sup> November, 2021, she received yet another unsigned letter, exhibit 'LHM36' to 'LHM37' wherein it was stated that she had failed to comply with the respondent's final say to transfer her to Lusaka and further alleged that she had resigned on 15<sup>th</sup> November, 2021 and was required to hand over her office. She deposed that she disputed her transfer to Lusaka as the respondent knew or ought to have known that she was a responsible married woman with four children and she was 20 weeks pregnant. That the respondent was aware that her Doctor had advised her against travelling long distances and to avoid long hours of work, stress, fatigue or exhaustion. That forcing her to travel from Kitwe to Lusaka could have resulted in complications of her pregnancy and her medical condition which would have eventually impacted her health. In support of this argument, the complainant produced copies of her

ante-natal card and radiological request form, exhibits 'LHM38' and 'LHM39', respectively. That even though the respondent wanted her to handover on 16<sup>th</sup> November, 2016, a driver was not sent to pick her up from her home as per normal routine transportation terms and conditions of service which were initially impliedly agreed on. That it was later agreed with the respondent that she should handover on 28<sup>th</sup> November, 2021 but she was shocked to find her office door lock changed and she could not gain access to her office. That because of the so many challenges she encountered at the hands of the respondent, on 29<sup>th</sup> November, 2021, the complainant sought the services of a Labour Consultant who tried to engage the respondent but it did not cooperate or indulge them to resolve her grievances. The complainant produced the letter, exhibit 'LHM40' which the Labour Consultant wrote to the respondent to that effect. She deposed that the respondent had neglected to pay her the difference of her 30% housing allowance arrears, severance pay and redundancy packages.

The respondent filed an affidavit in opposition to the notice of complaint on 3<sup>rd</sup> January, 2022, sworn by Zhang Ziwei, Branch Human Resource Officer in the respondent company. She deposed that the respondent employed the complainant as a Human Resource Officer by way of a written contract, 'LHM1' to 'LHM4' on 10<sup>th</sup> November, 2016 for a period of one year and it was to run up to 9<sup>th</sup> December, 2017. That by virtue of the said contract, the



complainant disputes having a verbal employment agreement with the respondent and that if there was such a contract, the same was superseded by the terms and conditions of the written employment contract that was entered into by the parties on 10<sup>th</sup> December, 2016. It was deposed that among the complainant's duties was to prepare employment contracts of the employees including that for herself. That for unknown reason, the complainant neglected and failed to prepare her contract of employment after it expired on 9<sup>th</sup> December, 2017. That in 2018, the parties continued working based on the terms of the 2016 contract of employment despite the complainant not preparing a written contract of employment. That in 2019, the complainant, as a Human Resource Officer, prepared a written contract, exhibit 'LHM5' to 'LHM10' which was entered into with the respondent. That by virtue of the 2019 contract, the 2016 contract was superseded. That to the best of the deponent's knowledge, no verbal agreement was entered into between the complainant and the respondent which varied or supplemented the terms of the two mentioned written contracts of employment save for the agreement, evidenced through the correspondence between the parties, on how much the complainant was to receive as housing and lunch allowances. The deponent disputed that the complainant's contract was permanent and pensionable as the complainant was entitled to gratuity at the end of each complete year of service. That the respondent's standard contract of employment as prepared by the complainant stipulated the basic

pay and provided a breakdown of allowances such as housing and lunch allowances. That however, for unknown reasons, the complainant prepared her own contract without a break down of the amount of allowances which was a departure from the respondent's standard contract of employment. That based on such concealment of facts, the complainant came up with her own figures for housing and lunch allowances without consulting and agreeing with the respondent. That the complainant demanded 30% of her basic pay as housing allowance as shown by her letter, exhibit 'LHM12'. It was argued that the K6,600.00 salary that was being paid to the complainant was inclusive of all allowances including housing and lunch allowances. That the respondent expressed misgivings as to why the complainant did not do a breakdown of the allowances within the K6,600.00 in her contract of employment like the standard contract of employment for the respondent. That as a result, the respondent responded to the complainant's demands of housing allowance at the rate of 30% of her basic salary to the extent that despite its position that the K6,600.00 was inclusive of the demanded allowances, the respondent was willing, in a spirit of give and take and as a way of appreciating the complainant's service, to offer her the purported housing allowance at the rate of 8% instead of 30% of her basic salary as can be discerned from the respondent's letter, LHM22'. That the complainant rejected the 8% as shown by the letter, 'ZZ1' and the respondent adjusted the offer to the rate of 10% of her basic salary as can be discerned from its letter, 'LHM23'. That the

complainant willingly accepted the offer of 10% of her basic salary as housing allowance as shown by the letter, 'ZZ2' and she received the money as agreed by the parties, being housing allowance calculated at 10% of her basic salary and lunch allowance, as shown by the statement, 'LHM24'. That, therefore, the complainant's claim for housing allowance at 30% of her basic salary after having accepted and received the 10% was an afterthought and not justifiable. That the complainant was not entitled to any further payment of housing allowance as what was agreed was duly paid to her. That following the misunderstanding between the complainant and the respondent on the failure to tabulate the allowances in the contract of employment contrary to the respondent's standard contracts of employment, the respondent drafted a contract that had a breakdown of allowances and gave the same to the complainant to sign, but the complainant refused to sign it. That the complainant's claim and reason for refusing to sign the said contract was baseless as the housing allowance that she was claiming was already paid to her. That the affiant believed that a new contract could not retrospectively deal with grievances arising from a previous contract as the complainant had other administrative recourse to pursue whatever grievances she had. That the conduct of the complainant was aimed at declining the terms of employment that were applicable to every employee in the standard contract and stick to the contract she drafted which was more favourable to her especially that she was in charge of drafting contracts. The

deponent denied that the K400.00 deducted from the complainant's pay was an entitlement. That the amount in issue was a bonus applicable to every employee and was given at the discretion of the respondent depending on how one worked in a given month. That, therefore, it was not a matter of right. That in the month it was deducted, the complainant was not among the employees deserving a bonus.

Further, the affiant deposed that according to clause 2 of the complainant's contract of employment, 'LHM5' to 'LHM10', the complainant was obligated to work in any other location within Zambia as determined by the respondent other than Mukulumpe. That downsizing work at Mukulumpe could not be used as an excuse by the complainant to claim to be separated from the respondent under redundancy as the complainant was bound to be transferred to any other place within Zambia by the respondent. That the transfer of the complainant was justifiable as the respondent needed Human Resource at the Lusaka office as can be discerned from the online advertisement, exhibit 'ZZ3'. That according to her written contract of employment, the complainant was not precluded from any transfer by her marital status and, therefore, it was wrong for her to refuse to be transferred. That the complainant was given sufficient time to prepare herself to move to Lusaka and that the respondent was willing to pay her for repatriation upon confirmation of the transfer but the complainant did not confirm the same. That by conduct of the

complainant of refusing to report for work, she was deemed to have deserted work and according to the respondent's disciplinary code, exhibit 'ZZ4', such conduct warranted an instant dismissal. That as a result, the complainant's conduct was taken as resignation and the respondent accordingly discharged her from her duties and requested her to do the handover as shown by the letter, 'ZZ5'. That subsequent to the handover letter, the complainant duly undertook the handover without raising any grievances in the manner her separation was done with the respondent as shown by the electronic mails, exhibits 'ZZ6'. That all the dues being claimed by the complainant were paid to her and she never challenged her separation administratively at the time of separation with the respondent. That this action was an afterthought on the part of the complainant inspired by frustrations.

At the trial, the complainant testified that sometime in September, 2016, she received a phone call from Mr. Xuan Ran who was at the time the Project Manager for the respondent in Chambeshi, Copperbelt. Mr. Xuan told her that he wanted to have a meeting with her and later went to her home in Chimwemwe, Kitwe. In the meeting, Mr. Xuan told her that Management had discussed and resolved that the respondent should re-employ her in the position of Human Resources Officer. That he explained to her that in the previous two years after she had left the respondent, he had employed about five Human Resources Officers whom he was not

satisfied with their performance. That they also discussed if she was interested in the same position and she agreed. That they further discussed her salary and agreed that it would be K8,000.00 net per month. That the salary also comprised of lunch at K120.00 and housing allowance at 30% of her basic salary. That they also discussed that in terms of her transport, there would be a vehicle and a driver assigned to pick her to and from work as well as for operations and other purposes. That her medical expenses would also be covered. That after everything was agreed upon, Mr. Xuan called the respondent's General Manager and after discussing the same matter, she was engaged as Human Resource Officer. On 12<sup>th</sup> December, 2016, she was called to report for work which she did and she was given part of her terms and conditions of services in her probationary contract for one year. That Mr. Xuan explained to her that he needed to ensure that her performance would not be regrettable as the five Human Resource Officers he had employed before. That the contract, exhibit 'LHM1 to 'LHM4' was from 12<sup>th</sup> December, 2017 to 11<sup>th</sup> December, 2017. That she performed her work satisfactorily after which she went back to inquire about other conditions of service, in particular, housing and lunch allowances and she was informed that she was on permanent and pensionable contract and that the allowances would be paid in due course.

That she continued to work and in 2019, the respondent engaged a new Human Resource Manager by the name of Zhang. That she

approached Ms. Zhang to query about her other conditions of services and Zhang told her the same thing that she was on a permanent and pensionable contract and that she would be paid. That she insisted on her terms and conditions of service and Zhang gave her one which was open ended and continuous, that is, exhibit 'LHM5' to 'LHM11' and that on the page marked 'LHM11' she presented her personal data, that is, information regarding her spouse and children. That the same year in December, 2019 she was awarded an outstanding performance service and dedication for 2019 and the prize was in monetary form. That she again queried about her other conditions of service, that is, lunch and 30% housing allowances and again she was told that she would be paid in due course. That on 19<sup>th</sup> August, 2021, she decided to formally write to Management the letter, exhibit 'LHM12' wherein she made a formal claim for the housing and lunch allowances after seeing that so much time had passed and what was agreed on was not being awarded to her. That the amount for lunch allowance was K8,835.20 while that for housing allowance was K112,737.00 for the period 12<sup>th</sup> December, 2016 to July, 2020, giving a total of K121,057.00. That in response, Management offered her 8% of her basic salary as housing allowance out of the 30% which they had verbally agreed on but she declined. Then Zhang increased it to 10% but the complainant still declined. Later, Zhang informed her that the General Manager was not around to authorise the 30% and that she could only go as far as 10%. That she was assured that the other 20% would be paid in December,

2020 when the General Manager returned to the office. That Zhang paid her K26,286.00 as indicated by the bank transfer, 'LHM24'. That the complainant thanked Management for the payment and informed Zhang that she would still claim for the remaining 20% as promised when the General Manager returned. That Zhang also confirmed, in her letter, 'LHM22' that indeed there was a verbal agreement that the complainant had with the respondent. That in the same letter, Zhang also indicated that going forward, she would outline the complainant's allowances clearly in the already existing permanent and pensionable contract starting from October, 2021. That Zhang further indicated that the payment was calculated from May, 2019 hence for the period December, 2016 to May, 2019 the allowances were not paid in full. The complainant testified that she continued working but with difficulties and challenges as the work environment became hostile. That in December, 2021, Zhang removed her K400.00 monthly bonus from her pay which she was entitled to since 2018, without informing her and without any reason. That the K400.00 had become part of her pay as Zhang had mentioned in the letter, exhibit 'LHM22' that she would outline all her allowances in the permanent and pensionable contract so as to be clear. That however, instead of outlining her allowances in the existing contract as promised, Zhang prepared a new contract, exhibit 'LHM14' to 'LHM21' which was for a fixed term of six months. That the complainant refused to sign the contract because it was inconsistent with the already existing permanent and pensionable contract and signing it would



have meant that she was going to lose her already accrued benefits. That Zhang later explained to her that there had not been a project in the past one year and there were not going to be any project in the next one year so the respondent could not sustain the complainant's permanent and pensionable contract. That Zhang urged her to sign the six months' contract which was to run from 1<sup>st</sup> October, 2021 to 1<sup>st</sup> April, 2022. That the complainant then informed Zhang that if that was to be the case, Zhang needed to declare her redundant, give her 30 days' notice and clear her in payment of the benefits she had accrued in the five years she had served before she could sign the new contract. She testified that before they could conclude the matter of adjusting the allowances in the already existing permanent and pensionable contract, on 1<sup>st</sup> November, 2021, Zhang gave her a transfer notice, 'LHM27'. That by that notice, she was transferred from Chambishi camp to Lusaka, head office where Zhang indicated that there was insufficient man power and her services were needed there; and that she had to report on 8<sup>th</sup> November, 2021. That the complainant was given three days within which to respond to the letter from 1<sup>st</sup> to 3<sup>rd</sup> November, 2021 and that silent would be deemed to be acceptance of the transfer. That on the same day, the complainant responded, via the letter, 'LHM28' indicating that eight days was short notice as Zhang was aware that she was a married woman with children and was at least entitled to adequate notice to prepare; and that the transfer letter did not include conditions such as upset allowance/repatriation to cover the

expenses of moving. That the complainant also complained that the respondent had no intention of terminating her employment considering that it was permanent and pensionable; and that she had only requested the respondent to give her what was legally right. However, the respondent treated her terms and conditions of employment casually when it decided to offer her a six months' contract knowing that she was 21 weeks pregnant and that signing the six months' contract would only exclude her from getting maternity leave. That Zhang responded to her through the letter, 'LHM29', wherein she indicated that repatriation allowance could only be paid after the complainant had confirmed the transfer and two days before travelling. That Zhang also advised the complainant, in the same letter, that employment concerned her as an individual and was not binding on her family. That she also insisted that the reason the complainant was being transferred was because there was no new construction project and that the depression was still going on. That the respondent could not sustain the complainant on a long-term contract at Chambishi camp. That the letter further indicated, in paragraph 5, that the complainant's failure to report to Lusaka on 8<sup>th</sup> November would be taken as refusal to work. The complainant stated that she had given her reasons as to why she could not accept her transfer, the main one being that there was no diligence in the manner in which Zhang came up with her transfer. That the respondent did not engage her to explain the nature and particulars of the transfer hence she did not give the requisite consent as required by

sections 28 and 29 Employment Code Act No. 3 of 2019. She explained that section 28 of the Employment Code Act required an employer to engage an employee before the transfer to explain the particulars of such transfer; and that the employee was required to give consent in writing. That a transfer was not to be coerced. That a refusal to accept a transfer would lead to termination by reason of redundancy in accordance with section 55 of the Employment Code Act. That however, the respondent decided to terminate her contract instantly and also coerced her as shown by the letter, exhibit 'LHM27', in which it was stated that silence would have meant that she had accepted the transfer. That she had explained the reasons why she could not accept the transfer which were based on her medical condition. That there was no fairness in the procedure that was adopted by the respondent. That Zhang had also mentioned on several occasions that there was no project hence the respondent had to downsize. That this meant that there was redundancy and the respondent was supposed to give her 30 days' notice of termination, and pay her a redundancy package as well as notice pay. However, the respondent subjected her to a disciplinary process which resulted into instant dismissal, stating that she had refused to work. Further, that the disciplinary procedure was flawed as no due diligence was exercised. That she was not charged but was dismissed instantly. That Zhang wrote the letter, 'LHM33' on 15<sup>th</sup> November, 2021 about her transfer refusal and indicated that since there was no new project, the complainant's long-term contract could not be sustained and as

sections 28 and 29 Employment Code Act No. 3 of 2019. She explained that section 28 of the Employment Code Act required an employer to engage an employee before the transfer to explain the particulars of such transfer; and that the employee was required to give consent in writing. That a transfer was not to be coerced. That a refusal to accept a transfer would lead to termination by reason of redundancy in accordance with section 55 of the Employment Code Act. That however, the respondent decided to terminate her contract instantly and also coerced her as shown by the letter, exhibit 'LHM27', in which it was stated that silence would have meant that she had accepted the transfer. That she had explained the reasons why she could not accept the transfer which were based on her medical condition. That there was no fairness in the procedure that was adopted by the respondent. That Zhang had also mentioned on several occasions that there was no project hence the respondent had to downsize. That this meant that there was redundancy and the respondent was supposed to give her 30 days' notice of termination, and pay her a redundancy package as well as notice pay. However, the respondent subjected her to a disciplinary process which resulted into instant dismissal, stating that she had refused to work. Further, that the disciplinary procedure was flawed as no due diligence was exercised. That she was not charged but was dismissed instantly. That Zhang wrote the letter, 'LHM33' on 15<sup>th</sup> November, 2021 about her transfer refusal and indicated that since there was no new project, the complainant's long-term contract could not be sustained and as

such, she was no longer needed. That the complainant was asked to handover company property and informed her that that was her last day of work.

The complainant testified that she wrote the letter, 'LHM35' on 16<sup>th</sup> November, 2021 in which she asked about the nature of her separation and the respondent responded on 26<sup>th</sup> November, 2021 via the letter, 'LHM36' wherein it was stated that failure to report to a new site and failure to handover on 16<sup>th</sup> November, 2021 meant that she had resigned. She stated that when she went to handover on 28<sup>th</sup> November, 2021, she found that her office was already opened and so she hesitated to do the handover. That they had broken the lock and she was told to handover to a Mr. Chisha instead of Mr. Liu who was mentioned in the letter of 16<sup>th</sup> November, 2021. That, therefore, she refused to do the handover and went back without doing it. According to her, Zhang had told her that Mr. Chisha was a witness as he was not working for the respondent at the time but she told them that since they had broken the locks, she also needed a witness. That she went and saw a Labour Consultant with whom she discussed her grievance and subsequently, the Labour Consultant called Zhang. However, Zhang refused and told her that she should either go to the Labour Office or Court. That since her office was already opened, she handed over via email and she was paid her salary. That Zhang also confirmed that everything was in order.

She told the Court that the procedure followed when transferring her was flawed and that the removal of her K400.00 monthly bonus from her pay was wrongful and unfair. Further, that her employment was wrongfully terminated because she was supposed to be declared redundant due to the downsizing and given adequate notice before separation. That her 30% housing allowance and K102.00 lunch allowance for the period 12<sup>th</sup> December, 2016 and May, 2019 were not paid. Further, she testified that 20% housing allowance from May, 2019 to November, 2021 was also not paid.

During cross-examination, the complainant stated that her first written engagement with the respondent was in 2016 and it was under the contract, exhibit 'LHM1' to 'LHM4'. That the said contract did not indicate that she was on probation. She stated that the contract was for one year and that she was not paid gratuity at the end of the contract. That she was not paid anything but she was told to continue working and also that she was on permanent and pensionable contract. That there was no clause in the contract which stated that she was on a permanent and pensionable contract but it was verbally agreed. The complainant admitted that after that contract, she entered into another contract, exhibit 'LHM5' to 'LHM11' and it was the contract that was running at the time she was given the notice of transfer. When referred to clause 2 of the said contract, the complainant admitted that she was required to work in any part of Zambia and the

respondent had the right to transfer her to any part of Zambia. She stated that she was not aware that the respondent had projects within Zambia but outside Chambishi because Zhang never engaged her to explain that position. That she was aware that the respondent had its head office in Lusaka and other project sites. That there was nothing wrong with the respondent transferring her to another office but it had to follow the procedure. She admitted that by virtue of the respondent giving her an opportunity to work from Lusaka, it still wanted to maintain her services and position in the company. She stated that there was no clause in the contract which provided for the notice period for transfer but that fair practice demanded that adequate notice was given. She stated that pregnant women were not precluded from being transferred. She maintained that her family was a party to her employment contract even though it was only signed by herself and the respondent. She stated that her supervisor under the contract she entered into in January, 2019 was Zhang but Zhang had no right to make any decision regarding her transfer. That the person who had the authority to transfer her was the Human Resource Manager from the head office. She stated that she complained to head office about her transfer but she did not have any evidence before Court because it was a verbal complaint. She stated that housing and lunch allowances were not provided for in her contract but the issue of the said allowances was settled by way of a verbal agreement. When referred to the letter, 'LHM12', the complainant admitted that in the said letter, she reminded the

respondent that her housing allowance was 30% of her basic salary. When referred to the letter, exhibit 'LHM22', the complainant confirmed that in response to her letter, the respondent proposed 8% of her basic salary as housing allowance. That the 8% was imposed in the sense that they had already agreed on 30% of her basic salary verbally and she was not given a chance to talk further because Zhang kept on indicating that her letter was final. That she objected to 8% but agreed to 10% in that Zhang told her that that was what she could manage at the time and the balance would be paid to her in December when the Manager returned. That her agreement to the 10% was in writing but she forgot to produce the letter in her affidavit in support the notice of complaint. That she did not conceal it but she had put it into account that she had been paid. When referred to the letter, 'ZZ2', the complainant confirmed that she authored the said letter and that it was in response to housing and lunch allowances. That that letter settled the issue of housing allowance. That there was nothing in the letter showing that she was going to follow up the difference of 20%. That she was paid the 10% for the period May, 2019 to October, 2021. That the document did not state the period for which she was supposed to receive housing allowance but it was Zhang who had stated that she would pay her from May, 2019 to October, 2021 and she agreed to it. She admitted that she was working when she received the letter of transfer. That she did not move to Lusaka but she gave valid reasons as to why she could not move. She stated that she continued working and was in the office



at all times and only stopped reporting for work on 15<sup>th</sup> November, 2021. That the reason she stopped reporting for work was because she was told to stop by the respondent and the respondent did not send transport on 16<sup>th</sup> November, 2021 when she was supposed to go and do a handover. She stated that according to the respondent's disciplinary code, not reporting for work for more than five days without a reason warranted summary dismissal. The complainant stated that an employee was entitled to a bonus for hard work and any other duties which were out of their job description carried out excellently. That giving a bonus in a particular month for good performance was in the discretion of the respondent. That to some of the employees, bonuses were an entitlement because they were performing duties outside their job description. That she classified the K400.00 as a monthly bonus in the notice of complaint and so it remained a bonus. She stated that she did not continue going for work after handing over. She admitted that she was paid gratuity at the end of 2020. That she was not paid gratuity in 2019 as the same was supposed to be paid at the respondent's discretion. She admitted that preparing employment contracts was part of her duties but she denied having prepared her 2019 contract.

In re-examination, the complainant stated that she did not sign the disciplinary code, 'ZZ4' to approve of the disciplinary procedure that the respondent applied when dismissing her. She stated that the gratuity paid to her in 2020 and 2021 was not contractual but

it was out of the respondent's own discretion. She stated that it was verbally agreed that the balance for the housing and lunch allowances would be paid together with what was not paid in full from December, 2016 to May, 2019.

RW1 was Chisha Kapembwa, Administrative Officer in the respondent company. The witness informed the Court that he was relying on the affidavit in opposition to the notice of complaint filed into Court on 3<sup>rd</sup> January, 2022.

In addition, the witness testified that the complainant was employed by the respondent as a Human Resource Officer on 10<sup>th</sup> December, 2016 on a one year contract which came to an end on 9<sup>th</sup> December, 2017. That after the expiration of her contract, the complainant did not prepare another contract for herself. That in 2019, the complainant signed another contract which came to an end in 2020. That after 2020, the complainant never signed a contract but continued to work until the day she stopped work in 2021. The witness told the Court that the complainant's contract for a fixed term one year from December 2016 to 2017 was not a probationary contract but was a formal contract as the complainant had previously worked for the respondent in the same capacity. He testified that at the end of her one-year contract, the complainant was paid all her terminal benefits which included gratuity, annual leave pay and all that was supposed to

be paid at the end of the contract. That the complainant was not on a permanent and pensionable contract.

Regarding the complainant's claim that her transfer notice was not valid, the witness stated that the complainant was transferable to any part of the country as part of her contractual obligations and that enough notice was given for her to be transferred to the head office in Lusaka. That she was transferred to Lusaka because the head office in Lusaka needed a Human Resource Officer as evidenced by the advertisement, exhibit 'ZZ3'. That the complainant's contract did not exclude her from being transferred by virtue of her being pregnant and having a family. That she was transferable regardless of her condition.

With respect to the complainant's claim that there was an unlawful deduction of K400.00 monthly bonus, the witness stated that the respondent's Management had the discretion to give a bonus to a deserving employee who had worked hard in that particular month and recommended by their supervisor. That the said bonus was not part of the complainant's salary.

In relation to the complainant's claim that the termination of her employment was by reason of redundancy because the respondent's business was going down, the witness stated that the respondent's business was not going down and that the complainant was transferable where her services were needed in

another station. That in this case, she was transferred to Lusaka where her services were needed. That the complainant did not report to Lusaka but instead wrote a letter where she gave reasons as to why she should not have been transferred which included family matters which were not part of the contract conditions. That the complainant also stopped going for work at the Chambishi camp. That when the complainant did not report for work for five consecutive days, she was deemed to have deserted work and Management took it that she had voluntarily resigned. That the penalty for someone who had absconded work was summary dismissal.

The witness testified that the complainant had never made any request for a certificate of service or recommendation letter when she separated with the respondent. He also testified that the complainant was not supposed to receive redundancy benefits because all her benefits were paid at the end of each year she served. That the position of Human Resource Officer in the respondent company was not abolished and the complainant was merely transferred. That she was transferred in the same capacity as Human Resource Officer.

Regarding the complainant's claim for housing allowance at 30% of her basic pay, the witness stated that the complainant was paid all her arrears. That initially, the respondent had offered her housing allowance at 8% of her basic pay but the complainant

declined. Then the respondent offered her 10% which she agreed to and she was paid. That it was not true that the complainant was to be paid the 20% balance of housing allowance after the Regional Manager returned. He also testified that the complainant could not be paid salaries until the matter was disposed of because she was no longer working for the respondent. Further, that the complainant's employment was not wrongfully terminated but she just resigned on her own. That the respondent took it that she had stopped work and that she had deserted.

During cross-examination, the witness stated that the complainant stopped reporting for work on 15<sup>th</sup> November, 2021. He confirmed that the complainant received the letter, 'LHM33' on 15<sup>th</sup> November, 2021. When referred to the letter, 'LHM34', the witness confirmed that the said letter indicated that the complainant's last day of work was 16<sup>th</sup> November, 2021. He stated that the complainant was absent for five days because immediately she received the letter of transfer, she was supposed to report to Lusaka but the complainant never reported for work from that date. That the complainant was not absent for only one day. That the complainant stopped reporting for work before the letter dated 15<sup>th</sup> November, 2021 was written to her. He admitted that the letter of transfer was given to the complainant on 1<sup>st</sup> November, 2021. That the complainant never reported for work from 1<sup>st</sup> to 15<sup>th</sup> November, 2021. The witness stated that when one was transferred, by law, they were supposed to comply with

Management's decision as their services were needed at that particular station. That the complainant's services were needed at the head office in Lusaka and that was why she was transferred. That there were no provisions where it was indicated that failure to report to the place of transfer was tantamount to refusal to report for work. That the complainant's contract indicated that the complainant could be transferred to any other station apart from Mukulumpe as long as it was within Zambia. He stated that the complainant was paid gratuity for the period 2019 to 2020 for her one-year contract; and for January, 2020 to 2021 and also for January, 2021 to November when she stopped working. That all her terminal benefits were paid. He stated that the complainant started working for the complainant on 10<sup>th</sup> December, 2016 and she was paid gratuity for the five years that she worked. That gratuity was provided for in the complainant's contract which had been attested by the Labour Office. That he did not have the said contract as it was at the Labour Office. The witness stated that he was aware that when an employee was being repatriated, transport had to be provided to the employee and not the family. That once an employee was given transport, even the family had to use the same transport to be repatriated to where the employee was transferred. The witness admitted that the respondent had given the complainant standard terms and conditions of employment. He denied that the complainant was entitled to housing allowance at 30% of her basic pay. He also stated that the complainant was offered 30% of her basic pay as housing allowance and it was

incorporated into her whole salary together with her lunch allowance. He stated that the complainant was paid all her terminal benefits at the end of her contract but the proof of payment was not produced before Court. He stated that the respondent did not subject the complainant to a disciplinary action when she failed to prepare her own contract where she should have indicated her allowances. That this was because the respondent took it that the complainant was a professional Human Resource Officer and since most Managers of the respondent company were foreigners, they all depended on her decision and expected her to run all activities. He stated that he was not aware that by law, an employee had to be subjected to medical tests before transfer. That the respondent did not neglect the complainant's pregnancy condition as it was not part of her conditions of service. He stated that the complainant's contract of employment was amended in 2019 following the new Employment Code Act but he was not too sure of the month in which it was amended. When referred to the contract, 'LHM14' to 'LHM21', the witness admitted that the complainant refused to sign the contract. That as a result, the respondent did not depend on both the 2016 and 2019 contracts but only depended on the 2019 contract as it superseded the 2016 contract. That they had attested the said 2019 contract and the attested copy was at the Labour Office. That it was signed in January, 2019 and was amended when the new Employment Code Act came into force in May, 2019. He admitted that since the complainant refused to sign the contract,

'LHM14' to 'LHM21' which was drafted on 1<sup>st</sup> October, 2021, the issue of putting her housing and lunch allowances in her contract was not concluded. That all of the complainant's needs were attended to and she was paid. That the complainant was the one who was supposed to include her housing and lunch allowances in her 2019 contract as she was the one who prepared it. That preparing contracts was part of her job description. That as Human Resource Officer, the complainant was mandated to prepare all contracts and no other person was mandated to do such. When referred to the contracts, 'LHM21', and 'LHM10', the witness stated that Zhang never used to prepare the contracts but she just use to authorise them. That the contracts used to be prepared by the Human Resource Officer. When referred to 'LHM4', the witness stated that the said contract was not prepared by Han Pei but it was prepared by the Human Resource Officer and Management just approved it. The witness stated that the complainant deserted work. When referred to the advertisement, exhibit 'ZZ3', the witness admitted that the complainant was transferred to Lusaka to occupy the position of Administrative Assistant. He explained that the position of Administrative Assistant was not advertised so that the complainant could go and occupy it but that she was going to occupy the position of Human Resource Officer. He stated that the complainant was given adequate notice to go to Lusaka and that the particulars of her transfer were written to her.



In re-examination, the witness stated that drafting of contracts used to be done by the Human Resource Officer and would be approved by the Regional Manager or Administrative Officer. That the complainant was the Human Resource Officer at the time. He stated that the complainant's contract of employment reflected her housing allowance at the rate of 30% of her basic salary. That this was included in her monthly lump sum which also included her basic pay and lunch allowance. That it was not tabulated in her contract.

The complainant filed final written submissions which I have duly considered and I will make reference to them where relevant.

I have considered the parties' affidavit and viva voce evidence, as well as the complainant's final written submissions.

The facts which were common cause are that the complainant was employed by the respondent as a Human Resource Officer, on a fixed term contract for one year from 10<sup>th</sup> December, 2016 to 9<sup>th</sup> December, 2017. After the said contract expired, the complainant continued to work and only signed the second contract on 15<sup>th</sup> January, 2019 which was with effect from 2<sup>nd</sup> July, 2019. Both the first and second contracts made no provision for the complainant's lunch and housing allowances and as a result, the complainant, through her letters, exhibits 'LHM12' dated 19<sup>th</sup> August, 2021 and 'LHM13', dated 17<sup>th</sup> September, 2021 demanded

for lunch allowance and housing allowance at the rate of 30% of her basic salary from 10<sup>th</sup> December, 2016 when she was employed. In response, the respondent, through its letter, exhibit 'LHM22' dated 2<sup>nd</sup> October, 2021 offered the complainant lunch allowance and housing allowance at 8% of basic salary which the complainant rejected. Then the respondent, through its letter, exhibit 'LHM23' dated 15<sup>th</sup> October, 2021 offered the complainant lunch allowance at K180.00 per month and increased the rate of housing allowance to 10% of her basic salary. The complainant, through her letter, exhibit 'ZZ2' accepted the offer and was paid the sum of K5,220.00 as her lunch allowance and the sum of K21,066.00 as her allowance, which payments were back dated to May, 2019. Before the respondent responded to the complainant's demands for lunch and housing allowances, the respondent had, on 1<sup>st</sup> October, 2021, offered the complainant a new contract of employment, exhibit 'LHM14' to 'LHM22' which was for a fixed term period of six months from 1<sup>st</sup> October, 2021 to 1<sup>st</sup> April, 2022 but the complainant had declined to sign the said contract on the ground that it was going to vary the terms and conditions under her already existing permanent and pensionable contract.

On 1<sup>st</sup> November, 2021, the respondent wrote the letter, 'LHM27' to the complainant by which the complainant was transferred to its headquarters in Lusaka and told to report on 8<sup>th</sup> November, 2021. The complainant, through her letter, 'LHM28' contested the transfer on the ground that she was a married woman with

children and also that she was not given adequate notice of the transfer. On 2<sup>nd</sup> November, 2021, the respondent wrote back to the complainant and informed her that there was no project at Chambishi and also that her failure to report to Lusaka would be taken as refusal to work. On 4<sup>th</sup> November, 2021, the complainant wrote the letter, 'LHM30' to the respondent wherein she maintained her position that the decision by the respondent to transfer her was wrong. As a result, the respondent, through its letter, 'LHM31' dated 10<sup>th</sup> November, 2021 asked the complainant to exculpate herself for failure to report for work. In her exculpatory letter, 'LHM32', the complainant maintained her position stating that her transfer was not done with good intentions. She claimed that the respondent's action was discriminatory owing to her pregnancy condition and also that it amounted to constructive dismissal as she was told that failure to report would be deemed to be refusal to work. Consequently, the respondent wrote the letter, 'LHM33' to 'LHM34' to the complainant, dated 15<sup>th</sup> November, 2021 by which it terminated the complainant's contract of employment on the ground of refusal to work and asked her to do a handover. In response, the complainant wrote the letter, 'LHM35' dated 16<sup>th</sup> November, 2021 to the respondent wherein she asked the respondent to explain the nature of her separation and in its letter, 'LHM36' to 'LHM37', dated 26<sup>th</sup> November, 2021, the respondent clarified that it took it that the complainant had resigned.

From the evidence on record, the following are the issues for determination:

1. Whether the complainant is entitled to the payment of lunch allowance; and housing allowance at the rate of 30% of her basic salary for the period 10<sup>th</sup> December, 2016 to May, 2019; and the balance of 20% of the housing allowance for the period May, 2019 to November, 2021.
2. Whether the non-payment to the complainant of the K400.00 monthly bonus in the month of October, 2021 amounted to a unilateral variation of the complainant's basic condition of employment by the respondent.
3. Whether the complainant's transfer by the respondent from Mukulumpe to Lusaka was null and void *ab initio*.
4. Whether the complainant's employment was terminated by reason of redundancy thereby entitling her to a redundancy package.
5. Whether the complainant is entitled to the payment of damages for the loss of employment and wrongful termination of her contract.

I will start with the first issue, which is whether the complainant is entitled to the payment of lunch allowance at K180.00 per month and housing allowance at the rate of 30% of her basic salary per month for the period 10<sup>th</sup> December, 2016 to May, 2019; and the balance of 20% of the housing allowance for the period May, 2019 to November, 2021.

According to the complainant, before she was re-employed by the respondent, she negotiated what were to be the terms and conditions of her service with the respondent's then Human Resources Manager, Mr. Xuan. These were, among others, K8,000.00 net monthly salary which included lunch allowance at K120.00 per month and housing allowance at 30% of her basic salary. However, upon being re-employed, the complainant signed a written fixed term contract, exhibit 'LHM1' to 'LHM4' which was for a period of one year from 10<sup>th</sup> December, 2017 to 9<sup>th</sup> December, 2017. That the said contract made no provision for lunch and housing allowances as agreed verbally. That after pressing the respondent, it finally agreed to include lunch allowance at K180.00 and housing allowance at 10% of her basic salary as part of her pay, but only backdated the payment of the said allowances to May, 2019 instead of December, 2016. She also argued that the 10% was below the minimum standard of 30% provided for in the laws and she made particular reference to the Minimum Wages and Conditions of Employment (General) Order, 2011. Further, that the 10% was also contrary to the 30% initially agreed upon in the verbal agreement. That she was, therefore claiming arrears for lunch and 30% housing allowance for the period December, 2016 to May, 2019 and the 20% balance of her housing allowance for the period May, 2019 to November, 2021. On the other hand, the respondent argued that the complainant's salary was inclusive of all her allowances, including lunch and housing allowances but the

**provide to an employee either housing, a loan or advance towards the purchase or construction of a house, guarantee facility for a mortgage or house loan on behalf of an employee or pay housing allowance."**

It can be seen from the wording of the above provision, in particular, the use of the word '*may*' that the provision of housing or the payment of housing allowance in lieu thereof by an employer to an employee was not mandatory. It had to be provided for in a collective agreement or a contract or under the general conditions of service of the employer. In the present case, the complainant's contract of employment did not make any provision for any form of housing for the complainant or the payment of housing allowance in lieu thereof. Further, there was no provision for the payment of lunch allowance. The complainant did not also produce the respondent's general conditions of service, if there were any, to show that she was entitled to the two allowances. For the foregoing reasons, I find that the complainant was not entitled to both lunch and housing allowances during the period she served under the written contract, 'LHM1' to 'LHM4', that is, from 10<sup>th</sup> December, 2016 to 9<sup>th</sup> December, 2017.

As for the period 10<sup>th</sup> December, 2017 to 1<sup>st</sup> January, 2019 which the complainant served without any written contract after the expiration of the first contract, exhibit 'LHM1' to 'LHM4' and before signing the second written contract, exhibit 'LHM5' to 'LHM10', I am guided by the decision of the Supreme Court in the

case of **Choonga v ZESCO Recreation Club, Itezhi-tezhi<sup>2</sup>**, where it was held that:

**“Since the respondent allowed the appellant to continue his duties for one month after the contract expired due to effluxion of time on 31<sup>st</sup> July, 2020, it can be implied and properly so, that the contract of employment was extended for the same period and on the same conditions as those contained in the expired fixed term contract of employment.”**

In the same vein, since the respondent had allowed the complainant to continue working after her first contract, exhibit ‘LHM1’ to ‘LHM4’ expired on 9<sup>th</sup> December, 2017, it can be implied that her contract of employment was extended for another one year and on the same conditions contained in that contract. Therefore, it follows that during the period 10<sup>th</sup> December, 2017 to 1<sup>st</sup> January, 2019, the complainant was not entitled to lunch and housing allowances as the same were not provided for in her contract of employment.

As for the period between 2<sup>nd</sup> January, 2019 and May, 2019, it is on record that on 15<sup>th</sup> January, 2019, the complainant accepted the offer of the second written contract, exhibit ‘LHM5’ to ‘LHM10’ which was with effect from 2<sup>nd</sup> January, 2019 when she signed it. This was a permanent and pensionable contract as the duration of the contract was not stated in the said contract. Like the first contract, exhibit ‘LHM1’ to ‘LHM4’, this contract also made no provision for lunch and housing allowances. During the said period, the law that was in force was the old Employment Act, Cap. 268 of the Laws of Zambia, as the Employment Code Act No. 3 of

2019 only came into effect on 9<sup>th</sup> May, 2019. Therefore, it follows that from 2<sup>nd</sup> January, 2019 to 8<sup>th</sup> May, 2019, the complainant was not entitled to lunch and housing allowances, as the same were not provided for in her contract.

It should be noted that whereas the Employment Code Act No. 3 of 2019 made no provision for lunch allowance, it made the provision for either accommodation or the payment of housing allowance to an employee mandatory. Therefore, the respondent cannot be faulted to have backdated the payment of the complainant's housing allowance to May, 2019 and not December, 2016 when the complainant started work.

In summary, the complainant's claim for lunch allowance and housing allowance at 30% of her basic salary for the period 10<sup>th</sup> December, 2016 to 8<sup>th</sup> May, 2019 has failed and is accordingly dismissed.

Further, the question that begs an answer is whether the complainant is entitled to the payment of the 20% balance of the housing allowance, for the period May, 2019 to November, 2021.

According to the complainant, the standard rate for housing allowance under the Zambian Laws is 30% of the basic salary as per the Minimum Wages and Conditions of Employment (General) Order, 2011 but the respondent only paid her 10% of her basic



salary for the period May, 2019 to November, 2021. Further, that Zhang had promised that she would be paid the 20% balance when the General Manager who was away returned to work. On the other hand, the respondent argued that the complainant accepted its offer of 10% of her basic salary as her housing allowance as shown by the letter, 'ZZ2'. That the Minimum Wages and Conditions of Employment (General) Order, 2011 did not apply to her and she was never promised that she would be paid the 20% balance when the General Manager returned.

As I have already stated above, the complainant's second contract, exhibit 'LHM5' to 'LHM10' which was with effect from 2<sup>nd</sup> January, 2019 also made no provision for housing allowance. However, after pressing the respondent, the complainant was offered housing allowance at 10% of her basic pay as shown by the letter, 'LHM23' dated 15<sup>th</sup> October, 2021 which rate of housing allowance she accepted. Subsequently, the complainant was paid a total of K21,066.00 as her housing allowance with effect from May, 2019. I must mention that with the coming into force of the Employment Code Act No. 3 of 2019, it is now mandatory for employers to provide accommodation to its employees or pay them housing allowance. Section 91 of the said Act provides as follows:

**"An employer shall provide an employee housing, a loan or an advance towards the purchase or construction of a house, a guarantee facility for a mortgage or house loan on behalf of the employee or pay the employee housing allowance under—**

- (a) a collective agreement registered under the Industrial and Labour Relations Act;**
- (b) a contract of employment; or**

**(c) the general conditions of service of the undertaking.”**

However, it can be noted from the reading of the above provision that the Act has not prescribed the minimum rate of housing allowance, in an event where the employer chooses to provide housing allowance. Further, I have perused the correspondence between the complainant and the respondent regarding her demand for housing allowance and I find that at no time did the respondent indicate that the complainant would be paid the 20% balance upon the return of the General Manager. Infact, in her letter, exhibit 'ZZ2', the complainant clearly stated that she was in agreement with the offer of 10% of her basic pay as housing allowance and acknowledged having received payment of the same for the period May, 2019 to October, 2021.

For the foregoing reasons, I find that the claim by the complainant that she was entitled to or promised housing allowance at the rate of 30% of her basic pay for the period May, 2019 to November, 2021 has no basis and is accordingly dismissed.

With regard to the second issue, which is whether the non-payment of K400.00 monthly bonus in the month of October, 2021 amounted to a unilateral variation of the complainant's basic condition of employment by the respondent, it was the complainant's contention that the said bonus was her accrued right as it had become part of her pay. That it was an entitlement

as she used to receive the payment every month since 2018. That the respondent removed it from her pay in the month of October, 2021 without any reason and also without informing her.

On the other hand, the respondent argued that the paying of bonuses was in the discretion of Management and it used to be paid out to deserving employees who had worked hard and recommended by their immediate supervisor in a particular month. That K400.00 was not part of the complainant's salary.

I have considered the opposing arguments regarding this issue.

In the case of **Mike Musonda Kabwe v B.P. Zambia Limited**<sup>3</sup>, it was held that:

**"If an employer varies a basic or basic conditions of employment without the consent of their employee then the contract of employment terminates; the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service do provide for such payment. We would add here that if the conditions of service provide for early retirement and not redundancy then the employee should be deemed to be on early retirement."**

In *casu*, it is not in dispute that the K400.00 being claimed by the complainant was being paid to her as a bonus but it was not provided for in her contract of employment. In support of her claim, the complainant produced her July, 2021 pay statement, exhibit 'LHM26' to show that she used to receive the said payment. Since such payment was not provided for in her contract of

employment, it remained to be determined and paid at the sole discretion of the respondent. In cross-examination, the complainant conceded, and rightly so, that the giving of a bonus in a particular month for good performance was in the discretion of the respondent. This is the legal position as enacted by section 66(6) of the Employment Code Act.

The learned authors, Judge W.S. Mwenda and Chanda Chungu, in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, have explained at **page 119** as follows:

**“Section 66 of the Employment Code Act outlines when wages are due and how they should be paid. If employment allowances are part of the contract of employment, they should be paid in accordance with the contract. However, section 66(6) of the Employment Code Act states that if the allowances are not part of the contract of employment, they need not be paid in accordance with the guidelines in section 66(1) (2) or (3) of the Code. In other words, the Employment Code Acts states that the payment of an allowance or bonus that is not part of the contract can be done at the employer’s discretion. The most common of such allowance would be the bonus payment allowance which is normally not in the contract of employment and, therefore, solely at the discretion of the employer.”**

In the instant case, therefore, the complainant’s claim that the respondent’s stopping of the payment of K400.00 monthly bonus amounted to a unilateral variation of her conditions of service is bereft of merit and is accordingly dismissed.

I now turn to the third issue, which is whether the complainant's transfer by the respondent from Mukulumpe to Lusaka was null and void *ab initio*.

The complainant contended that her transfer to Lusaka was not done with good intentions in that it was imposed on her after she declined to sign the contract, exhibit 'LHM14' to 'LHM22' which was a variation of her existing permanent and pensionable contract. She also argued that the eight days which she was given to move upon her transfer to Lusaka was short notice considering that she was a married woman with children and she needed enough time to prepare. She also argued that the respondent was aware that she was 20 weeks pregnant and her doctor had advised her against moving long distances and doing stressful work and also to avoid fatigue and exhaustion. Further, that in the notice of transfer, exhibit 'LHM27', the respondent had stated that her long term contract could not be sustained at Chambishi camp as there was no new construction project and it was downsizing. It was her further argument that the manner in which the transfer was done was not proper as she did not give consent which was a pre-requisite and the respondent did not engage or explain the particulars of her transfer before effecting it as provided for under sections 28 of the Employment Code Act No. 3 of 2019. The respondent, on the other hand, contended that the complainant was transferable to any part of the country as part of her contractual obligations and that she was given sufficient notice.

That the reason she was transferred was because the respondent's head office in Lusaka needed a Human Resource Officer as evidenced by the advertisement, 'ZZ3'. That the complainant was not precluded from being transferred by virtue of her being married and pregnant.

I have considered the arguments from both sides.

It is on record that in its letter, exhibit 'LHM27', dated 1<sup>st</sup> November, 2021, the respondent transferred the complainant to its headquarters in Lusaka with effect from 8<sup>th</sup> November, 2021. However, the complainant contested the transfer on the grounds that she was a married woman with children and also that she was 20 weeks pregnant. Further, that she was not given sufficient.

As rightly argued by the respondent, it was clearly stated in the complainant's contract under clause 2, that she could be placed in any part of the country as determined by the respondent. It should also be noted that section 24 of the Employment Code Act categorically states that a contract of employment is not binding on the family of an employee except where it makes a separate provision for a family member. Therefore, the complainant's contract of employment did not bind her family and it was wrong for her to have refused the transfer on account of her being a married woman with children. I have also looked at the documents produced by the complainant in support of her claim that she was

advised against travelling long distances by her Medical Doctor, that is, copies of her ante-natal card and radiological request form, exhibits 'LHM38' and 'LHM39', respectively. I have found that the same do not contain any restrictions on her movements. Further, there is nowhere in her contract where it was stated that before transferring her, the respondent had to first consult her and also explain the reasons for the transfer. The provisions of the Employment Code Act that the complainant relied upon, that is, sections 28 and 29 are not applicable to the complainant as they relate to employees on transfer from one employer to another, that is, from one company to another company. In this case, the complainant's transfer was within the same company. Furthermore, the complainant's contract did not provide for the notice period for transfer. Therefore, respondent had the discretionary power to transfer the complainant, as its employee, either with immediate effect or otherwise giving a period of time that it considered as being reasonable. Based the foregoing, the complainant's claim that her transfer was null and void *ab initio* cannot stand and is accordingly dismissed.

I now turn to the fourth issue, which is whether the complainant's employment was terminated by reason of redundancy, thereby entitling her to a redundancy package.

In support of this claim, the complainant contended that after pressing the respondent for the payment of her her lunch and

housing allowances, the complainant first attempted to vary her contract of employment from a permanent and pensionable contract to a fixed term contract, exhibit 'LHM14' to 'LHM21' which was for a period of six months. That when she declined to sign the said contract and asked the respondent to first declare her redundant, give her the requisite 30 days' notice and pay her the benefits that had accrued under the permanent and pensionable contract, the respondent forced the transfer on her to its headquarters in Lusaka. That infact, the real reason behind her transfer was that the respondent's business was going down as it did not have any projects at the Chambishi camp hence it had to downsize. On the other hand, the respondent argued that it decided to transfer the complainant to its headquarters in Lusaka because there was insufficient manpower at Lusaka and they needed a Human Resource Officer. Further, that it had no project at Chambishi camp and as such, it could not sustain the complainant's long-term contract. That the complainant was transferred in the same capacity as Human Resource Officer.

I have considered the parties' opposing arguments.

I note that although the respondent had no project and had to downsize at its Chambishi camp, it took steps to find the complainant alternative employment within the company by transferring her to its headquarters in Lusaka where her position was still available and on the same terms and conditions of



service. However, it is clear from the complainant's letters, in particular the letters, exhibits 'LHM29' and 'LHM30' that she was not willing and had no intentions of going to Lusaka to take up the position. Even after being cautioned and asked to exculpate herself as to why she did not report at her new work station, the complainant still indicated that she was not willing to go to her new station. If indeed the reason she could not go to Lusaka was due to insufficient notice, the complainant could have still accepted the transfer and ask for more time to move to Lusaka. From the foregoing, the respondent cannot be faulted for having come to the conclusion that she had refused to work and deemed her to have resigned. Therefore, the complainant's claim that her employment was terminated by reason of the respondent's business going down or downsizing and/or redundancy cannot stand and is accordingly dismissed. Consequently, the complainant's claim for a redundancy package or severance pay cannot stand and is accordingly dismissed.

Regarding the fifth issue, which is whether the complainant is entitled to the payment of damages for loss of employment and wrongful termination, it was the complainant's argument that her employment was terminated without giving her an opportunity to be heard. The respondent, on the other hand, argued that the respondent was deemed to have deserted work as she refused to report to Lusaka where she was transferred.

As I have already found above, it is clear from the letters the complainant wrote to the respondent, more especially her exculpatory letter, 'LHM32' that the complainant had no intentions of reporting to her new station in Lusaka where she was transferred to. Therefore, the respondent cannot be faulted for having deemed the respondent to have resigned or deserted work. In the result, the complainant's claim for damages for loss of employment and wrongful termination lacks merit and is accordingly dismissed.

In her notice of complaint, the complainant also claimed for a declaration that she be issued with a certificate of service and recommendation letter but she did not lead any evidence to that effect. However, section 59 (1) and (2) of the Employment Code Act No. 3 of 2019, provides for the issuance of certificate of service and a testimonial to an employee on the termination of employment. The said section provides as follows:

- (1) Despite the provisions of subsection (2) an employer shall, on the termination of a contract of employment, give an employee a certificate of service indicating—**
- (a) the name of the employer;**
  - (b) the name of the employee;**
  - (c) the date of engagement;**
  - (d) the date of discharge;**
  - (e) the nature of employment;**
  - (f) the employer's account number with any fund or scheme under which statutory contributions have been or will be remitted to the fund or scheme on behalf of the employee;**
  - (g) the employee's national registration number and membership number in the fund or scheme during the course of the contract; and**

- (h) a statement of the amount of statutory and any supplementary contributions paid by the employer to the fund or scheme during the course of the contract.
- (2) An employer may give a testimonial, reference or certificate of character to an employee at the termination of the employee's service."

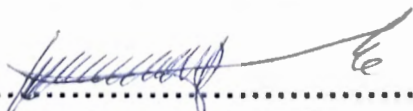
It can be seen from the above provision that it is mandatory for an employer to issue a certificate of service upon terminating an employee's contract of employment. For this reason, I order that the respondent should issue a certificate of service to the complainant.

As regards the issuance of a testimonial or recommendation as the complainant put it, it can be seen from the reading of the aforementioned statutory provision that it is in the discretion of the employer. Therefore, the respondent was not obligated to issue a testimonial or a recommendation to the complainant. Therefore, her claim lacks merit and is accordingly dismissed.

I make no order for costs. Each party will bear own costs.

Leave to appeal is granted.

Delivered at Ndola this 30<sup>th</sup> day of June, 2022.

  
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**Davies C. Mumba**  
**HIGH COURT JUDGE**