IN THE HIGH COURT FOR ZAMBIA **2022/HPIR /0864**

AT THE PRINCIPAL REGISTRY

INDUSTRIAL RELATIONS DIVISION

HOLDEN AT LUSAKA

BETWEEN:

INNOCENT KABAMBA **COMPLAINANT**

AND

STAR TECH COMMUNICATION LIMITED **RESPONDENT**

Coram: Chigali Mikalile, J this 31st day of May, 2024

For the Complainant: Mrs K.M Nyimbili – Messrs Legal Aid Board

For the Respondent: Company employee

JUDGMENT

Legislation referred to

1. The Employment Code Act No. 3 of 2019
2. The Industrial Relations Court Rules, Chapter 269

Cases referred to:

1. Wilson Masauso v. Avondale Housing Project Limited (1982) Z.R. 172 (S.C)
2. Galaunia Farms Ltd v. National Milling Company Ltd (2004) ZR 1
3. Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited, CAZ Appeal No. 129/2017

4. Zambezi Portland Cement v. Kevin Jivo Kalidas, CAZ No. 29/2019
5. Boniface Siame v. Mopani Copper Mines, SCZ No. 75/2013
6. Chimanga Changa Limited v. Stephen Chipango Ngombe (2010) 1 ZR 208
7. Care International Zambia Limited v. Misheck Tembo, Selected Judgment No. 56/2018
8. Supabets Sports Betting v. Batuke Kalimukwa, SCZ Selected Judgment No. 27/2019
9. Redrilza v. Abuid Nkazi & Others, SCZ Judgment No. 7/2011
10. ZCF Finance Services Limited v. Happy Edubert Phiri, SCZ Appeal No. 93/2001 (unreported)
11. Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe, Appeal No. 94/2015
12. Contract Haulage v. Mumbuwa Kamayoyo (1982) ZR 56
13. Zambia Telecommunication Company v. Eva Banda, CAZ N0. 2/2017
14. Swarp Spinning Mills Plc. v. Sebastian Chileshe & Others (2002) Z.R. 23 (S.C)
15. First Quantum Mining & Operations Limited v. Obby Yendahmoh, Appeal No. 206/2015
16. Khalid Mohamed v. The Attorney-General (1982) Z.R. 49 (S.C.)
17. Chilanga Cement Plc. v. Kasote Singogo, S.C.Z Judgment No. 13/2009

Texts referred to:

1. Mwenda, W.S. and Chungu, C. A Comprehensive Guide to Employment Law in Zambia (UNZA) Press, 2001
2. Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd
3. Garner. Black's Law Dictionary (8th Edition): Thompson West, 2004, USA

Introduction

3. The process of ending an employee's contract can be complex and contentious. Termination and dismissal are two significant aspects of employment law and the distinction between the two usually forms the bedrock of many contentious actions between

employers and former employees as was the case in the matter at hand. The gist of the complainant's action was that he was dismissed unlawfully and wrongfully by the respondent. The respondent maintained that it simply relied on the termination clause to end the complainant's employment.

4. Disenchanted with the events that unfolded, the complainant commenced this action on 26th October, 2022 for the following reliefs:
   (i) A declaration that the dismissal was unfair, wrongful and unlawful;
   (ii) Damages for wrongful and unfair dismissal;
   (iii) An order that the respondent pays the complainant overtime and other allowances for the period of 5 months from 1st April 2022 to 1st July;
   (iv) Damages for mental anguish;
   (v) Interest on sums found due;
   (vi) Any other relief the court may deem fit and;
   (vii) Costs

Affidavit in support of complaint

5. The complainant deposed that on 5th August, 2021, he entered into a contract for service with the respondent on temporal basis as CCTV Operator for four months. He exhibited "IK1" and "IK2" true copies of the offer letter and the contract for service for the temporal employment respectively.

6. On 1st March 2022, the complainant's probation was extended for another period of 3 months effective 1st March, 2022. After 3

months, the complainant was promoted to the position of IT Technician as indicated in the exhibit "IK3".

7. On 1st May, 2022, the complainant entered into a contract for service with the respondent as an IT Technician to be based at Kagem Mine Lufwanyama. The contract is exhibited as "IK4". The complainant deposed that he worked overtime for a period of 5 months from the time the contract commenced in May. On 28thJune, 2022, he received a letter of warning for negligence of duty from the respondent which is exhibited as "IK5".

8. On 1st July, 2022 the complainant received a letter of termination of contract exhibited as "IK6". The complainant averred that he was neither heard as required by the respondent's procedure nor given a chance to exculpate himself after receipt of the warning letter. No warning letter was ever written to the complainant in relation to the charge for which he was dismissed.

Answer

9. The respondent filed its answer on 10th October, 2023 wherein it admitted that the complainant's probation was extended for 3 months and his salary increased to K6,500.00 effective 1st March, 2022. The respondent denied the assertion that the complainant worked overtime for 5 months from commencement of his contract in May to July, 2022 when the contract was terminated.

10. On the complainant's assertion that he received a warning letter with a charge of negligence of duty, the respondent's response was that the complainant was not charged with any offence but that his employment was terminated under clause 2.0 of the contract for service agreement. It was further stated that since the complainant was not given notice, payment in lieu of notice of one month's salary was made to him in accordance with clause 2.0 of the contract.

Trial Course

11. The complainant testified on his own behalf and called no other witness. Two witnesses testified for the respondent.

12. The complainant, augmenting on his pleadings, testified that he was served with two letters. One was the warning letter which served as a charge letter and the other was his dismissal letter. He reiterated that he was not given the opportunity to be heard. He was only given payment in lieu of notice after filing the notice of complaint.

13. The complainant beseeched the court to find that his dismissal was unlawful and wrongful. According to him, clause 10 of the contract says dismissal should come only after 2 warning letters and yet he only received one. He also asked court to order the respondent to pay him overtime, damages for mental anguish as well as costs.

14. When *cross examined* by the respondent's Human Resources Director, the complainant confirmed having read his

contract of employment before appending his signature. He acknowledged that clause 2 does provide that the contract can be terminated at any time with notice or by making payment in lieu of notice. He acknowledged that the period from May to July is three months. He added that he was on break from work when he was served with the charge sheet.

15. In *re-examination*, the complainant reiterated that he was dismissed whilst he was on break from work. He explained that he used to work for three weeks at a time and be off for a week. It was during his break that he was told not to return to work but report to head office for purposes of receiving the warning letter.

16. RW1 was Christine Kapula, the Human Resource Director, who testified that when the complainant phoned her to complain about a deduction on his pay, she informed him that the deduction was due to a charge against him. The complainant explained his side of the story and RW1 undertook to speak to his supervisor. According to RW1, the complainant's dismissal was not based on the charge as alleged by the complainant. It was predicated on clause 2 of the contract of employment.

17. As regards the allegation that payment in lieu of notice was only made after commencement of the action, RW1 testified that before payment is made to an employee who is leaving employment, all the amounts due have to be calculated and this takes time. Ms. Kapula explained that when the matter was taken to the labour office, they were told to pay the complainant

everything owed to him including the K500.00 which he was charged. It was, therefore, unfair for the complainant to make the demands which he is making because he was paid according to his contract.

18. On the claim for over time, RW1 pointed out that the period May to July is not 5 months. She testified that the program the complainant was working under was such that he would work for 3 weeks and be off for 12 days. 3 of those 12 days were Sundays. It was her testimony that the complainant's claim for overtime was covered by the 12 days he was allowed to take off work. She added that when she called the complainant to the office and asked him if there was anything he was owed, he expressed that he was satisfied with the amount that was computed and that is when he was paid.

19. In *cross examination*, RW1 accepted that the employment relationship was governed by the contract of employment. She confirmed that clause 10 of the contract provides that two warning letters must be issued to an employee before dismissal. RW1 acknowledged that the dismissal letter written to the complainant did not make reference to any clause in his employment contract. She conceded that if the respondent had relied on clause 10 of the contract, it would have been required to give the complainant two warning letters.

20. RW1 admitted that the complainant was not paid immediately but after the matter was taken to the labour office

and she conceded that there was no proof of payment exhibited before Court.

21. RW1 clarified that a month had elapsed from the time of the warning letter was issued to the date of termination. According to RW1 the complainant was heard. She accepted that the K500.00 deduction was made before the complainant was charged. She vehemently denied the assertion that the complainant was dismissed because he brought up the issue of the K500.00 which was deducted from him.

22. In *re-examination,* RW1 denied the averment that the complainant was only paid because he brought the issue to court. She explained that the respondent had procedures which had to be followed.

23. RW2 was Progress Kapula Chintu, the respondent's Chief Executive Officer, whose evidence was that the complainant's contract has a term to the effect that it can be terminated by either party without a reason. The complainant's contract terminated without notice. RW2 asked the court to find that the complainant was not unfairly dismissed.

24. RW2 testified that the complainant's leave days were catered for because the complainant used to have 12 days off after working for 3 weeks. RW2 elaborated that of the 12 days, his Sundays were catered for leaving him with 8 days of rest. When this is multiplied by 12 months, it amounts to 96 days of rest. RW2 emphasised that it was not possible for someone to

work without resting. In essence he asked the court to dismiss the complainant's claim in totality.

25. When *cross examined*, RW2 conceded that the complainant worked 21 straight days in both day and night shifts. He explained that the contract did not provide for hours of work because the working hours were not regular. He disputed the assertion that the complainant was working more hours than he was resting. He conceded that the respondent did not avail a document indicating either the complainant's leave days or the payment in lieu of notice.

26. RW2 conceded that a deduction was effected before any charge could be laid against the complainant. He also conceded that the warning letter was issued on 28th June, 2022 while the termination letter was issued on 1st July, 2022. Consequently, it is true that the complainant was served with termination while serving the warning.

27. Still in cross examination, RW2 explained that he was familiar with the complainant's conditions of service and they did not require that two warnings must be given before termination on account of performance. RW2 accepted that the complainant did raise concerns over the K500.00 deduction but denied the assertion that the respondent terminated the complainant because he challenged the wrong procedure effected.

28. In *re-examination*, RW2 clarified that the complainant was on call and not working 24 hours. He maintained that the

contract was clear that it can be terminated without giving notice.

Submissions

29. Only the respondent filed written submissions. In the submissions, it was highlighted that the issues to be resolved are twofold. Firstly, whether the respondent unfairly, wrongfully and unlawfully dismissed the complainant. Secondly, whether the complainant was entitled to damages.

30. The respondent relied on Black's Law Dictionary which defines breach of contract as *"violation of a contractual obligation by failing to perform one's own promise, by repudiating it..."* The respondent submitted that the burden of proof rests on the complainant as elucidated in the case of **Wilson Masauso Zulu v. Avondale Housing Project Ltd**[1] and the case of **Galaunia Farms Ltd v. National Milling Company Ltd**[2].

31. The respondent relied on section 15 of the Employment Code Act which stipulates that a person shall not be employed under a contract of employment except in accordance with the provisions of the Act. Further reference was made to sections 52 and 53 of the Act which provide for termination of contract and notice for termination of contract respectively. It was emphasised that the complainant's employment contract was terminated by payment in lieu of notice as indicated on exhibit "IK6". In addition, he was furnished with the reason for termination as guided in the case of **Sarah Aliza v. Casa Dei**

Bambini Montessori Zambia Limited[3]and the case of **Zambezi Portland Cement Limited v. Kevin Jivo Kalidas**[4].

32. The respondent submitted that the employer needs only to establish that it acted reasonably in dismissing the employee. To buttress this position, the respondent called in aid the case of **Siame v. Mopani Copper Mines**[5] which echoed the earlier position in the case of **Chimanga Changa Limited v. Stephen Chipango Ngombe**[6] wherein the Supreme Court held that:

> *An employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision....*
>
> *An employment relationship is anchored on trust. And once such trust is eroded the very foundation of the relationship weakens.*

33. In relation to whether the complainant was unfairly or wrongfully dismissed, the respondent had recourse to the learned authors Mwenda and Chungu who, in their text *A Comprehensive Guide to Employment Law in Zambia,* defined unfair dismissal as dismissal that is contrary to statute or based on unsubstantiated grounds. The respondent also called in aid the cases of **Care International Zambia Limited v. Misheck Tembo**[7] and the case of **Supabets Sports Betting v. Batuke Kalimukwa**[8] to further buttress the argument. In the latter case, the Supreme Court placed emphasis on the fact that the employer must show the principal reason for the dismissal and that reason must be related to the conduct, capability or

qualification of the employee for performing work for which the employee was employed.

34. The respondent's contention was that it acted rightly in dismissing the complainant as he has been warned verbally on several occasions which culminated with him been issued a written warning. The respondent asked that the matter be dismissed.

Analysis and decision

35. I have carefully considered the evidence on record. Facts not in dispute are that the complainant was initially engaged by the respondent on a short-time contract of 4 months commencing 5th August, 2021. The contract was extended for 3 months effective 1st March, 2022. On 1st May, 2022 he was given a two-year contract.

36. I note that the two contracts read that they are contracts for service implying that the complainant was engaged to give services as an independent contractor or freelancer; that the contract was a business to business relationship with more autonomy for the complainant and fewer legal protections than those offered in a contract of service. However, a careful perusal of the contracts reveals that this was not the case. The contracts show that the complainant was a salaried employee amenable to the disciplinary processes of the respondent company. As such, the complainant as a former employee is entitled to benefits and protections under employment law such

as holiday pay, overtime pay and protection against unfair dismissal among other things.

37. The complainant claims that the respondent breached its internal procedures as he was not given an opportunity to be heard. He also claims that the respondent breached the terms of the contract of employment by giving him only one warning as opposed to two before dismissal and further did not pay him for overtime.

38. The respondent of course denies these allegations and asserts that the agreement governing the parties' relationship was terminated in accordance with the contract and the complainant was paid all his dues.

39. Thus, the cardinal issues for determination as I see them can be broadly categorised as follows:

i. The complainant's mode of separation from the respondent;

ii. Whether the complainant was unfairly or wrongfully dismissed thereby entitling him to damages;

iii. Whether the complainant is entitled to overtime pay.

40. As I address these issues, I am mindful of the fact that the onus is on the complainant to prove his claims against the respondent as guided in the cases referred to by the respondent on this issue which have been cited above.

Mode of separation

41. The complainant, on one hand, argues that he was dismissed without being given an opportunity to be heard. On the other hand, the respondent contends that the complainant's employment was simply terminated in accordance with clause 2 of the employment contract. Clause 2.0 of the contract allows either party to terminate the contract upon giving 30 days written notice and further allows the employer to instantly terminate and pay one month's salary in lieu of notice.

42. The termination letter dated 1st July, 2020 reads in part:

Star Tech management regrets to inform you that your contract has been terminated due to the constant lack of efficient performance shown by you. You are therefore entitled to payment in lieu of notice, your 2 leave days accrued during the month of May.

43. I have considered the opposing arguments. The respondent's argument, quite clearly, is that the complainant was not dismissed as alleged and this implies that he is not entitled to damages for unlawful dismissal. It is thus cardinal to determine whether the employment relationship ended by termination or dismissal. It is after all settled law that there is a distinction.

44. The two employment actions taken to end the employment relationship where discussed by the Supreme Court in the case of **Redrilza v. Abuid Nkazi & Others** (9). The court held as follows:

Indeed, there is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account vary. Simply put, 'dismissal' involves loss of employment arising from disciplinary action, while 'termination' allows the employer to terminate the contract of employment without invoking disciplinary action.

45. It is common cause that the complainant herein did not undergo any disciplinary processes. However, his employment was terminated instantaneously or without notice. In the case of **ZCF Finance Services Limited v. Happy Edubert Phiri**[10], the Supreme Court stated that termination without notice is referred to as summary dismissal. Summary dismissal or instant dismissal, is appropriate where the employee has committed a fundamental breach of his contract or the employee by his conduct commits a serious offence that undermines his mutual duty of trust and respect to the employer.

46. Section 50(2) of the Employment Code Act states that where an employer summarily dismisses an employee without due notice or payment of wages in lieu of notice, the employer shall, within four days of the dismissal, submit to a labour officer a written report of the circumstances leading to, and reasons for, the dismissal.

47. What can be deduced from the foregoing is that where an employer brings an employment relationship to an end without notice before the expiration of the period for which the employee was employed for serious misconduct or other conduct that justifies dismissal, that is regarded as summary dismissal.

48. The complainant herein was not given notice and it is common cause that he was not even paid in lieu of notice. He only received payment after he commenced legal action. As seen from the above cited authorities, that is summary dismissal.

49. Having found that the complainant was dismissed, what ought to be determined is whether the dismissal was properly carried out.

Was the dismissal unfair?

50. As submitted by the respondent, unfair dismissal is dismissal that is contrary to statute or based on unsubstantiated grounds. The case of **Care International Zambia Limited v. Mischeck Tembo**[7] refers. The case of **Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe**[11] highlights that unfair dismissal focuses on why the dismissal was effected. Therefore, in order to sustain a claim for unfair dismissal, the complainant would have to demonstrate that some statute has been breached or that he was dismissed for no valid reason.

51. According to the complainant, he was called to the office and given two letters, a warning letter and a dismissal letter. The record shows that the complainant received his letter of termination on 1st July 2022. As seen from the extract of the termination letter cited above, the complainant was dismissed for reasons related to his performance and his cry before this court is that he was not given an opportunity to exculpate himself. Quite clearly, the complainant was calling to his aid section 52(3) of the Employment Code Act which states:

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.

52. From the forgoing provision, it is clear that the respondent was mandated to give the complainant an opportunity to be heard on the allegation that he had constantly failed to perform efficiently. By failing to accord him that opportunity, the respondent breached the law and acted contrary to section 15 (the very section it quoted in its submissions) which is to the effect that a person should be employed in accordance with the provisions of the Act.

53. In the case of **Contract Haulage v. Mumbuwa Kamayoyo**[12], the Supreme Court stated as follows:

Where there is a statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is ultra vires: and where there is some statutory authority for certain procedure relating to dismissal, a failure to give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in those circumstances is null and void.

54. In light of the fact that the respondent failed or neglected to abide by the provisions of section 52(3), the inescapable conclusion is that the complainant's dismissal was in fact unfair.

Was the dismissal wrongful?

55. This kind of dismissal is essentially a dismissal contrary to the terms and conditions of the contract of employment and its roots lie in common law. The case of **Zambia Telecommunication Company v. Eva Banda**[13] is instructive on this aspect.

56. Thus, in order to satisfy court that he was wrongfully dismissed, the complainant must show that the respondent failed to comply with the correct procedure in dismissing him. The complainant's evidence is that he was dismissed after the respondent issued only one warning letter as opposed to the required two. The respondent maintained that the complainant was terminated in accordance with clause 2 of the contract which gave it the leeway to terminate with or without notice.

57. I have examined the salient clauses in the complainant's conditions of service to ascertain whether the dismissal was wrongful. The complainant's contract clearly shows that there are two methods of termination available to the respondent, one pursuant to clause 2 and the other under clause 7.

58. Clause 2, as already stated, gives the respondent the liberty to terminate with or without notice. Clause 7 reads in part as follows:

> *7.0 TERMINATION OF CONTRACT*
>
> *Other than by written notice as above, STAR TECH shall have the right to terminate this agreement under this contract without liability for compensation or damages or contract assignment fees upon occurrence of any of the following events:*

7.1 *Forthwith, if the IT technician is guilty of any gross negligence or incompetence in the performance of his assignment hereunder or misconduct prejudicial to the interest of STAR TECH or any of its subsidiary or associated companies.*

59. Clause 7 of the contract further provides for offences and their penalties. The offence of failure to perform duties attracts the penalty of immediate dismissal after two warning letters.

60. While the respondent did not rely on clause 7, it is clear that it would have been the ideal provision in light of the fact that the reason for termination was failure to perform duties. That the respondent did not rely on clause 7 does not take away from the fact that its own procedure has a set method of disciplining an employee guilty of that offence.

61. By summarily dismissing the complainant after only one warning letter, the respondent abrogated the conditions of employment. As such, the complainant's dismissal was wrongful.

62. The result is that the complainant's dismissal was both unfair and wrongful as the respondent breached section 52(3) of the Employment Code Act by not availing the complainant an opportunity to be heard and by not following the procedure in the contract of giving the complainant two warning letters before dismissal. I am fortified by the case of **Care International v. Misheck Tembo** (supra) which holds that a dismissal can be both unfair and wrongful.

Damages for unfair and wrongful dismissal

63. In terms of the measure of damages, the case of **Swarp Spinning Mills Plc. V. Sebastian Chileshe & Others**[14] is instructive. The Supreme Court held as follows:

> *In assessing damages to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance, where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering.*

64. Furthermore, in the case of **First Quantum Mining and Operations Ltd v. Obby Yendamoh**[15], the Supreme Court had this to say about awarding of damages in instances where the dismissal is both unfair and wrongful:

> *The matters however, do not end there because, the Court below went on to award two remedies, that is twenty four months' damages for wrongful dismissal and twelve months' salary as compensation for unfair dismissal. The position we have taken is that the two awards were wrong in principle because they arise out of one compensatory event, which is the loss of employment...In essence the fact that a single compensatory event had been proved by two facts i.e. wrongful dismissal and unfair dismissal does not mean two remedies should be awarded.*

65. The above authorities determine that a claimant that successfully proves unfair and wrongful dismissal is entitled to damages and this ought to be normal measure i.e. contractual

length of notice, unless the circumstances of the case are such that the claimant is entitled to more. Further, the court need not award separate damages for unfair dismissal and wrongful dismissal. One award is sufficient.

66. Arising from this, I ask myself if the facts of this case demand that the award exceeds one month's pay as per notice period provided for in the contract.

67. I note that in his affidavit, the complainant averred that he received the warning letter on 28th June, 2022 and that he received the termination letter on 1st July, 2022. However, at the hearing, he clarified that he was called to the respondent's offices were he was served both letters at the same time. This evidence was not challenged by the respondent. In fact RW1 confirmed that the complainant did inform him that he had not seen the warning letter hence she asked him to pick the letter from the office whereat the termination letter was also served on him.

68. As found, the respondent's disciplinary procedure provides that the respondent issues a second warning letter before effecting a dismissal on an employee that fails to perform his duties. However, only two days had gone by between the authoring of the only warning letter and that of the dismissal letter. As the evidence has shown, the complainant received both letters on the same day and was not even at his station at the time he was served the letters. Quite clearly, receiving both letters at the same time was an unexpected turn of events more

so that the complainant was not given time to reform in terms of his performance before the dismissal was effected.

69. In the circumstances, I hold the firm view that the dismissal was effected in a traumatic fashion and as such, the complainant is entitled to more than the normal measure of damages.

Over time

70. According to the complainant's affidavit, the complainant worked overtime for 5 months. The respondent made a bare denial of the claim. However, this does not take away the complainant's burden to prove his claim. It is trite law that the complainant cannot automatically succeed by virtue of failure of a defence. (See **Khalid Mohamed v. Attorney General**[16])

71. Overtime is provided for by the Employment Code Act under section 75(1) as follows:

> *Subject to subsection(2), an employer shall pay an employee who works in excess of forty-eight hours in a week, one and half times the employee's hourly rate of pay*

72. Thus, to be entitled to overtime pay, the complainant ought to prove that he worked over and above the 48 hours stipulated in clause 2.2 of his contract as well as the Employment Code. Careful scrutiny of the complainant's testimony shows that there was nothing adduced to support this claim. The complainant did not lead any evidence on the number of extra hours he allegedly worked during the five months in contention. This court cannot begin to make inspired guesses.

73. This claim is therefore devoid of merit and is accordingly dismissed.

Damages for mental anguish

74. I have considered the opposing views regarding this claim. According to *Black's Law Dictionary* (8th Edition, 2007), mental anguish is:

> *A highly unpleasant mental reaction such as anguish, grief, fright humiliation or fury that results from another person's conduct, emotional pain and suffering.*

75. It is to be noted that the complainant did not testify on any of the reactions cited in the above definition.

76. In the case of **Chilanga Cement Plc v. Kasote Singogo**[17] it was held as follows:

> *We are of the view, however, that such an award for torture or mental distress should be granted in exceptional cases, and certainly, not in a case where more than the normal measures of common law damages have been awarded; the rationale being that the enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of the job.*

77. It is evident from the above holding that damages for mental distress or mental anguish are only granted in extraordinary cases or quite rarely. I opine that the evidence before me does not present any exceptional circumstances which warrant the award of such damages. In any event, the

complainant has been awarded more than the normal measure of damages. The claim is therefore unsuccessful.

Other reliefs and costs

78. The evidence has not revealed any other relief that may be granted to the complainant.

79. As for costs, the respondent has not exhibited any misconduct in the prosecution of this case. Therefore, in accordance with rule 44 of the Industrial Relations Court Rules Chapter 269, there is no justification to slap an order for costs on it.

Conclusion

80. The complainant has proved on a balance of probabilities that he was dismissed and that his dismissal was both unfair and wrongful and this entitles him to damages. The claims for overtime and damages for mental anguish have been dismissed for want of merit.

81. I thus make the following orders:

(i) I award the complainant 6 months' **full** salary as damages for unfair and wrongful dismissal.

(ii) The judgment sum shall attract interest at short term bank deposit rate from the date of notice of complaint to the date of judgment and thereafter at current lending rate as determined by the Bank of Zambia until full settlement.

(iii) Each party shall bear own costs

Parties are informed of their right to appeal.

Dated this 31st day of May, 2024

.....

M.C. Mikalile

HIGH COURT JUDGE