IN THE HIGH COURT FOR ZAMBIA **2022/HN/IR/41**
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Industrial Relations Division)

BETWEEN:

NYANDENI KALELA **1ST COMPLAINANT**
HERICK CHIFUMPA MUTALE **2ND COMPLAINANT**

AND

FIFTEEN MCC AFRICA
CONSTRUCTION & TRADE LIMITED **RESPONDENT**

Before the Hon. Mr. Justice Davies C. Mumba in open Court on the 13th day of December, 2022

For the Complainants: In Person
For the Respondent: Mr. C. Chali, Messrs GM legal Practitioners.

JUDGMENT

Case referred to:

1. Mike Musonda Kabwe v B.P. Zambia Limited (1997) S.J.

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021.
2. W.S Mwenda, Employment Law in Zambia: Cases and Materials: UNZA Press, Lusaka, 2004.

By notice of complaint supported by an affidavit filed into Court on 19th May, 2022, the complainants commenced this action against the respondent seeking the following reliefs:

A Court order declaring that the termination of employment by redundancy was wrongful, unlawful and unfair.

1. Damages for loss of employment.
2. Damages for pain and suffering.
3. Payment of the redundancy package underpayment.
4. A Court order for the respondent to pay K50.00 increment on salaries.
5. Interest on the amounts found due.
6. Costs.

In their affidavit in support of the notice of complaint sworn by the Nyandeni Kalela, the 1st complainant herein, it was deposed that the 1st and 2nd complainants were employed by the respondent as Procurement Officers on 26th September, 2018 and 26th July, 2019, respectively. That they were both dismissed from employment on 29th April, 2021 under the guise of redundancy. That it all started when management placed all the employees on forced leave, a decision which they did not appreciate but was later resolved with the help of the Mayor who directed management to reinstate all the employees. That when the Mayor posted the outcome of his intervention on his facebook page, the 1st complainant commented that '*good move*', which led the

Human Resource Manager to admonishing him and advised him that there were right channels of communication as opposed to resorting to social media. That they were later given interdepartmental transfers to go and work under the roads department under a Mr. Wang as Dam Site Workers to lift sand filled sacks as shown by the letters, 'NK3a', which was humiliating and a demotion in the literal sense. That they approached the Human Resource Manager and stated in no uncertain terms that they were not going to accept the sudden change in their duties from working as Procurement Officers to lifting sand filled bags at the dam. That they were advised to put their refusal to work as Dam Site Workers into writing which they did as shown by the letters, 'NK4' and 'NK4a. Thereafter, management decided to place them on redundancy. He contended that they were disputing the decision to place them on redundancy because it was irregular, as their positions were the only ones which were affected. It was deposed that the respondent had not, in the recent past, undergone any downsizing process which was a prerequisite. He also deposed that no notice was given to them and neither was the Ministry of Labour notified. Further, that prior to placing them on record, the respondent took two Chinese nationals to work under them in order for them to learn the procurement process who had since been given their positions. He stated that foreign nationals could only take up positions if there were no Zambians who were qualified to take up the concerned positions, contrary to the

decision made by the respondent. That their redundancy was, therefore, erroneously done. He implored the Court to declare their redundancy wrongful, unlawful and unfair. He further deposed that they were paid redundancy packages but the same were under calculated. He also deposed that the respondent did not effect the K50.00 increment on their salaries as per the collective agreement of 2019. That they approached their union, that is, the Mine Workers Union to intervene as shown by the letter, 'NK8' but to no avail.

On 10th June, 2022, the respondent filed an answer and a counter-claim, seeking the following reliefs:

1. An order that the complainants' refusal to be transferred to alternative work sites amounted to resignation.
2. An order against the 1st complainant for the payment of the sum of K11,915.20 being the money which was wrongly paid to him as redundancy package.
3. An order against the 2nd complainant for the payment of the sum of K8,191.70 being the money which was wrongly paid to him as redundancy package.
4. Interest on the sums found due at the current bank lending rate.
5. Legal Costs.
6. Any other reliefs the Court may deem equitable.

The answer and counter-claim were supported by an affidavit in verification of the answer, sworn by Clement Machinjili, Human Resource Manager. The deponent deposed that the complainants were employed by the respondent as shown by their respective contracts, 'CM1'. That due to the adverse effects of the Covid-19 pandemic, the respondent, in April, 2020, placed the complainants and 38 other employees on forced leave. That the respondent had faced a lot of economic and dire financial straits during the upsurge of the Covid-19 pandemic so the respondent came up with initiatives to safe guard the employees' jobs by undertaking projects within the respondent company to avoid loss of jobs. That as a result, the respondent transferred the complainants and other 38 employees to alternative work sites. That the said transfers were on a temporary basis as shown by the letters, 'CM2'. That the complainants refused to be transferred without even reporting or having sight of their job posts as shown by their letters of refusal, 'CM3'. That following their refusal, there was no work which could be allocated to the complainants as the procurement department where they were working from had been abolished in a bid to ensure the survival of the company. That consequently, the complainants were rendered redundant as shown by the letters of termination of their contracts, 'CM4'. That the complainants were paid their redundancy packages which appeared as gratuity on their pay slips; accrued leave days and one month's pay in lieu of notice, as they were on forced leave. He averred that infact, the

complainants' act of refusing to be transferred amounted to resignation and as such, the complainants were erroneously or mistakenly paid redundancy packages and they should be ordered to pay it back.

At the trial, the 1st complainant informed the Court that he was a Stores Officer at Epiroc Zambia. He testified that he was employed by the respondent as a Procurement Officer on 26th September, 2018. That he used to procure spare parts and material for machines for the respondent. That his contract ended on 25th September, 2021 and it was renewed for another three years. That when the Covid-19 cases escalated, they were all placed on forced leave on 26th March, 2020. That he was later called back for work by the Human Resource department to work under the safety department as a Safety Officer and he was told to go for a Covid-19 test at Luanshya hospital. That by that time, he had high symptoms of Covid-19 and the doctor certified him not fit for work. That the Safety Officer, Mr. Bwalya who had gone with them to do the test told them that the Human Resource Officer would get in touch with them. That after some months, he saw the former Mayor of Luanshya post on his facebook page that he had visited the respondent's site and discussed with the Human Resource department and management that everybody should be reinstated back to their positions and that Zambians should be treated fairly just like the Chinese. That the 1st complainant commented on the said post that '*job well done.*'

That after some weeks of that post, they were all called back for work and according to the information that was drafted on the paper which contained names of those that were called back, they were redirected from being Procurement Officers to Assistant Stores Officers. That as they reached the site for work on 28th March, 2021, he was asked by the Human Resource Manager, Mr. Clement Machinjili why he had commented on the Mayor's post and told to go to the Human Resource Officer for a disciplinary action commenting on the facebook page. That when he arrived at the Human Resource Officer's office, he was told to wait for Mr. Machinjili as he was the one who was going to deal with the matter. That when Mr. Machinjili went there, the 1st complainant told him that he had gone for the disciplinary action and Mr. Machinjili told him to wait for him outside the respondent's premises together with the other workers. That Mr. Machinjili also told him to forget about his comment on facebook and that it should never happen again and he went outside the premises to join the workers. That as he, the 2nd complainant and other employees were waiting, Mr. Machinjili went where they were standing and informed them that they were still waiting for the Chinese to advise them on an alternative where to take them because no black person was going to be allowed to work at the warehouse at the time because of Covid-19. That as they were waiting, they were again redirected to work at the dam site, a job which involved lifting sacks filled with soil and mounting the sacks on the banks of the dam. That they thought it was unfair

on their part so they informed their union representatives who told them that they were not aware of the move by management. After that, they approached the Human Resource Manager, Mr. Machinjili and told him that they felt that it was unfair on them. That he asked them why they thought it was unfair and they stated their reasons. That Mr. Machinjili then advised them to put their grievance in writing and on 28th April, 2021 they took to him their transfer refusal letters and he told them to go back the next day for the response from management. That when they went back the next day on 29th April, 2021, their contracts were terminated by reason of redundancy. That just after receiving the termination letters, Mr. Machinjili told them that they would be paid their redundancy packages as stated in the letters and in accordance with the Laws of Zambia. That because they were not happy with the decision by management to terminate their employment, they engaged their union representatives from MUZ who wrote to the respondent's Human Resource Manager the letter, 'NK6' over the matter. The 1st complainant testified that their redundancy packages were not paid right away. That they were only paid their basic pay in that month. That their redundancy packages were paid the next month but they were underpaid.

He further testified that after conducting a search, they discovered that their jobs were given to Chinese nationals who had recently come to Zambia, namely, Mr. Wang and Mr. Ying.

That they had retrieved some purchase orders, 'NK9' which were issued by the said Mr. Wang and Mr. Ying as proof. He stated that they engaged the Legal Aid Board because they wanted to sort the matter out of Court and the Legal Aid Board drafted a demand letter demanding the underpayment on their redundancy packages as well as damages for loss of jobs and unfair dismissal. However, the respondent did not respondent to the letter hence they brought the matter to Court.

In cross-examination, the 1st complainant declined to answer how he had obtained the purchase orders, 'NK9'. He admitted that Mr. Wang and Mr. Ying replaced them but he did not have their appointment letters. He stated that he was employed as an Assistant Procurement Officer. That he had professional qualifications in Accounting and Administration. That he had studied Business Administration from ICM, an international Institute. He stated that his contract ended on 25th September, 2021. He then explained that his first contract ended on 26th September, 2018 and it was renewed for three years but he did not complete it because he was declared redundant. He confirmed that he was placed on forced leave on 25th March, 2020. That he did not know how many employees were placed on forced leave as he was only aware about his department. He admitted that it happened during the time Covid-19 cases escalated and further stated that management placed them on forced leave to put up measures to fight Covid-19. That he was

not aware if management put up the measures because he was on forced leave. He stated that they were only being paid the basic salary during the forced leave. He stated that at some point, he was called to work under the safety department and he underwent medicals but the medicals were not successful. That he was ready to accept the position under the safety department. He stated that he did not have the minutes of the meeting between the former Mayor of Luanshya and the respondent's management and Human Resources department. That he did not have a copy of the former Mayor's facebook post. He stated that he did not have the list of names of employees who were redirected from being Procurement Officers to work as Assistant Stores Officers. He also stated that Mr. Machinjili had directed that disciplinary action be taken against him for his facebook comment but he was not charged. He stated that he was not the only employee who was given a new position by the respondent. He admitted that they were redirected to work at the dams and the job entailed lifting sacks filled with soil. That he did not report for work at the dams but he knew the job description at the dams despite not having reported. He stated that the letters of transfer had stated that the job at the dams was a temporary project by the respondent. When referred to his letter of transfer, 'CM2', the 1st complainant admitted that according to the said letter, he was being moved to the dam on a temporary basis. That he refused to take up the position and authored a letter to that effect. When referred to the respondent's counter-claim, the

complainant denied that his refusal to work amounted to resignation. He stated that he was on forced leave for over a year until he was redirected. That while on forced leave, he was still getting his basic pay despite not working. He confirmed that after receiving the letters of termination, they received one month's basic pay. That the redundancy package was underpaid because it was supposed to be calculated at the rate of 25% of their basic pay in accordance with the Employment Code Act and the collective agreement. That he could not tell by how much they were underpaid.

The 2nd complainant testified that he started working for the respondent on 26th July, 2016 as an Assistant Procurement Officer on a fixed term contract which ended on 25th July, 2019. That the contract was renewed on 26th July, 2019 and it was supposed to end on 25th July, 2022. That it was during that period that there was an out break of Covid-19. That on 26th March, 2020, management placed them on forced leave and they were being paid their basic pay every month. After one year and a month, the Mayor visited the respondent's site and had a meeting with the respondent's management and MUZ. That the Mayor then posted on his facebook page that all workers must go back for work and be reinstated to their positions. That after a week, they were called back for work and a list was put on the notice board. He stated that they were redirected to go to the mores department and after doing their medicals, they reported

for work at the respondent's site on 27th April, 2021 but they were told to wait outside. That they were then addressed by the Human Resource Manager, Mr. Machinjili and they were advised to wait as management was looking for alternative work where they could be redeployed. At this stage, the 2nd complainant then informed the Court that he was adopting the evidence of the 1st complainant as his evidence.

In addition, the 2nd complainant stated that management did not give them the K50.00 salary increment which was awarded to all the employees in 2019. That after contacting their union representative, they were told that they were still negotiating with management as to what transpired. He also stated that he was underpaid gratuity by K3,537.01 while the 1st complainant was underpaid by K5,298.00. That the gratuity was supposed to be calculated at 25% of the annual basic pay per each year served. That their basic pay was K2,234.10. That in his second contract, he served for 18 months. That for the 18 months, he was supposed to be paid K10,053.00 but he was paid K8,191.70, leaving a balance of K1,861.30. That as for the 1st complainant, he was supposed to be paid K17,313.50 for 31 months but he was paid K11,915.20, leaving a balance of K5,398.30.

During cross-examination, the 2nd complainant stated that the increment of K50.00 was agreed upon by the respondent and the union on 12th February, 2019. That he did not produce any pay

statement prior to 12th February, 2019 and after February, 2019. When referred to the pay statement, 'NK8a' he confirmed that that was his last pay. He confirmed that what appeared as gratuity was actually the redundancy package.

RW1 was Clement Machinjili, Human Resource Manager in the respondent company. He informed the Court that he was going to rely on his affidavit filed into Court on 10th June, 2022.

In addition, the witness testified that in April, 2020 during the Covid-19 era, the respondent's management decided to place all the employees on forced leave as per directive from the government since the respondent had recorded some Covid-19 cases. That the number of employees placed on forced leave was 560 and that it was done in order for the respondent to put up measures that were going to safeguard the lives of the employees, including the complainants. After putting up the measures, management decided to start reintegrating the employees but it was done gradually. That it took about a year and by April, 2021, there were about 40 employees who were still on forced leave. That management had to come up with measures to reintegrate all the employees and they were lucky that the principal owner of the mine, Luanshya Copper Mine gave them a contract to build a tallying dam within the premises of the respondent company. That because the project gave the respondent chance to complete the reintegration of the

employees including the complainants, management had to come up with a strategy. That management then wrote letters to all the employees that were still on forced leave informing them to report back for work to work at the temporary project at the tallying dams.

The witness testified that because most of the respondent's equipment were Chinese made, they had difficulties in procuring spare parts for the machines since China was the epi-centre of Covid-19, meaning that they had little work in most of the departments. That that compelled the respondent to merge certain departments such as the procurement and stores departments since they had similar duties. That for the people that had accepted to work at the dams, it was decided that immediately the respondent put in place a measure to reduce physical contact by workers, management would proceed to get people from the dams to fill up the positions in that department. That unfortunately, the complainants refused to work at the tallying dam site and never at any point reported to the site. That the Human Resource department then advised them to put their refusal into writing and the complainants wrote the letters, 'CM3' and 'CM4' to that effect. He stated that the transfers were temporary transfers as the complainants had been on forced leave for more than one year. That the transfers were lawful as it was the respondent's duty to secure the employees' jobs. The witness referred the Court to clause 12.1.2 of the complainants'

contracts of employment, 'CM1', and stated that the transfers were reasonable. That after the complainants refused to take up their positions, the respondent had no option but to terminate their contracts by reason of redundancy. That the respondent had prior discussions with the complainants' union representatives from the Mine Workers Union of Zambia (MUZ), local branch to the effect that since they were on forced leave, the complainants were just getting their basic salaries.

The witness also stated that because the respondent had difficulties in procurement spare parts and machines from China, the complainants were informed that there was no work for the procurement department.

The witness also told the Court that the respondent had a counter-claiming against the complainants, which was that they should pay back the redundancy packages that were paid to them.

Regarding the complainants' claim for the K50.00 on their salaries, the witness testified that after negotiations between management and MUZ, it was agreed that salaries would be increased by K50.00 across the board and that the increment was effected as regards the complainant.

Regarding the complainants' claim that they were underpaid their redundancy packages, the witness explained that the redundancy package was paid in accordance with the Employment Code Act, that is, two months' basic pay per each year served and it was done on pro rata basis since they were some incomplete years in the duration of their service. He also stated that the complainants had terminated their employment by refusing to work.

During cross-examination by the 1st complainant, the witness stated that he had worked as a Human Resource Practitioner for more than ten years. When referred to the letter 'CM2', he stated that he may have missed to copy the letters to the union representatives due to pressure of work. He stated that he did not have any medical certificate to show that the respondent had recorded a case of Covid-19. He stated that he was aware that some of the machines used to be procured from Komatsu and Volvo but he was not that Komatsu and Volvo had plants in Zambia from where they sell spare parts.

When referred to the transfer letter 'CM2', the witness stated that he could not indulge in the complainant's job description. When asked if he had acted without taking into account their job description, the witness stated that it was a collective decision that was made not by an individual but by the respondent. When referred to the letter, 'NK6', from the Deputy General Secretary

from MUZ, the witness admitted having received the letter. When referred to page 5 of the collective agreement, 'NK7' the witness admitted that those were the old basic salaries. When referred to page 3 of the same document, the witness confirmed that the K50.00 was an increment across the board. When referred to the 1st complainant's contract of employment, 'NK1', the witness confirmed that their basic pay was K2,031.00. That the K50.00 was included. He stated that there were Zambians who still remained working at the warehouse after employees were put on forced leave. That the respondent was using auxiliary workers who had remained quarantined on the site. When referred to paragraph 13 of his affidavit, the witness failed to explain the difference between resignation and redundancy. He stated that he was aware that other than section 55(2)(a) and (b, there were other provisions under section 55 but denied having left out any of them.

During cross-examination by the 2nd complainant, the witness stated that the K50.00 increment was effected. When referred to his termination letter, 'NK5', the witness stated that the time frame would have been effected but the respondent if the redundancy was initiated by the respondent but it was initiated by the complainant's refusal to work. He stated that he did not have any document to prove that there were discussions between the union and the respondent regarding their redundancy. He also stated that there was no need to notify any Authorising

Officer because the redundancy was initiated by the complainants and not the respondent. When referred to the termination letter, 'NK5', the witness stated that there was a difference between diminishing work and ceasing work. That there were three employees in the procurement department. That it was not just the complainants' work which diminished. That the respondent had contacted the union representative for a discussion but he did not have the minutes to that effect.

I have considered the affidavit and *viva voce* evidence from the parties. I have also considered the complainants' final written submissions.

The facts which were common cause are that the 1st and 2nd complainants were employed by the respondent as Procurement Officers on 26th September, 2018 and 26th July, 2019, respectively, under written contracts of fixed durations of three and two years, respectively. On 25th March 2020, the respondent placed its employees on forced leave due to an upsurge of Covid-19 cases. After over a year in April, 2021, the respondent started calling back the employees and the complainants were given letters of transfer to work at the respondent's temporary project at the dam site. After the complainants expressed their displeasure about their transfer to the dam site as they considered it to be a demotion, they were advised to put their refusal to work at the dam site into writing which they did as

shown by the letters, 'NK4' and 'NK4a. Following their refusal to be transferred, the respondent terminated the complainants' employment by reason of redundancy citing section 55(1) (b) and (c) on 29th April, 2021. The respondent also paid the 1st and 2nd complainants redundancy packages in the sums of K11,915.20 and K8,191.70, respectively.

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

1. Whether, in terminating the complainants' contracts of employment, the respondent complied with the relevant law on termination of employment by reason of redundancy.
2. Whether the complainants' redundancy packages were under calculated.
3. Whether the complainants are owed salary arrears in the sum of K50.00 per month from January, 2019 to the date of termination of their employment.

I will start with the first issue, which is, whether in terminating the complainants' contracts of employment, the respondent complied with the relevant law on termination of employment by reason of redundancy.

The complainants have contended that the respondent terminated their employment by reason of redundancy. That However, in carrying out the said redundancy, the respondent

contravened the provisions of section 55 of the Employment Code Act No. 3 of 2019 as it did not follow the procedures laid down in the said provisions. Further, that the respondent did not undergo any downsizing and that their positions were given to Chinese nationals.

On the other hand, the respondent contended that there was no need to comply with the provisions of the Employment Code Act because redundancy was initiated by the complainants themselves as they refused their temporary transfers to the dam site; and that infact, the complainants had resigned.

I have considered the arguments from both parties.

I have perused section 55 of the Employment Code Act which provides for the reasons which inevitably lead to the termination of a contract of employment of an employee by reason of redundancy as well as the procedure that ought to be adopted whenever an employer intends to terminate a contract of employment by reason of redundancy. The relevant portions of the said section provide that:

> **"55 (1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to-**
>
> **...(b) the business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged; or**

(c) an adverse alteration of the employee's conditions of service which the employee has not consented to.

(2) Where an employer intends to terminate a contract of employment by reason of redundancy, the employer shall:-
(a) give notice of not less than thirty days to the employee or a representative of the employee of the impending redundancy and inform the representative on the number of employees, if more than one to be affected and the period within which the termination is intended to be carried out;
(b) afford the employee or representative of the employees an opportunity to consult on the measures to be taken to minimise the termination and the adverse effects on the employee; and
(c) not less than sixty days prior to effecting the termination, notify an authorised officer of the impending termination by reason of redundancy and submit to that authorised officer information on—
(i) the reasons for the termination by redundancy;
(ii) the number of categories of employees likely to be affected;
(iii) the period within which the redundancy is to be effected;

and

(iv) the nature of the redundancy package."

In the present case, it is clear from the evidence that the transfer of the complainants from the procurement department to the dam site was an adverse alteration to their conditions of service as they considered it to be, and rightly so, a demotion. It is also clear that the complainants did not consent to the alterations to their conditions of service as evidenced by their letters of refusal of the transfers, 'NK4' and 'NK4a'. Therefore, I am satisfied that the complainants were properly deemed redundant by the respondent in line with section 55(1)(c) of the Employment Code Act cited above. Owing to the above, the complainants'

arguments that their positions were taken up by Chinese nationals and that the respondent was not undergoing any downsizing are irrelevant, as the redundancy was necessitated by their refusal to take up their new roles. It also follows that the respondent's counter-claim that the refusal by the complainants to be transferred to another department amounted to resignation and they should be ordered to pay back the money they were paid as redundancy packages cannot stand and is accordingly dismissed.

However, the question that begs an answer is whether the respondent should have followed the procedure outlined in section 55(2) of the Employment Code Act cited above.

Having considered the circumstances under which the complainants' were declared redundant, I agree with the respondent that it was not necessary for the respondent to follow the procedure outlined in section 55(2). This is because the complainants' employment automatically terminated on the date they were transferred from the procurement department to the dam site on 28th April, 2021. By that action, the respondent unilaterally varied their conditions of service; and they are deemed to have been declared redundant on the date of variation

holding of the Supreme Court in the case of **Mike Musonda Kabwe v B.P. Zambia Limited**[1]. In that case, 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."**

Based on the above authority, the respondent was not wrong to have demeed the complainants redundant after they refused to be transferred to another department. It was also not necessary for the respondent to go through the process outlined in section 55(2) as the complainants' contracts of employment automatically terminated by reason of redundancy on 28th April, 2021 when the respondent varied their basic conditions of service without their consent as they were deemed to have been declared redundant. In this regard, the complainants' claim that the termination of their employment was wrongful and unfair cannot stand and is accordingly dismissed. Consequently, their claims for damages for loss of employment; and damages for pain and suffering cannot also stand and are accordingly dismissed.

Regarding their claim that their redundancy packages were under calculated, the complainants argued that their redundancy packages should have been calculated at the rate of 25% of their

annual basic pay as provided for in the Employment Code Act and not at the rate of two months' pay per each year served. The complainants did not lead evidence as to how much they were paid as their redundancy packages in contrast to how much they were supposed to be paid. However, during cross-examination, the 2nd complainant admitted that what was termed as *'gratuity'* on their pay statements, 'NK8' and 'NK8a' was infact their redundancy packages. Before that, the 2nd complainant had testified that their gratuity was underpaid as it was supposed to be calculated at 25% of their annual basic pay and not two months' basic pay per each year served. The 2nd complainant stated that based on their monthly basic pay of K2,234.10, the 1st complainant was supposed to be paid K17,313.50 for 31 months but he was paid K11,915.20, leaving a balance of K5,398.30. That as for himself, on his second contract, he had served the respondent for 18 months and he was supposed to be paid K10,053.00 but he was paid K8,191.70, leaving a balance of K1,861.30.

On the other hand, the respondent argued that the complainants were not underpaid. That the redundancy packages were paid in accordance with the Employment Code Act, that is, two months' basic pay per each year served and it was done on pro rata basis since they were some incomplete years in the duration of their service.

I have considered the arguments from both parties.

I note that the complainants' contracts of employment and the collective agreement, 'NK7' did not provide for redundancy as a mode of termination; and the appropriate redundancy package thereof. Therefore, in determining whether or not the complainants were underpaid, I will be guided by the provisions of section 55 (3) of the Employment Code Act No. 3 of 2019 which are couched in the following terms:

> **"...an employee whose contract of employment has been terminated by reason of redundancy shall-**
> **unless better terms are agreed between the employer and the employee concerned or the employee's representatives, be entitled to a minimum redundancy payment of not less than two months' pay for every year served and other benefits the employee is entitled to as compensation for loss of employment; and**
> **be paid the redundancy payment not later than the last day of duty of the employee, except that where an employer is unable to pay the redundancy payment on the last day of duty to the employee, the employer shall continue to pay the employee full wages until the redundancy package is paid.**

Based on the above authority, the complainants' redundancy packages were supposed to be calculated at two months' pay for each year served. According to the evidence on record, the 1st complainant had served two complete years where as the 2nd complainant had served one complete year. Their last basic pay was K2,234.10 as shown by their pay statements for May, 2021 and according to their contracts of employment, they were entitled to monthly housing allowance as 30% of their basic pay and monthly transport allowance in the sum of K102.00.

Therefore, the complainants were receiving a total of K3,006.33 per month.

For the 1st complainant, K3,006.33 multiplied by 2 months and by 2 years equals K12,025.32 and this was what he was supposed to be paid as his redundancy package. According to the pay statement, 'NK8', the 1st complainant was paid the sum of K11,915.20 as his redundancy package, although it was erroneously termed as gratuity. This means that the 1st complainant was under paid by K110.12 and I, therefore, enter judgment in his favour in the sum of K110.12 being the underpayment on his redundancy package.

As for the 2nd complainant, K3,006.33 multiplied by 2 months for 1 year equals K6,012.66. His pay statement, 'NK8a' shows that he was paid K8,191.70. This means that he was overpaid by K2,179.04, and the respondent is entitled to recover the said amount.

I wish to add that the complainants, having been serving on long term contracts, and their contracts having been terminated in accordance with the Employment Code Act, in particular, section 55(1)(c), they were entitled to be paid gratuity as provided for under section 73 of the Employment Code Act, which states as follows:

accordance with the period of

sed on the above provision, the complainants are entitled to e payment of gratuity at the rate of 25% of their annual basic ay earned during the period they worked for the respondent on heir last contracts. Since there is no evidence as to how much hey were getting before May, 2021, I refer the matter to the earned Deputy Registrar for the assessment of gratuity.

I now turn to the complainants' claims for K50.00 increment on their salaries from 2019 to the date of the termination of their employment.

The complainants did not produce any pay slips for the period before February, 2019 when the said increment is said to have been agreed upon; and after February, 2019 to prove that the said increment was not effected. However, I note from the 2nd complainant's second contract, 'NK1a' which came into effect on 26th July, 2019, that he was entitled to a basic salary of K2,031.00. I believe this was also the 1st complainant's basic salary at that time as they had the same conditions of service as can be discerned from the evidence on record. According to their

last pay slips, 'NK8' and 'NK8a' for the month of May, their basic salary at the time their employment was terminated was K2,234.10. This, therefore, shows that the respondent had actually increased the complainants' salaries by more than K50.00. In this regard, the complainants' claim for the K50.00 increment on their salaries from January, 2019 cannot stand and is accordingly dismissed.

In sum, the 1st complainant has succeeded in his claim for underpayment of the redundancy package as found above. Further, both the 1st and 2nd complainants are entitled to the payment of gratuity. The total sums to be found due and payable to each complainant as gratuity shall attract interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complaint to the date of the judgment and thereafter, at 10% per annum until full settlement.

I make no order for costs.

Leave to appeal is granted.

Delivered at Ndola this 13th day of December, 2022.

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Davies C. Mumba
HIGH COURT JUDGE