IN THE HIGH COURT FOR ZAMBIA **COMP/IRCLK/442/2019**
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SAVIOURS MUNDIA **COMPLAINANT**

AND

CONSOLIDATED FARMING LIMITED **RESPONDENT**

Before: The Honourable Lady Justice Dr. Winnie Sithole Mwenda at Lusaka this 22nd day of June, 2023.

For the Complainant: *In person*
For the Respondent: *Mr. F. Mutale of Messrs. FM Legal Practitioners*

JUDGMENT

Cases referred to:

1. *Hacholi Makondo and 4 Others v. Attorney General and Another, CAZ Appeal No. 131/2019.*
2. *Kasembo Transport Limited v. Collins John Kinnear, SCZ Appeal No. 89/2010.*
3. *Zambia Consolidated Copper Mines v. Jackson Munyika Siame and 33 Others, SCZ Appeal No. 10/2023.*
4. *Cosmas Phiri and 85 Others v. Lusaka Engineering Company Limited (in liquidation) SCZ Appeal No. 1/2007.*
5. *Rosemary Ngorima and 10 Others v. Zambia Consolidated Copper Mines, SCZ Appeal No 97/2000.*
6. *Finance Bank Zambia Limited and Rajan Mahtani v. Simataa Simataa, SCZ Selected Judgment No. 21 of 2017.*
7. *Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others, SCZ Appeal No.06/2020.*
8. *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited, CAZ, Appeal No. 129/2017.*
9. *Kenny Sililo v. Mend-a-Bath Zambia Limited and Spencon Zambia Limited, SCZ Appeal No. 168/2014.*
10. *Lawrence Muyunda Mwalye v. Bank of Zambia (2010) 2 Z.R.387 (S.C).*
11. *Tebuho Yeta v. African Banking Corporation ABC (Zambia) Limited, SCZ Appeal No.117/2013.*
12. *Quattro Company Limited v. Moscane Mbulo, CAZ Appeal No. 118/2017.*
13. *Emporium Fresh Foods t/a Food Lovers Market and Another v. Kapya Chisanga, CAZ Appeal No. 44/2021.*

14. *Josephat Lupemba v. First Quantum Mining and Operations Limited, CAZ Appeal No. 120/2017.*
15. *Redrilza Limited v. Abuid Nkazi and Others, SCZ Judgment No. 7 of 2011.*
16. *Care International Zambia Limited v. Misheck Tembo, SCZ Selected Judgment No. 56 of 2018.*
17. *National Airports Corporation Limited v. Reggie Ephraim Zimba and Saviour Konie, SCZ Judgment No. 34 of 2000.*
18. *Zambia National Building Society v. Ernest Mukwamataba Nayunda, SCZ Judgment No 11 of 1993.*
19. *Chilanga Cement Plc v. Kasote Singogo, SCZ Judgment No. 13 of 2009.*
20. *Alistair Logistics (Z) Limited v. Dean Mwachilenga, CAZ Appeal No. 232/2019.*
21. *Chansa Ng'onga v. Alfred H. Knight (Z) Ltd, SCZ Selected Judgment No. 26 of 2019.*
22. *Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Limited and Mwiinga (1987) ZR 29 (S.C.).*
23. *Bruno Musunga v. Road Contractors Company, SCZ Appeal No. 171/2013.*

Legislation cited:

1. *The Employment Code Act, No. 3 of 2019.*
2. *Employment Code (Exemption) Regulations, Statutory Instrument No. 48 of 2020.*
3. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia as amended by Act No. 8 of 2008.*
4. *The Minimum Wages and Conditions of Employment (General) Order, 2011, Statutory Instrument No. 2 of 2011 as amended by Statutory Instrument No. 71 of 2018.*

Authoritative texts referred to:

1. *Mwenda, Winnie Sithole and Chungu, Chanda, A Comprehensive Guide to Employment Law in Zambia (2021) University of Zambia Press.*
2. *Chungu, Chanda (2022) "Mumba Malila, An Advocate for the Vulnerable Worker: Tiger Chicks (t/a Progressive Poultry v. Tembo and Others, SCZ Appeal No. 06/2020 and Kasembo Transport Limited v. Collins John Kinnear SCZ Appeal No. 89/2010" SAIPAR Case Review, Volume 5, Issue 1, Article 20.*
3. *Bryan A. Garner (ed), Black's Law Dictionary, 10th Edition (2014) Thomson Reuters.*
4. *Guest, Anthony Gordon (ed) et al Chitty on Contracts, 26th Edition, Volume 1 (1989) Sweet & Maxwell.*
5. *Ng'ambi, Sangwani Patrick and Chungu, Chanda Law of Contract in Zambia, 2nd Edition (2021) Juta & Company (Pty) Limited, South Africa.*

1. Introduction and Complainant's case

1.1 The Complainant herein, one Saviours Mundia, filed a Notice of Complaint pursuant to Section 85 (4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia on 21st October, 2019, against his former employer, Consolidated Farming Limited ("the Respondent"), on the grounds that he was employed as a Centre Pivot Management Supervisor on a written contract for a duration of six (6) months, effective from 23rd May, 2019, and due to expire on 24th November, 2019.

1.2 That, on 25th July, 2019, the Respondent dismissed him on the ground of unsuccessful probation without assessing and writing the assessment results to him or giving twenty-four hours' notice, contrary to Section 27 (2) and (7) of the Employment Code Act No. 3 of 2019, thereby breaching the rules of natural justice.

1.3 Consequently, the Complainant beseeched the Court to order the Respondent to pay him: -

(i) Notice pay;

(ii) Damages for breach of contract (unpaid total sum of the contract);

(iii) Allowances conferred on the Complainant by law;

(iv) Costs and interest at current banking rate; and

(v) Any other benefits the Court may deem fit.

1.4 In the Affidavit in Support of Notice of Complaint filed together with the Notice of Complaint, the Complainant averred that he was employed by the Respondent as a Centre Pivot Management Supervisor on a six-month

written contract effective 23rd May, 2019 to 24th November, 2019.

1.5 That, contrary to the rules of natural justice, the Respondent made only one contract whose copy is under the Respondent's custody. Further, that the Respondent ought to have assessed or given the assessment results to the Complainant and given twenty-four hours' notice as required by Section 27 (2) and (3) of the Employment Code Act No. 3 of 2019.

1.6 The Complainant further averred that on Monday, 22nd July, 2019, the Respondent called him to administration office and through the Operations Manager, alleged that on Friday, 19th July, 2019, he received money from a Mr. Ernest Ilishebo amounting to K300 in order to employ him as a pivot operator. That, present in the office were Ernest Ilishebo, the Respondent's Human Resource Manager, a security officer and two other employees of the Respondent.

1.7 According to the Complainant, Ernest Ilishebo was employed as a general worker by the Respondent under his supervision in May, 2019; therefore, the assertion that he received K300 in July to employ Ernest Ilishebo, who was already working, lacked merit as all employees of the Respondent, including the Complainant, are employed by the Respondent's Human Resource Department.

1.8 The Complainant further, alleged that, having failed to prove its allegation, the Respondent called the State Police from Shibuyunji Police Station and handed over

both the Complainant herein and Ernest Ilishebo. That, at the Police Station Ernest Ilishebo became the complainant and gave a contradictory statement that the Complainant herein got a sum of K300.00 to employ him as Centre Pivot Operator but instead employed him as Security Guard.

1.9 It was the Complainant's evidence that Ernest Ilishebo was just being used as evidently noted in his contradictory statement because he was employed in May by the Respondent's Human Resource Department as a general worker under the supervision of the Complainant and not as a guard as the Complainant never supervised guards. As proof of his assertion, the Complainant produced and marked as exhibit "SM2", a copy of the Respondent's attendance register for general workers under his supervision for one month starting 17th July, 2019, ending 16th August, 2019, which included Ernest Ilishebo at number 3.

1.10 That, the Respondent terminated the Complainant's employment on 25th July, 2019 and the reason given for the termination was unsuccessful probation. A copy of the letter of termination was produced and exhibited as "SM5".

1.11 That, the Respondent was in breach of the rules of natural justice as it failed to follow the statutory procedural requirement of assessing and writing the assessment results to the Complainant and did not give 24 hours' notice as required by the statute. Further, that the Respondent was not only in breach of the law but

also the contract by failing to give the Complainant twenty-four hours' notice as agreed under the terms and conditions of the contract.

2. Respondent's case

2.1 The Respondent filed its Answer on 20th November, 2019, wherein it denied the assertion by the Complainant that he was entitled to notice pay and asserted that the Complainant was paid the same. Further, that the Complainant was not entitled to any of his claims as the same were frivolous and vexatious.

2.2 In the Affidavit in Support of Answer, Patricia Ponga Mwali, the Respondent's Human Resource Manager, deposed that the Complainant was indeed employed on a contract effective 23rd May, 2019 to 24th November, 2019.

2.3 However, the Respondent denied the averment that the Complainant was employed as a Centre Pivot Supervisor and stated instead, that he was employed as Centre Pivot Maintenance (Sic). In support of this assertion, a copy of the contract of employment was produced as "PPM1".

2.4 It was averred that the Complainant's short-term contract was terminated due to unsuccessful probation as provided under clause 6 of the Contract of Employment as well as clause 3.3 of the Collective Agreement between the Respondent and the National Union of Plantation, Agriculture and Allied Workers (NUPAAW). A copy of the Collective Agreement was produced as exhibit "PPM3".

2.5 The Respondent denied being in breach of the rules of natural justice and averred that the alleged failure to give

twenty-four hours' notice was taken care of by payment of twenty-four hours' pay in lieu of notice. As evidence of this assertion, a copy of the payroll allegedly showing a payment of K572.00 to the Complainant, which included twenty-four hours' pay in lieu of notice and days worked prior to termination, was produced and marked "PPM4".

2.6 That, the Respondent acted within the law by terminating the contract for unsuccessful probation and payment of twenty-four hours' pay in lieu of notice. The Respondent, further, denied breaching any rules of natural justice and averred that the termination on the basis of unsuccessful probation was at the discretion of management of the Respondent and not the Complainant.

2.7 Finally, that the Complainant was not entitled to any of the reliefs being claimed as the claims were frivolous and vexatious.

3. <u>Summary of evidence</u>

3.1 The matter came up for trial on 9th March, 23rd March and 23rd May, 2023. The Complainant was his own sole witness. He will, hereafter, be referred to as "CW".

3.2 It was CW's evidence that he was employed by the Respondent as a Centre Pivot Management Supervisor and his job was to manage and maintain the centre pivots. His employment was for a period of six months, namely, from 23rd May, 2019 to 24th November, 2019. That, unfortunately, on 25th July, 2019, the Respondent terminated his contract of employment in breach of the rules of natural justice in that the Respondent failed to

follow the statutory procedural requirements to be followed when terminating employment on the ground of unsuccessful probation.

3.3 It was CW's further evidence that the Respondent did not give him notice of termination as the same was with immediate effect. That, contrary to what the Respondent pointed out with regard to exhibit "PPM4" annexed to the Affidavit in Support of Answer, that the document was proof of payment, the document did not stipulate payment in lieu of notice. Thus, both the letter of termination and exhibit "PPM4" did not mention any payment in lieu of notice. That, above all, he did not sign exhibit "PPM4" at all.

3.4 With respect to the Respondent's assertion that he was not employed as Centre Pivot Management Supervisor, CW said that the Respondent got it all wrong from the job title that it gave him. It was his evidence that he was not a unionised employee of the Respondent but a member of management, in this regard, CW referred this Court to exhibit "PPM3" (the Collective Agreement between the Respondent and NUPAAW), specifically to the definition of "management". CW read the definition as follows: -

> *MANAGEMENT shall mean:*
> *A member of management is one who is responsible for the work of others and has authority to discipline them. This includes all persons with access to confidential records and those charged with personnel management functions.*
> *Any member of staff as shall be determined by the Bargaining Unit as ineligible by agreement between the Employer and Union.*

3.5 According to CW, he was a member of management and in that regard referred the Court to exhibit "SM15", a

document CW referred to as his workbook with the title "17th June, 2019 Report". That, he used to plan for the work of others as a member of management and had the authority to discipline people but did not do so because the time he worked for the Respondent was too short.

3.6 It was CW's further evidence that he had access to confidential information and was charged with personnel functions. CW referred the Court to exhibit "SM2", being a copy of the Respondent's register which, according to CW, showed that people were reporting to him. CW further, referred the Court to exhibit "SM30" and pointed out that Charles Mutondo who is mentioned in the document was one of the employees under his supervision. Hence, he was a member of management and not a unionised employee.

3.7 CW also drew the attention of the Court to his contract of employment exhibited as "PPM1" in the Affidavit in Support of Answer. It was his evidence that the contract provided that he was a Centre Pivot Management Supervisor, which was a management position. Further, that his basic salary was K21, 980.89 and 35% of the basic salary was given to him as housing allowance.

3.8 CW testified that the Respondent got it wrong when they created a position which they didn't employ him for. That, the position they created was a unionised one, hence the Respondent terminating his employment based on the Collective Agreement. That, on the contrary, his employment relationship with the Respondent was governed by the Employment Code Act, No. 3 of 2019,

which provides for statutory procedural requirements to be observed when terminating employment based on unsuccessful probation.

3.9 In cross-examination, CW stated that he was employed as Centre Pivot Supervisor and that he had qualifications in water distribution, but did not have a copy of his qualification before Court. That, he was in a managerial position and his evidence to that effect was exhibit "SM30" which was authored by the Respondent's Medical Officer and countersigned by the Agriculture Manager. He admitted that there was no addressee's name on the exhibit, but was addressed to the supervisor and that he was not the only supervisor in the company. He, further, admitted that the document had no company logo. He denied the suggestion that the document could have been picked from somewhere else.

3.10 Under further cross-examination, CW said that the rules of natural justice which were breached by the Respondent are the statutory provisions, which were not followed. That, he ought to have been given the right to be heard, assessed and the results of the assessment communicated to him. Further, that the Respondent ought to have given him twenty-four hours' notice or pay in lieu of notice.

3.11 He conceded that when his employment was brought to an end, he was serving on probation. It was his evidence that the company was obliged to give him reasons for terminating his contract. That, his authority in this regard were rules of natural justice. When referred to

exhibit "PPM1", where a contract of employment was exhibited, CW said that the signature thereon was not his. That, while the other particulars relating to him were his, the signature purportedly signed by him, was not his.

3.12 According to CW, his Notice of Complaint was raised pursuant to the Employment Code Act which came into effect in May, 2020 but commenced in April, 2019. His understanding of coming into effect was to be actualised. He reiterated that his contract of employment was terminated on 25th July, 2019. He admitted that he was dismissed before the Employment Code came into effect.

3.13 Under further cross-examination, CW admitted that he was once reported to Shibuyunji Police Station by Ernest Ilishebo who alleged that CW got K300.00 from him so that he could be employed as a pivot operator but ended up being employed as a security guard. He admitted that all this happened while he was on probation. That, he did not tell the Court this in examination-in-chief.

3.14 It was CW's further evidence under cross-examination, that the Police at Shibuyunji gave him a letter to take to the Respondent. That, in that letter the Police said they were still investigating the matter. That, upon receipt of the letter, the Operations Manager at the Respondent company said the company could not take instructions from the Police but would rather terminate the contract of employment for unsuccessful probation.

3.15 When referred to exhibits "SM6" to "SM29" of the Affidavit in Support of Notice of Complaint, CW said that they were

reports for his performance. He admitted that the documents had no company logo but said they were company documents. That, the Agriculture Manager was approving his performance by signing against all his performances and ticking them.

3.16 In re-examination, CW clarified that there was no college globally that offered training for centre pivot maintenance and installation. He also said that he did not refer the Court to the Police issues because the Respondent when responding to the issue in its Affidavit in Support of Answer said that the issue had nothing to do with them; therefore, he could not talk about something that was irrelevant.

3.17 That marked the close of the case for the Complainant.

3.18 The Respondent's witness was David Kaindu, the Acting Human Resource Manager at the Respondent company. He shall hereafter be referred to as "RW". It was RW's testimony that he knew Saviours Mundia, the Complainant herein, as he was the Respondent's employee. That, he was a pivot maintenance mechanic. Further, that he signed a contract of employment with the Respondent. RW identified the document exhibited as "PPM1", as the contract he was referring to. RW clarified that pivot maintenance and pivot mechanic were one and the same thing. That, the position was not a managerial one.

3.19 RW gave the management structure of the Respondent as having the managing director at the apex, followed by the

general manager, agriculture manager; human resource manager and operations manager.

3.20 It was RW's testimony that managers are given permanent contracts. That, the Complainant was bound by the Collective Agreement and not the Employment Code Act. That, the Employment Code Act came into effect in 2020 and by then, the Complainant was no longer an employee of the Respondent as his employment had been brought to an end. That, the Respondent paid the Complainant for twenty-four hours' notice upon termination, allowances and salary for the days he worked in that particular month.

3.21 RW testified that the Complainant was on probation at the time of termination of his employment and that when someone is on probation, the notice of termination is twenty-four hours. That, the Complainant's daily rate was K49.00. When referred to exhibit "PPM4", RW said that the Complainant worked for nine days in the month he was terminated and was paid a total sum of K672 for the days he worked, notice, allowances and overtime.

3.22 In relation to the Complainant's claim that the Respondent had breached the rules of natural justice, RW testified that there was no breach of the rules of natural justice on the Respondent's part because the Complainant was terminated on the ground of unsuccessful probation.

3.23 In cross-examination, RW said that he knew Saviours Mundia through the records kept at the Respondent company. He admitted that he did not work with him.

According to RW, he was employed by the Respondent in February, 2019.

3.24 That, the Complainant was employed on a short-term contract of six months and was bound by a Collective Agreement. Further, that the Complainant was not a permanent and pensionable employee and was terminated in accordance with clause 3.3 of the Collective Agreement. When referred to clause 3.3 of the Collective Agreement (exhibit "PPM3"), RW admitted that the clause applied to permanent and pensionable appointments and hence, did not apply to the Complainant's appointment. It was his evidence that he did not know which termination clause applied to the Complainant.

3.25 Under further cross-examination, RW insisted that the Complainant was bound by the Collective Agreement although he could not link him to the same.

3.26 When referred to exhibit "SM4", that is, the Police Report on the case brought to the Police by Mr. Ilishebo Ernest, RW said that he was not privy to the said letter. With respect to exhibit "PPM4", RW identified the document as the Irrigation Payroll for the month beginning 17th July, 2019 and ending on 16th August, 2019 and that the Complainant's name was at number 18, which was highlighted in black.

3.27 RW was asked to read the definition of 'Management' in the Collective Agreement exhibited as "PPM3". The term was defined as one who is responsible for the work of others and has authority to discipline them. This includes all persons with access to confidential records

and those charged with personnel management functions. RW conceded that from the definition of management in the Collective Agreement, the Complainant was a member of management.

3.28 Under further cross-examination, RW said that he was unable to prove that the Complainant was paid in lieu of notice. He also agreed that the letter of termination, exhibit "SM5", stated that the termination was with immediate effect.

3.29 In re-examination, RW reiterated that clause 3.3 of the Collective Agreement did not apply to the Complainant. He further stated that the name of Mr. Saviours Mundia did not show on exhibit "SM30" and it could have been written by anyone. That marked the close of the Respondent's case.

4. Legal Arguments

4.1 The Complainant filed his submissions on 2nd June, 2023, while the Respondent filed its submissions on 16th June 2023. I have considered both sets of submissions before coming up with my decision in this case.

5. Findings of Fact

5.1 The undisputed facts of this case are that the Complainant was employed by the Respondent on a six (6) months' written contract, commencing on 23rd May, 2019 and expiring on 24th November, 2019.

5.2 On 25th July, 2019, the Respondent dismissed the Complainant on the ground of unsuccessful probation.

5.3 The disputed facts are that while the Complainant claims that he was employed as a Centre Pivot Maintenance Supervisor, which was a managerial position, the Respondent claims that the Complainant was employed as a Centre Pivot Mechanic, a unionised position.

5.4 The Complainant, further, alleges that the Respondent ended the employment relationship on the ground of unsuccessful probation without assessing and writing the assessment results to the Complainant or giving twenty-four hours' notice, contrary to Section 27 (2) and (7) of the Employment Code Act No. 3 of 2019, thereby breaching the rules of natural justice.

5.5 The Respondent counters the above assertion by claiming that the Complainant was paid twenty-four (24) hours' pay in lieu of notice and that there was no breach of the rules of natural justice.

6. Issues for Determination

6.1 After a careful consideration of the pleadings herein, the evidence at trial and the legal arguments on both sides, the issues for determination herein, in my view, are the following: -

(i) Whether or not the Complainant was a member of management;

(ii) Whether or not the Complainant's employment was regulated by his Contract of Employment, Collective Agreement or Statutory Law;

(iii) Whether or not the Respondent followed the statutory procedural requirements for termination on the ground of unsuccessful probation;

(iv) Whether or not the termination of the Complainant's employment was wrongful, unfair and/or unlawful, and if so, what quantum of damages the Complainant is entitled to;

(v) Whether or not the Complainant is entitled to any further relief.

7. Determination of Issues

Whether or not the Complainant was a member of management

7.1 The Complainant has asserted that he was a member of management whilst the Respondent has disputed this. To determine if the Complainant was indeed a manager, resort must be had to Section 3 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia as amended by Act No. 8 of 2008 which defines management in relation to an employee as: -

a person –

(a) who is the head of an institution or undertaking and has authority to hire, suspend, promote or demote an employee of the institution or undertaking;

(b) who is the head of a department in an institution or undertaking and has authority in the financial, operational, personnel or policy matters of an institution or undertaking;

(c) with decision-making authority in the financial, operational, personnel or policy matters of an institution or undertaking and who represents and negotiates on behalf of the institution or undertaking in collective bargaining or negotiates with any trade union; or

(d) with written institutional authority to perform the functions referred to in paragraphs (a), (b) or (c).

7.2 From the above, it is clear that a manager is one who has power and authority to make decisions affecting the entity and the business of his employer. In the case of **Hacholi Makondo v. Attorney General,**[1] the Court of Appeal guided that to determine whether an employee is in management or not, his job description, which reveals his principal accountabilities, must be compared to the description of management in Section 3 above. As I see it, when assessing whether an employee falls within the category of management, substance over form is the criterion to go by.

7.3 Therefore, the starting point in determining if an employee falls within the scope of management must be the contract of employment and job description. This is important because one must always start the investigation by deducing what the employer and employee agreed would be one's role in the organisation.

7.4 However, the inquiry does not end there as the Court has to interrogate the documents based on the duties and responsibilities of a particular employee, to ascertain with clarity if he/she was truly in management or not. Determining if one was in management entails dissecting the criteria from Section 3 of the Industrial and Labour Relations Act which necessarily involves assessing: -

(1) The position of the employee;

(2) The nature and scope of the employee's authority;

(3) The extent and independence of his/her powers;

(4) The power to make important or strategic decisions; and

(5) The ability to deliver any verdict that would impact or affect the Respondent's entity from a financial, policy, operational and/or financial perspective.

(6) Any other relevant factor.

7.5 For the record, an employee's remuneration and emoluments are not factors in determining whether or not an employee is a management employee or not. Entities across Zambia have different remuneration structures, with some institutions employing non-management staff on higher salaries than managers. It would, thus, be wrong to use an employee's remuneration package as a basis for ascertaining if the employee is a member of management. This was aptly put by Malila JS (as he was then) in **Kasembo Transport Limited v. Collins John Kinnear**,[2] where he stated the following on behalf of the Supreme Court: -

> *We are in no doubt whatsoever that the respondent was not part of management. Although he enjoyed seemingly good conditions of service, befitting of a management employee, he was indeed only but an elevated qualified clerk as defined in the relevant Order.*

7.6 To me, the above makes it clear that it is not the salary and benefits enjoyed by an employee that determine whether he/she is a management employee or not, but

rather the functions he/she exercises based on the contract of employment, job description and the facts and evidence. It should be pointed out the Complainant's job description has not been produced before this Court. An assessment will, thus, have to be made from what has been availed.

7.7 In order to determine whether or not the Complainant was a member of management, the Complainant's contract that has been produced by the Respondent herein as exhibit "PP1" needs to be examined. The Complainant does not dispute that he was employed by the Respondent on a six-month written contract, starting on 23rd May, 2019, and ending on 24th November, 2019. However, under cross-examination, the Complainant alleged that while the other particulars on the contract relating to him were his, the signature purportedly signed by him, was not his. In my view, this claim by the Complainant is tantamount to an allegation of dishonesty or fraud on the part of the Respondent which the Complainant should have pleaded in his Notice of Complaint.

7.8 The Complainant neither alluded to dishonest conduct on the part of the Respondent in the Notice of Complaint nor produced any evidence of it. Hence, the allegation is not supported by any evidence before the Court. Additionally, despite the assertion that the signature on the contract is not his, the Complainant has based his claim for damages for breach of contract on the same contract which he is disputing as being the one he signed.

7.9 For the above reasons, I find and hold that the contract produced by the Respondent as exhibit "PP1" is the contract that applied to the employment relationship between the Complainant and the Respondent.

7.10 The Complainant alleges that he was employed as a Centre Pivot Management Supervisor, and as such qualified as a member of the Respondent's management. To support his claim that he was a member of management, CW referred the Court to exhibit "SM15", a document he referred to as his workbook. That, he used to plan for the work of others as a member of management and had the authority to discipline people but did not do so because the time he worked for the Respondent was too short. It was CW's further evidence that he had access to confidential information and was charged with personnel functions.

7.11 The Respondent on the other hand states that the Complainant was not employed as a Centre Pivot Management Supervisor, but as Centre Pivot Maintenance, which is the same position as a Centre Pivot Mechanic. I should state here that the fact that the Complainant's own employer disputes that he was member of management points strongly against a finding that the Complainant was indeed a member of management, as he alleges.

7.12 The evidence of the Respondent's witness, RW, under cross-examination was to the effect that the Complainant was employed as a Centre Pivot Maintenance or Centre Pivot Mechanic, the two being one and the same thing.

Further, that that position was not managerial as managers were given permanent contracts, which did not happen in the Complainant's case. I have noted that the Respondent did not adduce any evidence to support this claim. However, the burden of proof was not on the Respondent, but the Complainant who alleged, to prove that he was in management.

7.13 Having examined the evidence adduced by the Complainant in support of this claim, it is clear that the Complainant was a junior employee, far removed from a position where he had authority to make decisions that would affect the Respondent and its business and/or operations. It appears that any powers he may have had were subject to his superiors, which leads to a conclusion that he lacked any managerial oversight and/or discretion.

7.14 The evidence reveals that the Complainant lacked the power to carry out any employee discipline, hire and/or dismiss any of the Respondent's employees, or exercise strategic discretion, independent from any superiors.

7.15 Based on the above, it is clear that the Complainant was not in management, as he claims, since he did not meet the criteria specified in Section 3 of the Industrial and Labour Relations Act, as amended by Act No. 8 of 2008.

Whether or not the Complainant's employment was regulated by his Contract of Employment, Collective Agreement or Statutory Law

7.16 The statute that has been constantly referred to by the parties herein is the Employment Code Act, No. 3 of 2019. I will start by addressing the issue of whether or not the Employment Code Act applied to the employee/employer relationship between the Complainant and the Respondent herein.

7.17 The Employment Code Act was assented to on 11th April 2019. However, the commencement order in relation to the Act was only brought into force on 9th May 2019. It is worth noting that Regulation 5(2) and (3) of the Fourth Schedule provides that: -

> *(2) A written contract of employment entered into under the law for the time being in force in any other country, attested by a government officer of that country and performed within the Republic, is deemed to have been entered into under this Act, and the provisions of this Act shall, apply to the contract in relation to its performance in the Republic.*
>
> *(3) Despite sub-paragraph (1), where a contract of employment made prior to the commencement of this Act is materially inconsistent with the provisions of this Act, an employer shall comply with the provisions of this Act within one year of the commencement of this Act.*

7.18 The implication of the above provisions is that all contracts of employment in Zambia are deemed to have been entered into in terms of the provisions of the Employment Code. This is subject to employers being given one (1) year from the date of commencement of the Code to comply with the provisions of the Act. In my view,

the one-year transition or grace period, applied solely to the substantive provisions of the Act, such as those relating to equal pay for work of equal value, the mandatory housing allowance, medical attention and leave entitlements. The transition period was so given so as not to ambush employers with costly introductions that if implemented immediately, would have jeopardised their enterprises.

7.19 However, the provisions of the Employment Code Act as it relates to the procedural aspects of the law, such as the need to give valid reasons (which was carried over from the repealed Employment Act), the need to give employees an opportunity to be heard prior to any dismissal based on conduct or capacity and the provisions on probation, became applicable immediately on commencement of the Code.

7.20 My view is fortified in this regard by the Supreme Court decision in **Zambia Consolidated Copper Mines v. Jackson Munyika Siame and 33 Others**[3], where the Court had the following to say: -

> *We accept that it is a well-settled principle of law that there is always a presumption that any legislation is not intended to operate retrospectively but prospectively and this is more so where the enactment would have prejudicial effect on vested rights. According to the learned authors of Maxwell on Interpretation of Statutes (6) "Nova Constitutio futuris foruam imponere devet, non praeteritis - upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes retrospective operations. Side by side with this presumption of prospective application is the well-established principle of law that all statutes must be construed as operating only on the cases where or on facts which came into existence after the statutes*

> *were passed unless retrospective effects are clearly intended. But there is another well-established principle of law which is that any enactments which relate to procedures and practice of the court have retrospective application, vide the Halsbury's Laws of England (5).* (Underlining supplied for emphasis only)

7.21 The guidance of the Supreme Court makes it clear that the procedures and practice of a statute take effect immediately, and actually, have a retrospective effect.

7.22 The record shows that the Complainant commenced employment with the Respondent on 23rd May, 2019, about two weeks after the commencement of the Act. Therefore, the procedural and practical elements of the Employment Code Act applied to his employment.

7.23 It is, thus, not correct for the Respondent to assert, as it has repeatedly done in its submissions, that the provisions alluded to by the Complainant in the Employment Code Act did not apply to the Complainant as they actually did. As highlighted earlier, it was only in relation to the substantive provisions of the Act that employers were given a one-year period to comply with the Act.

7.24 Having found as I have above that the Complainant was not a member of the Respondent's management, he was not precluded from and thus, eligible to be a member of the union. I therefore, agree with the Respondent's claim that the Complainant was a unionised employee.

7.25 Being a unionised employee, the Complainant was thus bound to the terms and conditions of the Collective

Agreement based on section 71 (3) (c) of the Industrial and Labour Relations Act which provides that: -

> *Every collective agreement which has been approved by the Minister shall be binding on the parties to it.*

7.26 The above position in relation to collective agreements has been confirmed by the Supreme Court in a number of cases, such as **Cosmas Phiri and 85 others v Lusaka Engineering Company Limited (in liquidation).**[4]

7.27 Since the Complainant was employed on a short-term contract of six months, the Collective Agreement between the Respondent and the National Union of Plantation, Agriculture and Allied Workers (NUPAAW), categorised him as a "Short-Term Employee". Short-term employees are defined in the Agreement as "employees who are engaged for work that is not permanent in nature and does not require a skill in the performance of that work and the employee though daily rated terms of earnings" (Sic).

7.28 As a unionised employee, the Complainant was bound by the terms of the Collective Agreement produced as exhibit "PPM3" in the Respondent's Affidavit in Support of Answer. However, as correctly conceded by the Respondent's witness, RW, clause 3.3 on probation and notice did not apply to the Complainant because he was not employed on permanent and pensionable basis, which was the category the provision related to. The above notwithstanding, the Complainant's contract of employment in clause 6 stated as follows on probation and termination, respectively: -

> ***Probation***
> *Your probation shall be subject to the satisfactory completion of three (3) months' probation period during which notice of separation shall be giving twenty-four (24) hours' notice. Neither party is under any obligation to give reasons for the separation/termination.*
>
> ***Termination***
> *To terminate this contract twenty-four (24) hours' notice or one (1) day's salary shall be given to either party.*

7.29 It is clear from clause 6 above that the contract of employment removed the obligation for either party to give reasons for separation or termination. Therefore, it can be argued, and rightly so, that freedom to contract is a legal principle that is respected by our courts and since the parties contracted not to give any reasons for termination of the contract during the period of probation, then the twenty-four hours' notice of termination of the Complainant's probation was sufficient as it was contractual.

7.30 It is indeed a basic principle of the law of contract that the parties to a contract are free to determine for themselves what primary obligations they will accept and choose to be bound by. In **Rosemary Ngorima and 10 others v Zambia Consolidated Copper Mines**,[5] it was held that

> *It is trite law that in any employer/employee relationship the parties are bound by whatever terms and conditions they set out for themselves.*

7.31 Therefore, where parties freely and voluntarily enter into a contractual arrangement, it is binding on them and the role of the court is to enforce it, given the need to

preserve the value and sanctity of contracts. However, the Supreme Court of Zambia has guided in a number of cases, one of them being **Finance Bank Zambia Limited and Rajan Mahtani v. Simataa Simataa**[6], that: -

> *...And yet, public policy itself does in some instances restrict freedom of contract for the public good.*

7.32 In other words, freedom of contract is not absolute. The Supreme Court in **Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others**,[7] held that: -

> *Our view is that parties to employment contracts are still generally entitled to exercise their freedom to determine their own terms and conditions of employment. Where, however, an employee falls within the protected categories, then that freedom to contract is circumscribed to the extent that the conditions to be agreed upon should not be less favourable than the minimum prescribed in the Orders made pursuant to the Act.*

7.33 Based on the above, where the statute provides for mandatory terms applicable to employees, freedom of contract is limited to the extent provided by the law.

7.34 In an article published in SAIPAR Case Review, Volume 5, Issue 1, the learned author Chanda Chungu, in an article titled "Mumba Malila, An Advocate for the Vulnerable Worker: Tiger Chicks (t/a Progressive Poultry v. Tembo and Others, SCZ Appeal No. 06/2020 and Kasembo Transport Limited v. Collins John Kinnear SCZ Appeal No. 89/2010", states as follows at page 84: -

> *Employment law is subject to the rules of the law of contract in that the employer and employee are bound to the rules on freedom of contract, therefore, they can agree to terms that they see fit to regulate the employment relationship. This notwithstanding, legislation provides for terms and conditions*

> *of service enjoyed by employees in Zambia. As the Supreme Court stated in Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others, where the statute provides for terms applicable to employees, freedom of contract is limited to the extent provided by the law.*

7.35 The need to ensure that all contracts of employment comply with the law has been fortified by the enactment of the Employment Code Act which at Section 127 reads as follows: -

> *Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions.*

7.36 The above provision, in my view, makes it clear that the written law must be the basic minimum for all employment relationships, but employees must benefit from any contract of employment or collective agreement applicable to them, which provides better terms than the written law. To put it another way, as the Court of Appeal confirmed in **Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,**[8] the parties to a contract of employment cannot and will not be permitted to 'contract out' of mandatory statutory provisions. Despite the doctrine of freedom of contract, no contract under Zambian law can provide less favourable terms than the compulsory terms guaranteed by the applicable statute(s).

7.37 Therefore, the Complainant's employment, apart from being subject to the terms of the contract of employment, was also regulated by the provisions of the Employment Code Act, No. 3 of 2019, as he did not fall in the category

of persons listed in Section 2(1) of the Employment Code Act, which states as follows:

> *This Act does not apply to –*
> *(a) persons in the Defence Force except locally engaged civilian employees;*
> *(b) members of the Zambia Police Service;*
> *(c) members of the Zambia Correctional Service; and*
> *(d) persons in the Zambia Security Intelligence Service.*

7.38 It was, thus, untenable for the Complainant's contract of employment to exclude the obligation to give reasons for termination, which is one of the most fundamental mandatory provisions of the Employment Code Act, enshrined in section 52(2) of the Employment Code.

7.39 I wish to point out that the Employment Code Act is not the only piece of legislation that governed the Complainant's employment. As an employee falling within the protected employees category, the Complainant was also covered by the Minimum Wages and Conditions of Employment (General) Order, 2011, Statutory Instrument No. 2 of 2011, as amended by the Minimum Wages and Conditions of Employment (General) (Amendment) Order, 2018, Statutory Instrument No. 71 of 2018 ("General Order") which applies to a group of employees specifically identified, covered and protected by the Minister of Labour vide a statutory instrument.

7.40 However, in some cases, the job title of an employee may differ from those provided for in the General Order. This notwithstanding, the court has the power to re-designate an employee's role. This was confirmed by the Supreme Court in Tiger Chicks (t/a Progressive Poultry Limited) v.

Tembo Chrisford and others (supra) where it was held, inter alia, that:

> *In other words, notwithstanding their work designation which do not answer to any of the categorised positions, it is possible for good cause, as happened in Kenny Sililo v. Mend-A-Bath and in Kasembo v. Kinnear, for non-categorised employees to be recategorised into one or another of the identified categories.*

7.41 The Supreme Court was clear that an employee could be re-designated to fit into one of the categories covered by the General Order where his/her job description demonstrates that his or her substantial, primary or core functions, duties and responsibilities correspond with the type of work carried out by the employees identified and covered by the Ministerial Orders.

7.42 Crucially, as with the inquiry on who is a management employee, the employee's job title is not conclusive proof that he or she falls within the ambit of the identified categories of the General Order. This is also an inquiry based on substance over form. An interrogation of that employee's duties needs to be undertaken to designate him under the correct employment category.

7.43 The court has the power to re-designate an employee where there is good cause and proper justification so as to ensure that employers do not disguise or miscategorise the nature of employment to circumvent statutory obligations they owe to the vulnerable workers identified by the Minister of Labour and duly covered by the statutory instruments.

7.44 Conversely, a further justification for the re-designation is to ensure that only the specific employees identified by

the Minister of Labour benefit from the law applicable to them. In Tiger Chicks (t/a Progressive Poultry Limited v. Tembo Chrisford and Others (supra), the Supreme Court held that: -

> *We entertain no doubt whatsoever as to the purpose of the Act and the Orders made under it by the Minister. We articulated that purpose quite clearly in many authorities including the Jennipher Nawa case to which reference has been made by the learned counsel for the appellant. That position has not changed. The purpose of the Act is to protect certain categories of employees from vulnerability and exposure to undue exploitation by employers...To this we can add that the Act does not provide a default position for all employees. Had the Act been intended to provide a fall-back position in respect of all workers in Zambia, it would have stated so.*

7.45 The above quotations demonstrate that the Ministerial Orders, such as the General Order, only apply to the employees expressly identified. It is, thus, important for the court to be vigilant in identifying the correct and appropriate employees who should benefit from the Orders, based on the process of re-designation in the manner outlined above.

7.46 Having examined the Complainant's contract of employment, the duties of Pivot Maintenance Mechanic and considered the evidence before this Court, it is clear that his primary functions and the substance of this role falls under the classification of 'handyman'. I am, thus, justified in re-designating the Complainant's employment to fit into the category of 'handyman' covered by the General Order. For these reasons, the General Order applied to the Complainant.

7.47 The General Order supplements the Employment Code Act by providing additional protection to vulnerable workers. It is, thus, imperative that employers of these protected employees abide by its provisions and ensure that the employees enjoy the entitlements provided for.

7.48 In **Kenny Sililo v. Mend-a-Bath Zambia Limited and Spencon Zambia Limited**,[9] the Supreme Court, in a judgment delivered by Malila JS (as he was then), held that: -

> *As we understand it, the law on minimum wages and conditions of employment are intended to set the basic minimum below which it will be unlawful to employ.*

7.49 From the above, it is clear that the General Order sets the basic minimum of benefits applicable to contracts of employment of the employees identified and covered by the provisions of the statutory instrument. Therefore, the answer to the issue under this head, is that the Complainant's employment was regulated by his contract of employment, collective agreement as well as the Employment Code Act, No. 3 of 2019 and the General Order, and all other applicable laws, such as the National Pension Scheme Act, National Health Insurance Act, the Workers' Compensation Act and the Industrial and Labour Relations Act, amongst others.

7.50 It should be noted that Regulation 2 of the General Order excludes government and local authority employees, domestic workers (who are provided for under a different Order), management employees and unionised employees, whose terms and conditions of employment

are regulated by collective agreements which result from collective bargaining by employers and employees. In Tiger Chicks (t/a Progressive Poultry Limited v. Tembo Chrisford and Others (supra), the Supreme Court held that: -

> *A plain reading of paragraph 2(1)(d)(i) and (ii) thus means that the Order is inapplicable where either employees are unionised or where their employment relationship is covered by a specific contract of employment which is attested by a proper officer...*

7.51 The Supreme Court further stated that: -

> *We agree with counsel for the appellant that unionised employees are already represented by their unions in as far as their conditions of employment are concerned. They thus do not require the additional protection offered under the Act.*

7.52 In the earlier case of **Lawrence Muyunda Mwalye v. Bank of Zambia**,[10] the Supreme Court held that: -

> *The Minimum Wages and Conditions of Employment Orders which are amended from time to time, are meant to apply to non-unionised workers whose organisations do not have clear guidelines on certain aspects of employment*

7.53 The justification for the exclusion of unionised employees from the General Order was based on the assumption that members of a trade union are able to bargain collectively and thus, cannot be termed as 'vulnerable' enough to benefit from the General Order. However, as was often the case, some collective agreements would be negotiated on the basis of less favourable terms. This would be to the detriment of the employees, whom despite being employees identified and covered by the General Order, would not be able to benefit from the law because of their unionised status.

7.54 It is for this reason that the introduction of Section 127 of the Employment Code, which has been reproduced above, was of vital importance. From 2019 onwards, all contracts of employment and collective agreements must provide as the bare minimum, basic terms and conditions of employment provided for in any written law, including the Employment Code and General Order. As the law does not apply retrospectively, unionised employees are only entitled to the benefits under the Employment Code and General Order which they ought to enjoy, going forward, with the said benefits under the law only accruing from the date that Section 127 of the Employment Code came into full effect, namely, 9th May 2019. In other words, a unionised employee who was employed before 9th May 2019 cannot claim underpayment and/or entitlement to any benefits in terms of the General Order for a period when the Order expressly excluded its application to the employee.

7.55 A unionised employee can, thus, only seek to enforce his benefits on the strength of Section 127 from May 2019 onwards, which is the date from which any benefits from the General Order would begin to accrue to him/her as they were not entitled to the same before Section 127, which only came into force on 9th May 2019, came to the rescue.

7.56 Therefore, whilst the Complainant, would ordinarily have been excluded from the application of the General Order based on his unionised status and the existence of the collective agreement applicable to him, his employment

from 23rd May, 2019 fell squarely within the enactment of the Employment Code and Section 127. Therefore, his employment was covered by the General Order, which together with any other written law, now sets the minimum standard for all contracts of employment and collective agreements.

7.57 It should be understood that the General Order also does not apply to employees whose terms and conditions of employment are more favourable than those in the Order. Hence, the General Order will not apply if a contract of employment provides better terms and conditions on the whole compared to the Order, as confirmed and attested by the Ministry of Labour. However, where a contract of employment provides some favourable terms but also other less favourable terms than the Order, the General Order shall apply to the extent that it provides the minimum benefits with respect to the less favourable terms.

7.58 The above was the holding in the seminal decision of Kasembo Transport Limited v. Collins John Kinnear (supra). In that case, an employee served as a bookkeeper. He enjoyed conditions that were comparably superior to those enjoyed by many employees that carried a similar job title or description.

7.59 Significantly, the employee's salary in the Kasembo Transport decision salary was higher than that provided for in the General Order. For this reason, his employer in that case was of the view that he was not a protected,

vulnerable employee entitled to the calculation of his retirement benefits in terms of the General Order.

7.60 The Supreme Court rejected that assertion and held that notwithstanding the fact that the employee received a higher salary than that prescribed in the Order, so long as he was a worker covered and identified by the General Order, he was entitled to benefit from all the entitlements in the General Order. In other words, the Supreme Court stated that he was entitled to the more favourable terms in the conditions, and where his contract was lacking, the General Order would step in and provide the minimum entitlement. In my view, the decision in Kasembo Transport Limited v. Collins John Kinnear (supra) is a perfect example of how section 127 of the Employment Code should work in practice.

7.61 In sum, the answer to the question whether or not the Complainant's employment was regulated by his contract of employment, collective agreement or statutory law, is that it was regulated by all three documents, hence, all the terms and conditions applicable to him in terms of his contract of employment, collective agreement and statutory law should be reconciled and interpreted to ensure that he benefits, on the whole, from all the most favourable terms applicable to him.

Whether or not the Respondent followed the statutory procedural requirements for termination on the ground of unsuccessful probation

7.62 The purpose of probation is to assess the ability and suitability of an employee for long term employment. The learned authors Mwenda and Chungu in their book, A Comprehensive Guide to Employment Law in Zambia, put it thus at page 20: -

> *An employee on probation is one who has been recently appointed, but whose ability and performance are being evaluated during a trial period before his employment is confirmed.*

7.63 In **Tebuho Yeta v. African Banking Corporation ABC (Zambia) Limited**,[11] the Supreme Court guided that: -

> *...probation period is a work test period for the benefit of both parties: the employer to assess whether the employee is suitable for the position and the employee has the opportunity to decide whether to take up the job permanently.*

7.64 The above underscores the fact that the purpose of probation is to allow the employer to evaluate an employee it is considering for a longer period of employment. It is also a route for the employee to decide if he or she is suited for the employment opportunity. It is for this reason that both the employer and employee are each given 24 hours' notice to terminate the contract during probation. However, as it relates to the employer, the Employment Code Act imposes further statutory requirements that must be adhered to.

7.65 The provision which deals with probation in the Employment Code, is Section 27. The relevant parts of Section 27 state as follows: -

27.

(1) An employee may be employed for a probationary period, not exceeding three months, for the purpose of determining that employee's suitability for appointment.

(2) An assessment of an employee shall be taken by the employer during the probationary period and the result of the assessment shall be communicated to the employee before the end of the probationary period.

(3) Where, during the probation period, an employer determines after an assessment that an employee is not suitable for the job, the employer shall terminate the contract of employment by giving the employee at least twenty-four hours' notice of the termination.

(4) ...

(5) ...

(6) ...

(7) An employee on probation may terminate the contract of employment by giving the employer at least twenty-four hours' notice of termination.

(8) ...

7.66 For the provisions on probation in Section 27 to apply to the contract of employment, an employee's contract of employment or applicable collective agreement should expressly provide for probation. This was the holding in **Quattro Company Limited v. Moscane Mbulo.**[12], where the Court stated that where neither the contract of employment, collective agreement nor any other document relating to employment makes reference to probation, the employee is deemed to have been confirmed from the date of commencement of his contract of employment.

7.67 However, where the contract of employment provides for probation, an employer shall abide by the guidance in Section 27 of the Employment Code Act. In the circumstances of the Complainant herein, probation was

incorporated in his contract of employment and was part of the collective agreement. It was, thus, a term of his employment and the law in relation to probation applied to him and the Respondent.

7.68 According to Section 27(1), probation is for a period of three (3) months, but can be extended for a further period of three (3) months where further evaluation is needed or where the employee needs more time to meet the employer's performance standards.

7.69 The provisions of Section 27 are also clear on the mandatory requirement for assessment of the employee by the employer and communication of the result of the assessment to the employee before the end of the initial probationary period. It is, thus, important for the employer to make the employee aware of its performance standard at the start of the probation period and thereafter assess the employee's capability and capacity for confirmation. To be clear, the performance standard, like the disciplinary code, is generally determined solely by the employer and, usually falls within the employer's discretion. A court should not interfere with the standards determined by an employer for its entity unless they are manifestly unlawful, unfair, discriminatory, irrational or unreasonable.

7.70 Except in the event of serious poor performance, an employer should give the employee a reasonable opportunity to improve his/her performance during the probation period, with an option to extend the probation

period for a further period for further assessment and evaluation.

7.71 Significantly, before any decision is made to dismiss the employee for poor performance during probation, the employee must be given an opportunity to be heard and make representations. This is because this requirement is mandatory in terms of Section 52(3) of the Employment Code Act which states that: -

> *(3) An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard.*

7.72 The mandatory nature of the opportunity to be heard was confirmed in **Emporium Fresh Foods t/a as Food Lovers Market and Another v. Kapya Chisanga**[13] where the Court of Appeal held that: -

> *The fact that section 52(3) prohibits termination of a contract of employment by an employer for reasons relating to conduct or performance of an employee without giving the employee an opportunity to be heard re-enforces the importance of adhering to the rules of natural justice. In turn, rules of natural justice are incorporated in the employers' disciplinary rules.*

7.73 If the employee has performed satisfactorily during probation, the employer must confirm his employment. In the event that the employer fails to write to the employee, the employee is automatically confirmed from the date of expiry of the probation period.

7.74 Only where an employee has been assessed, informed of the results of the assessment and given an opportunity to be heard, can the employer exercise the right to dismiss the employee for unsuccessful probation or extend the

probation period. If the employer fails to conduct the performance appraisal or inform the employee of the results of the appraisal by the end probationary period, the employee shall be deemed confirmed.

7.75 I should point out that the above substantive and procedural requirements relating probation are similar to those relating to dismissal based on poor performance given that both forms of dismissal are based on an employee's inability to satisfy the employer's performance standards. This finding is justified given that employees on probation are entitled to the same rights as their confirmed colleagues. In **Josephat Lupemba v. First Quantum Mining and Operations Limited,**[14] the Court of Appeal guided as follows: -

> *We believe that the principles laid down in the cases cited in this Judgment apply with equal force to an employee who is on probation as to one who is confirmed.*

7.76 The above is fortified by Section 27(6) of the Employment Code Act which provides that: -

> *An employee shall, unless the contract of employment or collective agreement provides otherwise, have the same rights and obligations during the probation period as an employee who has successfully completed the probation period.*

7.77 Based on the above, employers are guided that the requirements for termination based on unsuccessful probation correspond with the requirements for dismissal based on poor performance which necessarily entail abiding by the following four-stage inquiry to ensure that the dismissal for poor performance is fair: -

(1) Whether the employee was aware, or ought to have been aware of the standard expected by the employer when performing his/her duties;

(2) Whether the employee was given a fair opportunity to meet the standard;

(3) Whether the employee was given an opportunity to be heard prior to dismissal; and

(4) Whether the dismissal was the correct remedy for the poor performance.

7.78 The Complainant has claimed that the Respondent terminated his contract of service on the ground of unsuccessful probation, without assessing and communicating the assessment results to him or giving him twenty-four hours' notice, contrary to the provisions of Section 27 of the Employment Code.

7.79 There is no evidence on the record that the Complainant was given an opportunity to be heard prior to the Respondent bringing the employment relationship to an end. The Respondent has not refuted the Complainant's claim in this regard, save for the issue of 24 hours' notice of termination. It is the Respondent's contention that the issue of 24 hours' notice of termination was taken care of by payment in lieu of notice. However, there is no evidence before this Court to prove that the Respondent paid the Complainant any sum in lieu of notice. Exhibit "PPM4", which in any event is illegible, does not indicate any payment to the Complainant in lieu of notice. Moreover, the manner in which the Respondent brought the Complainant's contract of employment to an end was contrary to the provisions of the law.

7.80 In view of the above, my conclusion is that the Respondent did not follow the statutory procedural requirements stipulated in Section 27 of the Employment Code Act for termination on the ground of unsuccessful probation.

7.81 At this juncture I wish to highlight that both the Complainant and Respondent have referred to the Complainant's mode of exit as 'termination' as opposed to 'dismissal'. In **Redrilza Limited v. Abuid Nkazi and Others**,[15] the Supreme Court observed that: -

> *It is apparent, that the court, in its judgment used the term 'dismissal' and 'termination' interchangeably. This should not have been so, especially that the respondents were not dismissed from employment, but their services were terminated by way of notice.*

7.82 Based on the above, the terms 'termination' and 'dismissal' in this jurisdiction ought not to be used interchangeably. Dismissal applies where there has been some wrongdoing on the part of the employee that is preceded by some form of disciplinary process such as cases involving misconduct and poor performance.

7.83 Termination on the other hand applies where the employment is coming to an end, without any disciplinary process or wrongdoing per se, such as termination for operational requirements, termination for ill-health, termination for redundancy, bona fide mutual separation and resignation. 'Expiration' is a term introduced by section 52(7) of the Employment Code to cover situations where the contract of employment comes

to an end due to a specified event, such as expiration of the contract, retirement or death.

7.84 In light of what has been stated above, because unsuccessful probation relates to performance, I am of the view that the mode of the Complainant's exit was a dismissal as opposed to a termination. Hence, for the rest of this judgment, dismissal will be the term ascribed to the circumstances relating to the Complainant's exit from the Respondent company.

Whether or not the Complainant's dismissal from employment was wrongful, unfair and/or unlawful.

7.85 Unfair dismissal is dismissal that is contrary to the statute or based on an unsubstantiated ground. In **Care International Zambia Limited v. Misheck Tembo**[16], the Supreme Court stated that unfair dismissal is dismissal which is contrary to statute. In addition, the learned Authors Mwenda and Chungu state as follows at page 241 of their book: -

> *Unfair dismissal is dismissal that is contrary to the statute or based on an unsubstantiated ground. For unfair dismissal, the courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the court will look at the substance or merits to determine if the dismissal was reasonable and justified.*

7.86 From the above, it is clear that unfair dismissal may also occur where an employee is dismissed for an invalid and/or unsubstantiated ground. In cases where unfair dismissal is alleged, the court is obliged to consider the

merits or substance of the dismissal to determine whether the reason given for the dismissal is supported by the relevant facts, while wrongful dismissal looks at the form of the dismissal and refers to dismissing an employee in breach of contractual terms, such as non-compliance with the disciplinary procedure.

7.87 Black's Law Dictionary, 10th Edition, defines "unlawful" as not authorised by law; illegal. Therefore, unlawful dismissal is dismissal that is not authorised by law or is against the provisions of the law. It will be recalled that in the case of Care International Zambia Limited v. Misheck Tembo (supra), the Supreme Court stated that unfair dismissal is dismissal which is contrary to statute. In view of the Supreme Court's decision above, I subscribe to the view that unfair dismissal is essentially unlawful dismissal in that it is dismissal that is contrary to the law.

7.88 In the case of Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited (supra) the Court of Appeal for Zambia stated that Section 36 of the since repealed Employment Act (now Section 52 (2) of the Employment Code), placed a requirement on an employer to give reasons for terminating an employee's employment. Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination.

7.89 Thus, while an employer can dismiss an employee or terminate the contract of employment by giving notice, the employer must specify a valid reason related to the

employee's conduct or capacity or employer's operational requirements for the termination to be valid. Further, by virtue of Section 27(6) of the Employment Code, which provides that an employee on probation has the same rights and obligations as other employees, where the employer terminates the contract of employment for an employee on probation, he must give a valid reason.

7.90 The said valid reason, must be substantiated, meaning it must be supported by the relevant facts and evidence, and the decision to bring the contract to an end must be fair and reasonable. This avoids a situation where the employer invokes a valid reason merely to comply with the provisions of the law. The said valid reason must actually be justified, with the requisite details and basis for the decision communicated to the employee.

7.91 In this case the reason given to the Complainant, being "unsuccessful probation", was unsubstantiated. The purported reason for the unsuccessful probation was unsubstantiated and unjustified given that the Respondent did not carry out a performance appraisal that would have supported a finding that the Complainant performed poorly and/or was unsuitable for the role he sought to be confirmed into. In other words, the failure by the Respondent to carry out any performance appraisal meant that they had no reasonable or justifiable basis to find that the Complainant was unsuitable or performed poorly.

7.92 In view of the fact that the Respondent did not follow the statutory procedural and substantive requirements

stipulated in Section 27 of the Employment Code Act for termination on the ground of unsuccessful probation; further, taking into consideration the definition of unfair/unlawful dismissal as being dismissal which is contrary to or in contravention of statute or for an unsubstantiated reason, I find that the termination of the Complainant's employment was contrary to the requirements of Section 27 and section 52 (2)) of the Employment Code Act and therefore, unfair and unlawful.

7.93 Further, Section 52(3) of the Employment Code Act proscribes the termination of the contract of employment of an employee for reasons related to an employee's conduct or performance before the employee is accorded an opportunity to be heard. By virtue of this provision, employees on probation must be given the chance to be heard prior to being terminated.

7.94 The need to give an employee an opportunity to be heard is mandatory because it ensures that the employer has an open mind and a more complete picture of the facts and circumstances so that it may apply its mind to the matter and make a decision on an employee's fate in a fair and reasonable manner.

7.95 On the part of an employee, when he is presented with an opportunity to be heard, the employee must give an adequate justification and substantiate his explanation to the standard of traversing the employer's charge(s) or allegations, rather than merely offering bare denials.

7.96 It is also for this reason that an employer must take into consideration what the employee has had to say in his defence before making any decision – in other words, the employee's exculpatory explanation must have a bearing on the decision made, otherwise the employer would be deemed to have acted unfairly and unreasonably in arriving at its decision. This protects employees against the employer's pre-meditated decisions, such that an employee who can prove that an employer failed to properly consider his exculpation can claim unfair dismissal.

7.97 As alluded to above, the Employment Code Act imposes minimum terms and conditions that apply to all contracts of employment unless the contract or collective agreement provides more favourable terms. This includes the obligations relating to dismissal and termination of employment. As such, the requirement for an opportunity to be heard is implied into all contracts of employment.

7.98 In this case, the Complainant was not afforded an opportunity to be heard before his contract of employment was terminated. The breach of this mandatory requirement means that the employer was also in breach of the contract of employment which incorporated the need for an opportunity to be heard. On this basis, the Complainant's dismissal was not only unfair, but also wrongful for being in breach of a term implied into the contract of employment by law.

Whether or not the Complainant is entitled to any damages

7.99 Having found above that the Complainant was unfairly and wrongfully dismissed, the next step is to decide the quantum of damages to award him. From the onset I should point out that the Complainant's claim for salary equivalent to the unexpired portion of his contract is not tenable at law. This position comes out from a number of cases by the Supreme Court, one of which is **National Airports Corporation Limited v. Reggie Ephraim Zimba and Saviour Konie**,[17] where the Court held that: -

> *We find and hold that the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositioned by Lord Dunedin in Dunlop Pneumatic Tyre Company Limited vs New Garage and Motor Company Limited (8), especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.*

7.100 From the above, it is clear that there are a number of reasons that preclude the courts from awarding an employee his salary for the remaining portion of his contract. Firstly, such a claim defies the principles of damages in the law of contract which stipulate that damages should put an innocent party in the position he would have been had the loss not occurred. The Supreme Court in **Zambia National Building Society v. Ernest Mukwamataba Nayunda**[18] held that: -

> *The essence of damages has always been that the injured party should be put as far as monetary compensation can go in about the same position he would have been, had he not been injured. He should not be in a prejudiced position nor be unjustly enriched.*

7.101 Therefore, an innocent party is ordinarily not permitted to benefit from the breach of the guilty party but be compensated for the loss he suffered. Secondly, the payment of the unexhausted period of service to an employee in the event of breach by an employer would amount to unjust enrichment as the employee would be receiving payment without working or rendering a service to the employer in return.

7.102 Lastly, any liquidated damages provision should be a genuine pre-estimate to cover a loss suffered, and not act as a punitive measure. Enforcing an award of damages based on the unexpired duration of a contract is often exaggerated and it would be unconscionable to make an award beyond the loss suffered by an employee. Equally, the payment of salary for the remaining period is not granted because in some instances, the sum may not compensate an employee sufficiently, thus amounting to underpayment of the compensation due to an innocent party. As mentioned above, any award of damages should properly compensate an employee for the loss he has suffered.

7.103 It should be noted that in terms of the general principles of the law of contract, the learned Authors of Chitty on Contracts state at page 1771 that: -

> *Damages for a breach of contract committed by the Defendant are a compensation to the Plaintiff for the damages, loss or injury he has suffered through the breach. He is, as far as money can do it, to be placed in the same position as if the contract had been performed.*

7.104 The learned Authors Sangwani Patrick Ng'ambi and Chanda Chungu in their book Contract Law in Zambia, Second Edition at page 379 equally state that: -

> *The object of the common-law remedy of damages is to compensate for loss caused by the breach and is primarily intended to restore the party who has suffered loss to the same position they would have been in if the contract had been performed or carried out properly.*

7.105 The above makes it clear that the purpose of damages is to put an innocent party in the position he would have been but for the breach. To a certain extent the same principles apply in the employment context, save to add that there is a material detour as an innocent employee who has been unfairly, unlawfully and/or wrongfully dismissed, is also entitled to claim a higher sum to compensate him/her where the behaviour was inhumane and/or oppressive, or breached his/her statutory rights, and/or caused the employee to suffer any trauma, inconvenience or stress and crucially, any conduct that negatively affects the employee's future job prospects.

7.106 The justification for the calculation of awards in the employment context in this manner is to protect employees who are invariably the vulnerable party to the employment relationship. In **Chilanga Cement Plc v. Kasote Singogo**[19] the Supreme Court aptly guided that: -

> *Hopeless and weak employees like the respondent need to be protected from the whims and caprices of powerful elements in the large conglomerates such as the appellant, who might be tempted to use their positions to antagonise employees.*

7.107 Therefore, whilst the law of contract frowns upon punitive damages, employment law seeks to protect the

employee as the weaker party to a contract of employment by assisting and providing an additional basis for his/her claim for damages to encompass compensation for his/her unfair or wrongful treatment.

7.108 From the authorities on the subject, it is apparent that the law awards damages for wrongful, unfair and unlawful dismissal based on a number of factors and principles, such as how the dismissal was effected, that is, the conduct of the employer – whether it was oppressive and caused mental anguish, stress, or inconvenience, or infringed the employee's rights and whether the prospects of future employment by the employee are bleak.

7.109 In Care International v. Misheck Tembo (supra), the Supreme Court guided that the consequences for the employer of dismissing an employee unfairly are usually much more serious than those which attend to a wrongful dismissal. Further, as was the case here, where a dismissal is both wrongful and unfair, one award must be granted to encompass both events.

7.110 I have taken note that the Complainant's contract of employment was for six months, and he had four months left from the date of his dismissal to the date his contract was due to expire. This notwithstanding, the Court of Appeal in **Alistair Logistics (Z) Limited v. Dean Mwachilenga**[20], guided that the award of damages is guided by the circumstances of each particular case, and not by the contract. The Court of Appeal held that: -

> *Damages were not informed by the contract but the circumstances of each particular case. We could not agree with him more on this score. Each case must be decided on its own merits.*

7.111 On the basis of the above, the duration of the contract is not a consideration for the award of damages.

7.112 The appropriate factors and principles that should inform the quantum of damages are whether the termination or dismissal:

(1) was oppressive, harsh and/or inhuman;

(2) infringed upon the employee's rights;

(3) was inflicted in an abrupt or traumatic manner;

(4) caused the employee to suffer mental anguish, stress, or inconvenience;

(5) diminished the prospects of future employment by the employee.

7.113 In addition, any other relevant factor may be examined by the court to increase or minimise the damages to be awarded. For example, the age of the employee and the number of years he/she served, may be factors, as may be whether an employee's job requires a special skill or not. If a job requires a higher level of skill, the damages to be awarded will most likely be higher. Further, the sector that the employee was employed and the position that he held, are key factors that may be weighed when determining the quantum of damages. Just as with the skill of an employee, if an employee held a senior position, it is most likely that he/she would struggle to find alternative employment at that level, and thus the

damages to be awarded should take this into consideration.

7.114 The Supreme Court, in **Chansa Ng'onga v. Alfred H. Knight (Z) Ltd**[21], guided that the requisite factors and principles should be applied comprehensively and assessed to determine the appropriate quantum of damages due to an employee in each set of circumstances.

7.115 It should be noted, however, that in Chansa Ng'onga v. Alfred H. Knight (supra), the Supreme Court also held that the award of damages is subject to the expectation that all affected employees will take reasonable steps to mitigate their loss.

7.116 Let me repeat here that the Court of Appeal in Josephat Lupemba v. First Quantum Mining and Operations Limited (supra), stated that: -

> *We accordingly hold where an employee is terminated whether during or after the probation period, and it is found by the Court that the termination was unlawful, wrongful and unfair, the principles of awarding the measure of damages will be the same depending on the circumstances of each case. A deserving case in a termination involving an employee on probation will be given the same consideration as an employee who was terminated after confirmation.* (Underlining by the Court for emphasis only)

7.117 Based on the above, notwithstanding the fact that the Complainant was on probation, the quantum of damages due to him shall be determined as if he had been confirmed. Therefore, the damages due to the Complainant shall be assessed by applying the principles and factors outlined above to his circumstances.

7.118 It is clear that the conduct of the Respondent was oppressive as the Complainant was subjected to an unfair probation process, in that he was not subjected to a performance appraisal and was not afforded an opportunity to be heard, thus, infringing on his rights. The record shows that the Complainant was given 24 hours' notice, which ordinarily is permissible for probation, but in the circumstances, was traumatic and abrupt given that he was not subjected to any performance appraisal. I take judicial notice of the fact that any employee who is dismissed without being given an opportunity to be heard or make representations in response to purported poor performance would suffer stress and inconvenience.

7.119 However, the Complainant has not demonstrated that his future job prospects have diminished or are bleak. Ascertaining the scarcity of employment and job prospects will naturally depend on the age of the employee, the nature of his job, the position he/she held and the trade he/she is engaged in. I am cognisant of the fact that job prospects in the agricultural sector are not as bleak as in other sectors in Zambia.

7.120 Further, the nature of the Complainant's job, and the position he held as a mechanic, whilst requiring some skill, is not a position so senior as to lead to a situation where he would encounter serious difficulties in finding alternative employment. I am also not satisfied that the Complainant, whose contract came to an end in 2019,

fully demonstrated that he took reasonable steps to mitigate his loss.

7.121 For the above reasons, and having weighed all the relevant factors and principles relating to damages against the facts and evidence, I believe an award of eighteen (18) months' salary as damages for wrongful, unfair and unlawful dismissal is fair, reasonable and justified based on the decision of the Court of Appeal in Josephat Lupemba v. First Quantum Mining and Operations Limited (supra) and other authorities referred to above.

Whether the Complainant is entitled to any further relief

7.122 The Complainant has asked this Court to award him any other benefit the Court may deem fit. Section 85A of the Industrial and Labour Relations Act, allows this Court to grant any remedy it considers just and equitable, in addition to the remedies provided therein.

7.123 It is important to note that Section 23(1) and the Second Schedule of the Employment Code Act prescribe the form for written contracts of employment. Section 23 (1) states that: -

> *(1) An employer shall prepare a written contract of employment specifying the rights and obligations of the parties to the contract and include the minimum particulars of the contract as set out in the Second Schedule.* (Underlining supplied by the Court for emphasis only)

7.124 Despite being a mandatory requirement of the law, I have noticed a worrying trend by employers of failing to abide by the prescribed format for written contracts of

employment. An immediate example in this regard is the Complainant's contract of employment. The mandatory form for written contracts is prescribed to give certainty to both the employer and employee on the terms and conditions regulating the employment relationship and minimise issues when a dispute arise.

7.125 The law makes it clear that the form must include specific information that is set out in the Second Schedule to the Employment Code. Some of the mandatory terms to be included in the written contract of employment based on the Second Schedule, which are relevant in the circumstances are, *inter alia*, the following: -

(i) the wages to be paid and the scale or rate of wages, the method of calculating the wages and details of any other benefits;
(ii) the details of any cash payments, payments in kind or any other benefits;
(iii) the intervals of payment of the wages of the employee, monthly or at a shorter period, as the case may be;
(iv) if applicable, the particulars of any food to be provided under the contract or of any cash equivalent of the food.

7.126 The above makes it clear that the written contract must provide the wages to be paid, as well as the details of any allowances. In other words, each written contract of employment under Zambian law must provide the breakdown of the employee's salary to provide certainty for both parties and avoid any disputes that may arise. Where the applicable salary stated in the contract of employment or payslip, fails to provide a breakdown of the salary and allowances, as was the case with the

Complainant's contract of employment, it is assumed that the sum provided is the basic salary.

7.127 As the Complainant's contract did not expressly state the breakdown of his K2,000 salary, I hold that the Complainant was not paid his statutory housing, lunch and transport allowances. These allowances are strict legal allowances that all employees covered by the General Order, such as the Complainant, are entitled to. This means that the Complainant is entitled to payment of these allowances.

7.128 As mentioned earlier, the doctrine of freedom of contract does not extend to flouting mandatory provisions of the law, and any contract that seeks to undermine statutory provisions will not be enforced. In terms of the general principles of contract law, I agree with the learned authors Sangwani Patrick Ng'ambi and Chanda Chungu who opine at page 302 of their book Contract Law in Zambia: Second Edition (supra) that the court will not enforce any agreement that is in breach of the law, except where it is capable of being performed legally. In **Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Limited and Mwiinga**,[22] the Supreme Court aptly held that: -

> *As to the question of the possible illegality of the contract, we respectfully agree with the principle set out in Kulamma v. Manadan (1) that parties to a contract should be presumed to contemplate a legal rather than an illegal course of proceedings ...It must be made quite clear that the courts will never in any circumstances condone the flouting of the law; but we must approach this matter by considering whether it was possible for the parties to comply with their contract legally, in which event we must encourage such compliance.*(Emphasis, the Court's)

7.129 Put differently, if a contract can be performed legally, then the court must encourage such performance. Applying this to the employment context, given the paucity of job opportunities and in a bid to protect vulnerable employees who are in a weaker position compared to their employers, the court will not void an employment contract that falls foul of the law. This is so because the said contract is capable of being performed legally by simply implying terms into the contract from the law as demonstrated above, which then apply to the contract.

7.130 Further, this Court is empowered to make an order of underpayment, where appropriate, to ensure that an employee receives all his benefits in terms of the applicable statute(s). This is based on the inherent power of the Court provided by Section 85A of the Industrial and Labour Relations Act to grant remedies that are just and equitable. I am also guided by the Supreme Court in **Bruno Musunga v. Road Contractors Company**[23], where an employee was granted underpayment of his housing allowance to ensure that it conformed with the prescribed 30% of the basic salary, as provided for in the General Order.

7.131 With regard to the matter before this Court, there is no evidence before court of payment of any minimum statutory allowances to the Complainant by the Respondent. Therefore, the Complainant is entitled to

underpayment of salary and allowances in terms of the General Order and all applicable law.

7.132 According to the General Order, the Complainant was entitled to payment of housing allowance at a minimum rate of 30% of his basic salary, lunch allowance at K180 per month and transport allowance of K153.60 per month.

7.133 The Complainant was also entitled to severance pay in the form of gratuity as per the provisions of Section 54 (1) (c) of the Employment Code. The section states as follows:

> *Where a contract of employment for a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than 25% of the employee's basic pay earned during the contract period as at the effective date of termination.*

7.134 Employees on short-term, seasonal and permanent contracts are entitled to severance pay in the form of gratuity in terms of section 54 of the Employment Code, as they are contracts for a 'fixed duration' as envisaged, that are not excluded from severance by section 54(3) of the Employment Code. It should be noted that employees engaged on permanent contracts are included because they are also of a fixed duration, namely, from the date of commencement to retirement. Indeed, the Court of Appeal confirmed in the case of Alistair Logistics (Z) Limited v. Dean Mwachilenga (supra), that there is no contract of employment in Zambia that is indefinite.

7.135 In the premises, I am of the view that the Complainant is entitled to severance pay as provided for under Section 54 (1) (c) of the Employment Code Act, which is 25% of

the basic salary that the Complainant earned during his employment with the Respondent.

7.136 In relation to leave days, I wish to point that the Complainant's contract did not allude to the same. Therefore, the provisions of the Employment Code and General Order apply. The Employment Code (Exemption) Regulations came into force on May 8th 2020, that is, way after the Complainant's contract of employment with the Respondent had come to an end. These regulations suspended the operation of Sections 36 and 37 (which provide for annual leave and annual leave benefits formula, respectively) for all employees covered by the Employment Code. Therefore, Sections 36 and 37 of the Employment Code Act applied to the Complainant at the time of his termination.

7.137 However, the said provisions make it clear that an employee does not accrue any leave during the first year of his/her employment. The General Order which provides more favourable terms to the Complainant guides that an employee shall only be entitled to annual leave, after six months of continuous service.

7.138 As the Complainant had yet to work for the prescribed time period, he did not accrue any leave days as at the date of his dismissal, and is, thus, not entitled to payment of any accrued leave days.

8. Conclusion and Orders

8.1 I have determined above that the termination of the Complainant's employment contravened the requirements of Sections 27, 52 (2) and (3) of the Employment Code and was therefore, wrongful, unfair and unlawful.

8.2 Therefore, I award damages to the Complainant in the sum of K52,804.80, being eighteen (18) months' gross salary for wrongful, unfair and unlawful dismissal. The sum is based on a salary of K2, 933.60 which, as alluded to above, is the correct remuneration package that the Complainant was entitled to in terms of the law.

8.3 I also award the Complainant underpayment of his allowances as follows:

(i) Housing allowance at 30% of the Complainant's basic pay of K2, 000.00 being K600.00 per month x two (2) months = K1,200.00;

(ii) Lunch allowance for two (2) months at K180.00 per month = K360.00;

(iii) Transport allowance for two (2) months at K153.60 per month = K307.00.

Total amount = K1,867.00.

8.4 Further, the Complainant is entitled to severance pay in the form of gratuity based on section 54(1)(c) of the Employment Code Act equivalent to K1,000.00, being 25% of the basic pay the Complainant earned during his two (2) months of employment (totalling K4,000).

8.5 The sums due to the Complainant in paragraphs 8.2, 8.3 and 8.4 above amounting to a total of K55,671.80 shall attract interest at short term bank deposit rate from the

date of the Notice of Complaint to the date of Judgment and thereafter, at current lending rate as determined by the Bank of Zambia, until full payment is made to the Complainant.

8.6 Each party to bear own costs.

8.7 Leave to appeal is granted.

Dated at Lusaka this 22nd day of June, 2023.

Winnie Sithole Mwenda (Dr.)
JUDGE