

IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP/IRCLK/471/2021



BETWEEN:

MAIKISA MATTHEW ILUKENA

COMPLAINANT

AND

PATENTS AND COMPANIES REGISTRATION

RESPONDENT

Before The Hon. Mrs. Justice T.S.Musonda

For the Complainant : Mr. M.M. Liweleya & Mr. T.B.Munalula

From Messrs. M.L.L Legal Practitioners

For the Respondent : Mrs. Belinda L. Musopelo & Mr Dennis

Kamfwa, In House Counsel

JUDGMENT

Legislation referred to:

1. The Employment Code Act, No.3 of 2019
2. Industrial and Labour Relations Act, CAP 269
3. The Labour Act, Chapter 28:01
4. The Labour Relations Act No. 65 of 1995

Cases referred to:

- 1) Kitwe City Council V William Ng'uni, (2005) Z.R 57
- 2) Western Excavating (ECC) Limited V Sharpe, (1978) ICR 221
- 3) Heather Maureen Campbell Musariri V Ischool Zambia Ltd,
Comp.No.391/2016
- 4) Edward Mwango and Two Others ZESCO Ltd, 2010/HN/120
- 5) Attorney General V Martha Mwiinde, (1987) Z.R 71 (S.C)
- 6) Davis Evans Kasonde V Zambia Revenue Authority, S.C.Z Appeal
No. 84 of 2015
- 7) Jacques Chisha Mwewa V Attorney General, Comp No.95/08
- 8) Moses Choonga V ZESCO Recreation Club, S.C.Z Appeal No.168 of
2013
- 9) Zambia Revenue Authority V Dorothy Mwanza and Others (2010)
2 ZR 181
- 10) The Registered Trustees of the Presbyterian Church of
East Africa, The Presbyterian Foundation V Ruth Gathoni
Ngotho-Kariuki

Other works referred to:

1. Selwyn's Law of Employment, 14th Edition
2. Halsbury's Laws of England (4th Edition)
3. Grogan, J.J, 2014 Workplace Law, Juta & Company Limited

INTRODUCTION

1. The Complainant, **Maikisa Matthew Ilukena** herein instituted proceedings against the **Patents and Company Registration**

Agency, by way of Complaint dated 7th September, 2021. The Complaint was supported by an affidavit of even date. The Complainant sought the following reliefs:

- i. A declaration that the Complainant was constructively dismissed;
- ii. Payment of 60 months' salary with all allowances as damages for constructive dismissal;
- iii. In the alternative a declaration that the Complainant was dismissed maliciously and for unfair termination of his employment;
- iv. Damages for loss of earnings;
- v. Damages for emotional stress;
- vi. Damages for loss of expectation for continued employment;
- vii. General damages for breach of contract; and
- viii. Costs and any other relief the Court may deem fit.

THE EVIDENCE

The Complainant's case

2. The Complainant averred that he was employed by the Respondent as Human Resources and Administration Manager for a continuous period of about fourteen (14) years on renewable contracts of employment of five years. His contract of employment was accordingly renewed over his period of service. The contract was renewed for a further period of five (5) years and scheduled to run up to 30th April, 2021 as evidenced by the copy of the contract, exhibit, "MMI1".
3. By letter dated 4th February, 2021, exhibit, "MMI2", the Respondent's Registrar and Chief Executive Officer notified the Complainant of the expiration of his contract on 30th April, 2021 and requested him in line with the Conditions of

- Service, to indicate whether he wished to be considered for a new contract.
4. The Complainant by letter dated 10th February, 2021, exhibit "MMI3", notified the Respondent of his intention to be considered for a new Contract of Employment.
 5. By letter dated, 30th April, 2021, exhibit, "MMI4", the Respondent notified the Complainant that his contract would not be renewed. The Complainant by letter dated 30th April, 2021, exhibit, "MMI5", responded through his Advocates that the belated notification of the Respondent's decision not to renew his contract was a breach of his conditions of service.
 6. The Respondent by letter, exhibit, "MMI6", notified the Complainant's Advocates that the Complainant would be paid one month's salary in lieu of notice of non-renewal of contract and requested for bank details through which the money was to be paid. The Complainant through his Advocates, notified the Respondent that the payment of one month's salary in lieu of notice was not provided for his conditions of service, exhibit, "MMI8". The Respondent nevertheless, proceeded to deposit the one month's salary into the Complainant's bank account. The Complainant refunded the money back to the Respondent as evidenced by documents collectively, exhibited as, "MMI7".
 7. It was the Complainant's position that the failure by the Respondent to inform him that his contract would not be renewed within the period of not less than one month amounted to a breach of his Contract of Employment and was to be construed as an automatic renewal of his contract for a further period of five years.
 8. The Complainant further averred that his position that his contract was unlawfully and maliciously terminated was based on the following grounds:

- i. That the Respondent failed and or neglected to inform him of its decision not to renew his contract when the Respondent was mandated to do so by 31st March, 2021.
- ii. That the Respondent, as an afterthought by letter issued ten (10) days after the expiry of his contract, purported to pay him a salary of one month in lieu of notice not to renew his contract.
- iii. That the Respondent's failure to give the Complainant notice of the non-renewal of contract by 31st March, 2021, gave the Complainant the reasonable expectation that his contract would be renewed or had been renewed for another five years.
- iv. That the Respondent's belatedly notifying the Complainant of the decision not to renew his contract shattered his reasonable expectation of continued employment.

9. It was on the basis of the aforesaid averments that the Complainant sought the reliefs set out in the Notice of Complaint and its supporting affidavit.
10. When cross-examined, the Complainant acknowledged that by breach of conditions of service, he was referring to the Respondent's breach of the notice period.
11. When asked to clarify whether his contract was terminated or came to an end, the Complainant's position was that it was terminated.
12. The Complainant acknowledged that the contract of employment expired on 30th April, 2021 and its renewal was at the discretion of the Respondent.
13. The Complainant also acknowledged that under clause 12.2 of the conditions of service, there was no provision for the

automatic renewal of the contract for another period of five years.

14. The Complainant reiterated that the payment of one month's salary in lieu of notice was not in the conditions of service.

The Respondent's case

15. **Muyanje Kalumba Kawana** a Human Resource Officer in the Respondent Agency, was the witness called to testify on behalf of the Respondent.
16. It was the testimony of the witness that the Complainant was not constructively dismissed. The correct position was that the Complainant's contract expired. The Complainant would only be entitled to claim for constructive dismissal if he was subjected to working under a hostile environment and forced to resign under duress.
17. Further, the Complainant would be entitled to claim malicious dismissal where company policies had not been followed or there was an ulterior motive. Unfair termination would arise where reasons given for termination were unfair or no reasons were given for termination.
18. The Complainant was not entitled to loss of earnings on the ground that he was on a fixed term contract which had a start and end date. For the same reasons, he was not entitled to damages for loss of expectation continued employment.
19. The witness conceded that there was a breach of contract with respect to the notice period. The Complainant should have been given a month's notice but was instead given a shorter period.

20. To rectify the breach, following legal advice rendered by the Respondent's legal team, the Complainant was paid a month's salary in lieu of notice as per the common practice in cases of termination.
21. When cross-examined, the witness acknowledged that the Respondent ought to have written to the Complainant a month before the expiration of the Contract if they wished not to renew it.
22. The witness took the position that although there was a violation by the Respondent of Clause 12.2 of the Conditions of Service in not giving a month's notice. This did not amount to malicious dismissal.
23. The witness acknowledged that by Clause 12.2, in the event that an employee would not be engaged, the employee would be notified prior to the expiration of the contract.
24. The witness denied the assertion that the Complainant's Contract was terminated without giving valid reasons.
25. It was however acknowledged that there was nowhere in the contract where there was a provision to the effect that the violation of a contract would attract one month's payment in lieu of notice.
26. The witness acknowledged that by not writing to the Respondent, it would mean that the contract was renewed and a new contract would be signed. It would be in order for the Complainant to expect his contract to be renewed.
27. Re-examined, the witness took the position that the Complainant's contract came to an end through expiration.
28. With reference to the suggestion that by Clause 12.2 and 19 of the contract, an automatic renewal arose, it was the witness' position that renewal of contract was always in writing.

29. The witness also took the position that the payment of one month's salary in lieu of notice was illegal as it was not provided for in the contract. It was also confirmed that there was a breach of contract on the notice period for non-renewal of contract. The witness also acknowledged that it was true that the Respondent ought to have written to the Complainant within the stipulated one month.

SUBMISSIONS

30. Following the close of the Respondent's case, the parties both filed written submissions in support of their respective cases. I am indebted to Counsel for the detailed submissions which I have considered in my analysis of the evidence.
31. From the consideration of the oral and affidavit evidence and submissions before me, the following are the main issues framed for determination:

- (i) Whether the Complainant was constructively dismissed.
- (ii) Whether there was legitimate expectation that the contract would be renewed.
- (iii) Whether the Complainant was maliciously dismissed or unfairly terminated.
- (iv) Whether the Complainant is entitled to reliefs sought.

ANALYSIS AND DETERMINATION

Whether the Complainant was constructively dismissed

32. In resolving this issue, the starting point is stating the position of the law on what amounts to constructive dismissal.

33. The position of the law in this jurisdiction was settled in the case of Kitwe City Council V William Ng'uni (1) where the Supreme Court adopted the test for constructive dismissal as set out in the case of Western Excavating Limited V Sharpe (2). In the later case, the Court of Appeal stated that the test for constructive dismissal was to be determined by the contract test, that is, 'did the employer's conduct amount to a breach of contract which entitled the employee to resign.

34. Further, according to Selwyn's Law of Employment, 14th Edition at page 399, constructive dismissal arises in the following situation:

"Where the employee himself terminates the contract, with or without notice, in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct: this is known as 'constructive dismissal,' for although the employee resigns, it is the employer's conduct which constitutes a repudiation of the contract, and the employee accepts the repudiation by resigning. The employee must clearly indicate that he is treating the contract as having been repudiated by the employer... and if he fails to do so, by word or by conduct, he is not entitled to claim that he has been constructively dismissed.

35. It is thus evident from the meaning of constructive dismissal that an employee must terminate his or her employment because of frustration by the employer, either by the employer breaking fundamental terms of employment contract or making the work environment unbearable to the employee, thus forcing the employee to terminate the contract.

36. Termination by an employee as a result of breach of contract by the employer is what constitutes constructive dismissal. I therefore find that the circumstances of this case do not lend themselves to any interpretation of constructive dismissal as the Complainant never resigned, but left employment at the expiration of his contract of employment on 30th April, 2021.

37. Having determined that constructive dismissal does not arise in this case, it is my view that the next two issues for determination are interrelated, as such I will deal with them as a whole.

Whether there was legitimate expectation that the contract would be renewed and Whether the Complainant was maliciously dismissed or unfairly terminated

38. The parties are in agreement that there existed a binding Contract of Employment (Contract for brevity) which was signed by the Complainant on 28th April, 2021, as per exhibit, "MMI1" in the Complainant's affidavit in support of Complaint. It is not in dispute that the said Contract was for a fixed period of a duration of five years. It is not dispute from the position of both parties that the said Contract was due to expire on 30th April, 2021.

39. The parties are in agreement that the subject Contract is to be read together with the Patents and Companies Registration Agency Conditions of Service (Conditions of Service for brevity), exhibit, "MMI4" in the Complainant's affidavit in support of Complainant. This fact is evident from Clause 7 of the subject Contract which stated as follows:

"OTHER TERMS AND CONDITIONS

Other terms and conditions contained in the Patents and Companies Registration Agency Conditions of Service, edition of 2012, the Grievance and Disciplinary Procedures Code and other policy documents shall apply to the employee and shall form part of this Agreement."

40. The parties are also in agreement that the Complainant was written to by the Registrar and Chief Executive Officer of the Respondent as per exhibit, "MMI2", in the Complainant's Affidavit in Support of Complaint. In the said letter dated 4th February, 2021, the Complainant was advised that his Contract would be coming to an end on 30th April, 2021 and further that in line with Clause 12.1 of the Conditions of Service, the Complainant was to indicate if he wished to be considered for a new Contract. Clause 12.1 states as follows:

"An employee may, three (3) months before the expiration of the contract inform the Human Resource and Administration Manager in writing whether the employee intends to or does not intend to have the contract renewed."

41. Pursuant to the aforesaid letter, the Complainant wrote back to the Respondent, as per exhibit, "MMI3" in the Complainant's affidavit in Support. In the said letter, he expressed his desire to be re-engaged by the Respondent in the same capacity, pursuant to Clause 12.1 of the Conditions of Service.
42. The parties are in agreement that the Respondent responded to the Complainant's expression of interest in re-engagement by letter dated 23rd April, 2021, exhibit, "MMI4" in the Complainant's Affidavit in Support of Complainant. The Respondent's Registrar and Chief Executive Officer, notified the Complainant that his Contract would not be renewed in the following terms:

PACRA.0089

23rd April, 2021

Mr. Maikisa M. Ilukena

C/O Patents and Companies Registration Agency

P.O.Box 32020

LUSAKA

Dear Mr. Ilukena

END OF CONTRACT

The above subject refers.

Further to your letter dated 10th February, 2021 in which you expressed a desire to have your contract renewed as it expires on 30th April, 2021, I regret to advise that the contract will not be renewed.

On behalf of the Board and Management, I wish to thank you most sincerely for the invaluable service you

rendered to the Agency during period of your employment
and wish you the very best in your future endeavours.

Yours Faithfully,

Anthony Bwembya
REGISTRAR & CEO

Cc Board Chairperson

43. The parties are also in agreement that the Complainant should have at least given the Complainant one-month notice of its intention not to renew the Complainants contract of employment as per Clause 12.2 of the Conditions of Service which states as follows:

"12.0 RENEWAL OF LONG TERM CONTRACT"

12.2 Where the Agency has received communication from an employee of the intention to be re-engaged but the Agency does not intend to renew that employee's contract, the Agency shall inform the employee at least one (1) month before the subsisting contract expires.

44. Reference was made in the Complainant's submissions to Clause 2.2 of the Contract which states:

"Notwithstanding clause 2.1, the employer may terminate the contract without notice upon payment to the employee of three (3) months salary in lieu of notice."

45. Further reference was made to Clause 61.1.1 of the Conditions of Service which states:

"16.1.1 The Agency may terminate a contract of employment by giving an employee three (3) months written notice or by paying the employee three (3) month's salary in lieu of notice, except that the Agency shall not terminate a contract of employment of an employee without a valid reason."

46. It was on the strength of the aforesaid, that it was argued that Clause 16.1.1 was drawn from the Employment Code Act, No. 3 of 2019, which gave an employer a mandate or duty not to terminate employment for no good reason.
47. It was further argued that considering that Clause 12.2 was clearly titled **"RENEWAL OF LONG-TERM CONTRACT"** and mandated the Respondent to give one (1) month notice of non-renewal of Contract, there was a breach of contract by the Respondent.
48. Further, it was the Complainant's argument that he had a legitimate expectation of a renewal contract based on several factors.
49. The Complainant had served the Respondent for a continuous period of about fourteen (14) years as Human Resources and Administration Manager. He had had his requests for renewal approved by the Respondent, as demonstrated by the evidence on record during the course of his long-dedicated service.
50. Following the Complainant's request for renewal of the subject Contract, the Respondent only had one option which was to notify the Complainant within thirty days before the expiration of the subsisting Contract of the non-renewal of the Contract pursuant to Clause 12.2 of the Conditions of Service.

51. Therefore, in view of the fact that the Respondent failed to communicate its non-renewal of the Complainant's Contract before its expiry in compliance with Clause 12.2 of the Conditions of Service, the Complainant formed the reasonable expectation that his contract would be extended by a further five years effective the 1st May, 2021.

52. Reliance on this argument was made to the case of Heather Maureen Campbell Musariri V Ischool Zambia Ltd (3) where the Court decided as follows:

"By the evidence that was before it, and taking into account all the circumstances of the case, it found that the conduct of the Respondent created a reasonable expectation that the Complainant's contract would be renewed. A dismissal, therefore, occurred when the Respondent purportedly terminated the Complainant's Contract of Employment as she had acquired a reasonable expectation that it would be renewed. It was the Court's finding that reasonable expectation and renewal or re-employment in this case was as far as it relates unfair labour practices."

53. It was further argued that although Clause 12.2 of the Conditions of Service did not provide for payment in lieu of notice and the payment of months' notice was therefore illegal. The legitimate expectation that arose in this case gave a clear intention to maintain the Complainant on a new contract on the same terms and conditions as was guided in the case of Edward Mwango and Two Others ZESCO Ltd (4), where the Court stated:

"...the Defendant having continued to employ the Plaintiffs on the same terms and conditions when their contracts expired, the Defendant is deemed to have renewed the Plaintiff's temporary contracts for a like period to the ones that had expired by effluxion of time and this period renewal is deemed to have continued until the contracts were terminated. This view is fortified by the fact that the Plaintiffs continued to work on the same terms and conditions as stated in their temporary contracts....."

54. The Complainant was therefore entitled to payment of three months' salary in lieu of notice and damages for legitimate expectation and for loss of the legitimately expected remuneration and all other damages as set out in the Notice of Complaint and Affidavit in Support of Complainant. It was further argued that the Complainant was entitled to exemplary damages on the ground that the Respondent had acted in contumelious regard of the Complainant's rights when it failed to comply with the Terms and Conditions of service and further performed other illegalities by further violating the Contract by paying a months' salary in lieu of notice. The case of Attorney General V Martha Mwiinde (5) was cited in support of this position.

55. The Respondent in its submissions counter argued that the Complainant's argument on breach of contract suggested that when the Respondent failed to inform the Complainant one (1) month before the expiry of the Contract of Employment, the Contract was automatically renewed, before 30th April, 2021, for a further period of five years. This was premised on the fact that the Complainant sought remedies that were

available to termination of an existing contract and had referred to Clause 16.1.1 of the Conditions of Service which also applied to subsisting contracts.

56. Further, that the Complainant implied that the Respondent's letter dated 23rd April, 2021, amounted to unlawful or unfair termination of the Complainant's subsisting Contract that had automatically been renewed, as the three months' notice was not given and no reasons for termination were given.

57. The Respondent in response made reference to section 54 (7) (a) of the Employment Code Act which provides as follows:

"A contract of employment expires-

(a) At the end of the term for which it is expressed to made;"

58. Clause 16.4 of the Conditions of Service was also called in aid. It states:

"16.4 Termination by Expiry of Contract of Employment

A short-term or long-term contract of employment shall terminate by lapse of the term of the contract and the employee shall be entitled to the benefits set out in clause 16.1.3"

59. It was thus, the Respondent's position that Clause 2.1 of the Contract, section 54 (7) (a) of the Employment Code Act and Clause 16.4 of the Conditions of Service were binding on the parties.

60. It was further argued that as held in Davis Evans Kasonde V Zambia Revenue Authority (6), Clause 12.2 of the Conditions

of Service did not provide for automatic renewal of the Complainant's Contract. The said Clause did not override section 54 (7) (a) of the Employment Code Act and Clauses 2.1 and 3.0 of Contract. The provisions of the Contract, Conditions of Service and the Employment Code, relied on by the Respondent were binding on the parties and remained in force until the expiry of the Complainant's on 30th April, 2021. Section 54 (7) (a) of the Employment Code Act as well as Clause 16.4 of the Conditions of Service were also binding on the parties.

61. Also on the strength of the Davis Evans Kasonde V Zambia Revenue Authority case, at law, the expiry of a fixed term contract required no notice to be given to an employee.

62. In response to the position that the Complainant had legitimate expectation that the Contract would be renewed for a further five-year term for the reasons stated in the submissions, the Respondent made reference to Davis Evans Kasonde V Zambia Revenue Authority where the Appellant advanced a similar argument. The Appellant in that case argued that he had a legitimate expectation of renewal of Contract because the Contract had been renewed on two previous occasions. The Supreme Court however, rejected that argument and held as follows:

"..Our perusal of all contracts entered into between the parties to this appeal show that, they were all independent of each other and offered at the sole discretion of management without any input whatsoever from the Appellant.....and none of the subsequent contracts, in any way, referred to the previous one, meaning they were stand-alone

contracts, each with its own independent terms and conditions."

63. Based on the aforementioned authority, the Respondent's position was that the Complainant's fourteen years of service did not create legitimate expectation of renewal of contract because each contract was independent from each other and had a specific expiry date and the renewal of each contract remained at the discretion of the Respondent.

64. Further, that the facts in the case of Heather Maureen Campbell Musariri V Ischool Zambia Limited, that was relied on by the Complainant were very different and distinguishable from the facts in this case. In the aforementioned case, the Court found that the Complainant was allowed to continue working beyond the expiry of the contract and thus held:

"...An employee who continues to work, and is dismissed after the expiry of the fixed term contract now has a right to sue based on legitimate or reasonable expectation that the contract would be renewed..."

65. It was the position of the Respondent that similar conclusions were reached in the cases of Jacques Chisha Mwewa V Attorney General (7), Edward Mwango and Two Others V ZESCO Limited and Moses Choonga V ZESCO Recreation Club (8) where the common thread was that the employees were allowed to continue working after the expiry of their contracts.

66. It was on the basis of the aforesaid authorities that it was submitted that the current Zambian jurisprudence as regards legitimate expectation of renewal of contract is that the employer may only recognise legitimate expectation where

the employer allowed the employee to continue working after the expiry of the previous contract. This was on the basis that after the expiry of the contract, the relationship between the employer and employee terminates.

67. In the case at hand, the Complainant was informed of the Respondent's intention not to renew the Contract before expiry. Further, the Complainant was not allowed by the Respondent to continue working beyond the expiry date of the Contract, 30th April, 2021.
68. Further, that the Complainant was never assured of a new Contract by the Respondent and neither did the last Contract refer to any promise that the subject Contract would be renewed. The Complainant was on the contrary aware from the outset that the decision to renew the Contract could go either way in that he could have been or could not have been awarded a new Contract as it was the Respondent's sole discretion. The circumstances of the Complainant's case did thus not lend themselves to the creation of a legitimate expectation of renewal of contract.
69. It was on the basis of the aforesaid arguments that the Respondent formed the view that the Complainant was not entitled to any of the remedies sought which remedies were premised on the misapprehension that the Complainant's Contract was automatically renewed for a further period of five years before 30th April, 2021.
70. The belated communication of the non-renewal of the Complainant's Contract did not amount to termination of the Contract which came to an end by effluxion of time, on 30th April, 2021 in line with **section 54 (7) (a)** of the Employment Code Act as read together with Clause 2.1 of the Contract, Clauses 16.0 and 16.4 of the Conditions of Service.

71. Turning to the resolution of issues under this head, it is evident from the Complainant's submissions that the Complainant's position that he was maliciously dismissed or unfairly terminated is based on the argument that the Respondent failed to communicate the non-renewal of the Complainant's Contract one (1) month before its expiry.
72. Further, as submitted by the Respondent, the non-renewal letter of 23rd April, 2021, from the Complainant's perspective was deemed as termination of the Contract, which had been renewed based on the Complainant's legitimate expectation.
73. *Has the Complainant established a case of malicious dismissal and unfair termination?*
74. The Complainant's case is clearly anchored on the principle of legitimate expectation of renewal of the fixed term Contract of Employment.
75. In this jurisdiction, there is no legislation on the principle of legitimate expectation in the renewal of fixed term contracts. Therefore, in resolving the disputes between the parties, this Court will have to rely largely on decided cases.
76. In other jurisdictions, the principle has been clarified through legislation. It would be progressive if the Employment Code Act, could be amended to incorporate the principle of legitimate expectation, in view of the fact that it is a recurrent cause of employment disputes.
77. In our neighbouring jurisdiction, Zimbabwe, **section 12B (3) (b)** of the Labour Act, Chapter 28:01 of the Laws of Zimbabwe, provides that an employee will be deemed to have been unfairly dismissed if on termination of an employment contract of fixed duration, the employee had a legitimate expectation of being re-engaged and another person was engaged instead of the employee.

78. Similarly, in South Africa, section 186 (1) (b) of the Labour Relations Act No. 65 of 1995, defines dismissal from employment to include, where an Employee reasonably expected the Employer to renew a fixed term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms or did not renew it at all.

79. Decisions in this jurisdiction hold that fixed term contracts of employment, carry no expectation of renewal. This position was well set out in the cases cited by the Respondent in its submissions, namely, Zambia Revenue Authority V Dorothy Mwanza and Others (9) and Davies Evans Kasonde V Zambia Revenue Authority.

80. In Zambia Revenue Authority V Dorothy Mwanza and Others the Supreme Court had this to say on the renewal of fixed term Contracts:

- "1. Each employee was to hold office for a period of five years with effect from 1st February, 2001. Thus, at the end of the five-year period, there was no contract of employment.
2. The condition of service relating to "offer of new contract" does not provide for automatic renewal of contracts. The offer of a new contract is in the Appellant's discretion."

81. The Supreme Court in Davis Evans Kasonde V Zambia Revenue Authority, found that the fixed contracts in that case were independent of each other and offered at the sole discretion of management without any input whatsoever required from the Appellant. The stand-alone fixed contracts expired by effluxion of time and there was nothing that suggested that

the Appellant would 'automatically' as a mere formality be granted a new contract.

82. The discretion of an Employer to renew or not to renew a fixed term contract can however be challenged on limited grounds. Of relevance to this case is the ground of legitimate expectation.

83. The resolution of the Complainant's position that he was maliciously dismissed and unfairly terminated, lies in first determining whether the Complainant did in fact have reasonable or legitimate expectation that his contract would be renewed.

84. It is trite that the burden of proof lies on he who asserts the existence of facts. In civil matters, the standard is satisfied on a burden of probabilities. As indicated in the *Halsbury's Laws of England (4th Edition)* at paragraph 19, 'a party bearing the legal burden of proof must (1) satisfy a Judge of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard of degree of proof.'

85. Accordingly, in legitimate expectation claims, the burden of proof is always on the employee. The employee must demonstrate the existence of factors as set-out in *Grogan's 'Workplace Law'*, which was relied on by the Court in *Heather Maureen Campbell Musariri V Ischool Zambia Limited*. The position of the law was set-out as follows:

"The notion of reasonable expectation clearly suggests an objective test: the employee must prove the existence of facts that...would lead a reasonable person to anticipate renewal. The facts that found a reasonable expectation will clearly differ from case to case but will mostly commonly

take the form of some prior promise or past practice...The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the Contract was concluded thereafter, and the motive for terminating the relationship has been cited as factors to be considered."

86. It follows therefore that legitimate expectation must be based on a cogent, rational and objective reason induced by the employer either expressly or by conduct.
87. It does not encompass factors such as, hope, wishes, desires or anticipation. Further, in this jurisdiction, as demonstrated in the Supreme Court decisions of Zambia Revenue Authority V Dorothy Mwanza and Others and Davis Evans Kasonde V Zambia Revenue Authority, repeated past renewals of fixed contracts cannot be a basis for a claim based on legitimate expectation.
88. Further, it is clear that in our jurisdiction, legitimate expectation is proved, where termination of employment occurs after an employee is permitted to work beyond the expiration date of a past contract. (See Heather Maureen Campbell Musariri V Ischool Zambia Limited, Jacques Chisha Mwewa V Attorney General, Edward Mwango and Two Others V ZESCO Limited)
89. Turning to the resolution of the issue at hand, I found the case of Davis Evans Kasonde V Zambia Revenue Authority to be of assistance. Although, the main principles set out in this case, have been referred to above, I am of the view that a consideration of the brief facts will be relevant in demonstrating why I form that the said authority will assist this Court to resolve issues under this head.
90. In this case, the Appellant served the Respondent company on specific fixed term contracts for a total period of fifteen (15) years and one month. The Appellants past

contracts had been renewed upon request and the Respondent at its discretion renewed the contracts as provided for in terms of each Contract.

91. The Appellant three months before the expiration of the last contract on 18th June, 2023 made an application for renewal of contract in compliance with a clause in his contract which required him to give three months' notice of intention to renew contract. The contract was expiring on 30th September, 2013.

92. The Respondent only sat to consider the application for renewal on 27th September, 2021, which was three days before the expiration of the contract. The Respondent notified the Complainant of the non-renewal of the contract by letter issued on 27th September, 2021.

93. The Respondent argued that the two consecutive contracts had been habitually renewed and he had served the Respondent diligently. Further, that he had a legitimate expectation that his contract would be renewed based on his service and past renewals. He had also argued that the decision of non-renewal was not communicated to him before the expiry of the contract, in breach of the Respondent's own Human Resources Policies and Procedures which established a regular, consistent and predictable conduct, process or activity as regards the procedures to be followed by the Respondent when renewing contracts. This formed the basis of the reasonable expectation which was legitimate, logical and valid.

94. The Supreme Court as noted above, found that they all contracts entered into by the Appellant were independent of each other and awarded at the sole discretion of the Respondent.

On the facts of the case, the Complainant never demonstrated that he was assured by anyone acting on behalf of the Respondent and that none of the previous contracts in any way referred to the previous one, as each was a stand-alone contract.

95. The Supreme Court further observed that the Appellant was aware that he was serving a fixed term contract and must have been aware that the Respondent's decision to award him a contract could go either way, in that he could or could not be awarded a new contract in the Respondent's sole discretion.
96. With regard to the Appellant's grievance that he was not notified of the Respondent's decision on time, before the expiry of his contract, the Supreme Court noted that even if it were to accept that argument, it would not alter the fact that he was never dismissed because his contract of employment simply ran its course and was no longer in existence.
97. Turning to the facts of the case at hand, by way of comparison, I note that the Complainant just like the Appellant in the aforementioned case had had his past Contracts renewed. Further, the Complainant, just like that Appellant received late communication of the non-renewal of the Contract. The Complainant and the Appellant both formed the view that that their Contracts had been renewed based on the belated communication of the non-renewal of their Contracts.
98. On the facts of this case, therefore, in view of the fact that the Contract which the personally agreed upon and signed expired on 30th April, 2021, it was incumbent upon the Complainant to demonstrate on a balance of probabilities that after he indicated his intention to have his contract renewed by letter dated 10th February, 2021, the Respondent through its conduct either by words or action held itself out that it was going to renew the Contract of employment.
99. My first observation is that the Complainant's Contract of Employment as per Clause 3, did not provide an automatic renewal of the Contract. The decision to renew was at the sole discretion of the Respondent and the Complainant was not given any leeway to have a say in the renewal of the Contract. The Complainant by appending his signature on 28th April,

2021, agreed to be bound by Clause 3. This fact is further, supported by the Complainant's acknowledgment, when cross-examined that renewal is not automatic but at the discretion of the Respondent.

100. Turning to the law on long-term or fixed contracts, **section 54 (7) (a)** of the Employment Code Act is very instructive that a contract of employment expires at the end of the terms which it was expressed to be made.

101. Therefore, whilst renewal of the Contract on the facts of this case was not automatic, what was on the other hand automatic as **section 54 (7) (a)** demonstrates, was the expiration of the Contract on 30th April, 2021. The Respondent's duty was pursuant to Clause 12.2 of the Conditions of Service, to inform the Complainant at least a month before the expiry of the Contract of its non-renewal. That is that the contractual relationship of the parties was coming to an end on the appointed date.

102. It should be noted that there is need to be careful in the use of word/jargon under the Employment Code Act. A long-term contract expires on a fixed date, it does not terminate.

103. It is for this reason that the Employment Code, provides for termination of a contract under **section 54 (1)** and expiration of a contract under **section 54 (7)**.

104. A contract whilst it is in existence or extant may be terminated. Thus, an existing or current contract can be terminated either according to the terms of the contract or in accordance with the law by either party as provided for under **section 54 (1)** of the Employment Code Act. The Complainant's contract was liable to be terminated whilst it was extant and not after expiration.

105. Indeed, the non-renewal of a fixed term or long-term contract cannot amount to termination of contract because

upon effluxion of time no contract exists. According to section 54 (a) of the Employment Code Act, no notice is required (See Davis Evans Kasonde V Zambia Revenue Authority).

106. The Complainant's view was that he was maliciously dismissed and unfairly terminated based on his belief that the Respondent did not pursuant to Clause 12.3 of the Conditions of Service respond to his expression of interest to be re-engaged on time and only did so on 23rd April, 2021, which was seven (7) days before the expiration of the Contract. Further, considering that the Complainant's past contracts had been renewed, the silence of the Respondent gave him the reasonable expectation that the Contract had been renewed.

107. The Complainant relied on the case of Heather Maureen Campbell Musarari V Ischool Zambia Limited to buttress his point.

108. In light of the Davis Evans Kasonde V Zambia Revenue Authority decision, the Complainant's claims that he had a legitimate expectation of renewal of contract merely on the Respondent's failure to notify him one month before the expiration of the Contract on 30th April, 2021 and past renewals did not meet the threshold required at law. The facts in the Heather Musariri case as submitted are distinguishable from the present case as the Complainant in that case continued to work beyond the expiration date of the Contract, whilst there is no evidence in the case at hand that the Complainant worked beyond, 30th April, 2021.

109. The Complainant in this present case, was required to adduce cogent evidence that he was induced to belief that his contract had been renewed. There is no other evidence that this Court can point to in its assessment of whether the

Respondent did either expressly or by other conduct induce the Complainant to believe that his contract had been renewed.

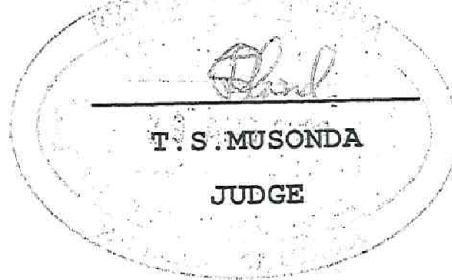
110. I further, refer to the Kenyan Court of Appeal case of The Registered Trustees of the Presbyterian Church of East Africa, The Presbyterian Foundation V Ruth Gathoni Ngotho-Kariuki (10) where the Court dealt the question whether failure to give notice of expiry of a fixed term contract amounted to renewal. I am aware this decision is not binding on this Court, but it of persuasive value and I shall turn to it for additional assistance. The Court of Appeal stated:

" We concur with the trial Judge to the extent that as per the contract of service the Appellants' were required to inform the Respondent of their intention of whether they would renew her contract three months prior to the expiry of the same. However, we respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well as the hospital's human resource manual that the renewal was subject to the mutual consent of the Respondent as the employee and the Appellant's as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in..... Further this Court its own words in.....held: 'we have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not envisage a situation where an employee is "forced" upon an employer (and vice versa) and case law is rife on

Costs

120. I acknowledge that Rule 44 of the Industrial Relations Court provides for payment of costs where a party has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. Having considered the circumstances of the case, I find nothing that justifies an order for payment of costs. Each party shall accordingly, bear their own costs.
121. Leave to appeal is hereby granted.

DATED THIS 29th DAY OF AUGUST, 2022



Respondent did either expressly or by other conduct induce the Complainant to believe that his contract had been renewed.

110. I further, refer to the Kenyan Court of Appeal case of The Registered Trustees of the Presbyterian Church of East Africa, The Presbyterian Foundation V Ruth Gathoni Ngotho-Kariuki (10) where the Court dealt the question whether failure to give notice of expiry of a fixed term contract amounted to renewal. I am aware this decision is not binding on this Court, but it of persuasive value and I shall turn to it for additional assistance. The Court of Appeal stated:

" We concur with the trial Judge to the extent that as per the contract of service the Appellants' were required to inform the Respondent of their intention of whether they would renew her contract three months prior to the expiry of the same. However, we respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well as the hospital's human resource manual that the renewal was subject to the mutual consent of the Respondent as the employee and the Appellant's as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in..... Further this Court its own words in.....held: 'we have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not envisage a situation where an employee is "forced" upon an employer (and vice versa) and case law is rife on

116. It follows therefore that the Complainant is not entitled to the following reliefs claimed:

- i) A Declaration that the Complainant was constructively dismissed;
- ii) Payment of 60 months' salary with all allowances as damages for constructive dismissal;
- iii) In the alternative a declaration that the Complainant was dismissed maliciously and for unfair termination of his employment;
- iv) Damages for loss of earnings;
- v) Damages for emotional stress;
- vi) Damages for loss of expectation for continued employment;
- vii) General damages for breach of contract.

117. The aforementioned claims are accordingly **DISMISSED**.


118. I however, find that the Complainant under the circumstances of this case, is entitled to a relief under **section 85A (d)** of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. This provision empowers Court to grant any remedy that it considers to be just and equitable in the circumstances of the case. Pursuant to **section 85A (d)** of the Industrial and Labour Relations Act, I find that an award of one months' salary as damages would be adequate compensation for the Respondent's breach of Clause 12.2 of the Conditions of Service.

119. The sum due shall attract interest at short term bank deposit rate from the date of the notice of complaint, 7th September, 2021 to the date of Judgment and thereafter at the current lending rate as determined by the Bank of Zambia until full payment.

Costs

120. I acknowledge that Rule 44 of the Industrial Relations Court provides for payment of costs where a party has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. Having considered the circumstances of the case, I find nothing that justifies an order for payment of costs. Each party shall accordingly, bear their own costs.
121. Leave to appeal is hereby granted.

DATED THIS 29th DAY OF AUGUST, 2022



T.S. MUSONDA
JUDGE