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Emporium Fresh Foods Limited t/a Food Lovers Market and Gourment Market Limited v. Kapya Chisanga CAZ Appeal No. 44/ 2021

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Facts

The Respondent, Mr. Kapya Chisanga was alleged to have disclosed information to people, without authority. Following this. He was summarily dismissed. The Respondent challenged his dismissal in the High Court alleging that his dismissal was wrongful, unlawful, and unfair. The High Court held that the Respondent's dismissal was wrongful, unlawful, and unfair, and granted 24 months salary as damages. The employer subsequently appealed the matter to the Court of Appeal for determination.

Holding

The Court of Appeal held that before an employer summarily dismisses an employee, the employee must be subject to a due process. The Court of Appeal in a judgment delivered by Siavwapa JA held that: -

> From the above, it is reasonable to draw an inference that in summary dismissal, once it has been established that an employee has committed a dismissible offence, they are liable to be dismissed without regard to the contractual or reasonable notice period or payment of salary in lieu of notice. This is however, only applicable where, the employee has been subjected, to the due process; namely, being formally made aware of the wrong he is alleged to have committed, given an opportunity to give his side of the story and informed of his guilty. (Emphasis author's)

From the above, the Court held that an employee must be made aware of the offence he is alleged to have committed, given an opportunity to be heard and thereafter informed of the verdict.

According to the Court of Appeal, because of section 52(3) of the Employment Code Act which imposes an obligation on all employers to afford employees charged with misconduct or poor performance with an opportunity to be heard, an employer can no longer summarily dismiss an employee without affording them a chance to be respond.

The Court of Appeal also discussed the applicability of the case of *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa.*[2] The Supreme Court in this case confirmed that where an employee commits an offence for which the appropriate punishment is dismissal, failure to follow the procedure in the contract does not render the dismissal wrongful. According to the Court of Appeal, the principle in this case only applies where there is clear evidence that an employee committed an offence. According to the Court of Appeal,

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[2] (1986) ZR 70.

> The employer should have satisfactory proof that the employee committed the offence. In this case, there is neither satisfactory proof that the Respondent committed the offence nor adherence to the disciplinary procedure.

Based on the above, the Court of Appeal held that the Chirwa decision does not apply to these facts and circumstances of the current case relating to the Respondent, Kapya Chisanga, as the employer did not provide clear evidence that he committed the offence or breached the disciplinary code.

Considering the above, the Court of Appeal held that the dismissal of the Respondent was unfair, unlawful, and wrongful. The Court thereafter held that the employee was entitled to 24 months' salary as damages, largely because:

> **…**the Respondent was dismissed in flagrant violation of the rules of natural justice in an abrupt manner.

Significance and Impact

Summary dismissal or instant dismissal relates to the dismissal of an employee without notice. It is often effected where the employee has committed a fundamental breach of his contract, commits a serious offence, or the conduct is so intolerable that undermines his duties to the employer.[3] The Supreme Court in *Simon Mukanzo v. Zambia Consolidated Copper Mines*[4] held that:

> As long as it was established that the Appellant's conduct was one which his employer could not tolerate, the employer was at liberty to terminate the contract of employment regardless of the provisions of the Disciplinary Code.

When an employee commits a serious offence or breaches his contract, the employee is deemed to have repudiated his employment contract, constituting an exceptional circumstance and summary dismissal is viewed as acceptance of the repudiation. Put differently, an employee is obliged to act in accordance with the express and implied terms of his contract of employment, and where he conducts himself contrary to these, the employer is permitted to dismiss him without notice, provided it serious or amounts to gross misconduct.

The Supreme Court in *Paul Chibangu Kamoto v. Zambia National Building Society*[5] was the opinion that:

> There is no fixed rule of law defining the degree of misconduct which will justify dismissal.

In another case, the Supreme Court in *Camfed Zambia v. Yvonne Matebele Sichingabula*[6] guided that: -

> there is no definitive list of types of misconduct that employees can commit at the work place and whether the conduct is serious enough to warrant dismissal is always a question of fact in each case.

[3] *ZCF Finance Services Limited v. Happy Edubert Phiri,* SCZ Appeal No. 93 of 2001.
[4] SCZ Appeal No. 133 of 1999.
[5] SCZ Appeal No. 02/2012.
[6] SCZ Appeal No. 111/2016.

The above holdings gives employers wide leeway to determine what amounts to gross misconduct or intolerable conduct that would justify this form of dismissal. In 2019, the Employment Code Act provides a list of circumstances where an employee could be summarily dismissed. Section 50 (1) of the Employment Code Act stipulates that:

> An employer shall not dismiss an employee summarily except in the following circumstances:
>
> (a) where an employee is guilty of gross misconduct inconsistent with the express or implied conditions of the contract of employment;
> (b) for wilful disobedience to a lawful order given by the employer;
> (c) for lack of skill which the employee, expressly or impliedly, is warranted to possess;
> (d) for habitual or substantial neglect of the employee's duties;
> (e) for continual absence from work without the permission of the employer or a reasonable excuse; or
> (f) for a misconduct under the employer's disciplinary rules where the punishment is summary dismissal.

The above circumstances have been introduced by the Employment Code Act as the only instances which would justify the summary dismissal of an employee. It is submitted that the six (6) instances above are still wide enough to encompass the latitude given to employers to summary dismiss employees for breach of contract and gross and serious misconduct.

It has often been understood that an employer is permitted to summarily dismiss an employee, without having to follow contractual procedures, primarily those in the employee's contract of employment or the Disciplinary code.

In cases such as *Yekweniya Mbiniwa Chirwa,* referred to above, and others such as *National Breweries Limited v Philip Mwenya*[7] and *Rabson Sikombe v. Access Bank (Zambia) Limited,*[8] it was confirmed that where an employee commits an offence for which the appropriate sanction is dismissal, there is no injustice from the failure to comply with the laid down procedure in the contract of service. The reason for this is that even if the opportunity to exculpate or mitigate is given to an employee, the punishment for the serious breach of contract would still be summary dismissal.[9]

From the above, as it relates to the right to a hearing prior to summary dismissal, it was previously held in the above cases that an employee need not comply with the rules of procedure embodied in terms of the contract of employment, disciplinary code or otherwise. This has now been varied by the Court of Appeal in this matter where Siavwapa JA held that summary dismissal is: -

> only applicable where, the employee has been subjected, to the due process; namely, being formally made aware of the wrong he is alleged to have committed, given an opportunity to give his side of the story and informed of his guilty. (Emphasis author's)

According to the reasoning above, summary dismissal can only be effected where an employee is subjected to due disciplinary proceedings, namely being formally charge and crucially, given an opportunity to be heard. This reverses previously decisions which have held that where an

[7] SCZ Judgment No. 28 0f 2002.
[8] SCZ Appeal No. 240/2013.
[9] *Prudence Rashi Chaikatisha v. Stanbic Bank Zambia Ltd,* SCZ Appeal No. 95.2015.

employee has committed a dismissible offence, the disciplinary process need not be followed. This was primarily on the basis that an employer was not expected to maintain the employment of an employee who has failed to faithfully discharge his duties and/or committed serious misconduct and ultimately conducted himself in such a manner that he undermined the trust and respect in the employment relationship.

For these reasons, the decision of the Court of Appeal in this matter is significant, if not revolutionary and transformative as it relates to the law relating to summary dismissal. Previously, only those on oral contracts had the right to be heard prior to a dismissal for misconduct or performance. This has been altered by the Employment Code Act which affords this right to all employees. Section 52(3) of the Employment Code Act reads as follows: -

> (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.

The introduction of section 52(3) of the Employment Code Act now means that all employees charged with misconduct or poor performance must be given an opportunity to be heard. This is a statutory right that must be maintained, even in the face of having committed a serious offence.

The above is very important and all employers in Zambia should take note. The law that permitted employers to instantly dismiss employees, without notice, now requires an employee to be heard, even if they are alleged to have committed a serious offence. The law that stated that the employer could dispense with procedures, related only to contractual, as opposed to statutory procedures. It is for this reason that Siavwapa JA, on behalf of the Court of Appeal said the following: -

> A close look at section 50 (i) (f) of the Employment Code Act No. 2 of 2019 reveals that summary dismissal must follow disciplinary rules as established by the employer in providing as follows;
>
> > 'An Employer shall not dismiss an employee summarily except in the following circumstances: for misconduct under the employer's disciplinary rules where the punishment is summary dismissal'.
>
> Although the Appellants have argued that section 50(i) (f) is independent of section 52(3), we find no substance in the argument because both sections occur under division 3.3 of the Code which deals with suspension and termination of contract of employment of which summary dismissal is a way of terminating a contract of employment.
>
> The fact that section 52(3) prohibits termination of 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 as envisaged by section 50 (i) of the Code.

According to the Court of Appeal, the introduction of section 52(3) of the Employment Code to give all employees an opportunity to be heard for misconduct or performance is now an implied, statutory term in all contracts of employment and Disciplinary codes.

The Court of Appeal heavily placed reliance on Davidson Morris' academic writing "Summary Dismissal (Fair Procedure Guide)" revised on 16th September 2022 where it guided that: -

> Summary dismissal does not equate to instant dismissal or dismissal 'on the spot' as you will need to ensure you have followed a fair process and established lawful grounds for dismissal before taking the decision to dismiss without notice.
>
> Regardless of the seriousness of the misconduct you will still be required to follow a fair procedure, as you would with any other disciplinary matter before a decision can be made on which disciplinary action is to be taken.
>
> As such, summary dismissal is not actually an instant decision but rather requires a thorough investigation and full disciplinary hearinq. You must provide the employee with the opportunity to defend the allegations made against them before deciding to dismiss either with or without notice.

The above reasoning, and adoption by the Court of Appeal has drastically transformed the law in relation to summary dismissal in Zambia. There is no doubt that there is some level of truth to the statement. Firstly, it is important that for summary dismissal to be justified, it must be backed by clear, lucid, and identifiable evidence that links an employee to misconduct in question. For this reason, employers are advised to carry out investigations which will prove an employee's gross misconduct.

However, where the statement from Davidson Morris that was endorsed by the Court of Appeal changes Zambian law is the emphasis on all full and fair disciplinary process. Without these, the Court of Appeal was adamant that the summary dismissal would be without any legal effect.

It is submitted that this approach is justifiable because of the legislative intervention. In *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[10] the Court of Appeal was clear that that parties cannot contract outside a statute and all contracts must conform with the law. Therefore, the introduction of the statutory requirement in section 52(3) of the Employment Code to give an opportunity to be heard cannot be done away with, because it has been imposed by legislation and thus it is mandatory that employers comply.

It should be pointed out that the Court of Appeal went on to state that: -

> Summary dismissal should therefore, be understood to refer to the power bestowed upon the employer to instantly dismiss an employee <u>following adherence to the disciplinary process as set out in the employer's disciplinary code or rules</u>. Once this procedure has been followed there is no requirement for the employer to give notice or payment in lieu of notice. (<u>Emphasis author's</u>)

With all due respect, the above statement is not wholly incorrect and defies clear precedent from the Supreme Court. In *Chambeshi Metals Plc v. Jean Mbewe*[11] for example, the Supreme Court held that the failure to abide by procedures in the disciplinary code is not fatal where an employee has clearly committed a dismissible offence.

The above is supported by the cases cited above, namely, *Chirwa, Mwenya* and *Rabson Sikombe* decisions cited above, the Supreme Court expressly provided that where an employee

[10] CAZ Appeal No. 129/2017.
[11] SCZ Appeal No. 027/2012.

commits a dismissible offence which is clear from the set of facts, the employer need not adhere to the disciplinary code or rules. This is because an employer need not follow laid down contractual provisions where it is clear an employee has behaved in any way that undermines the faithful discharge of his duties or brought the trust and respect with his employer into disrepute.

However, by virtue of section 52(3) of the Employment Code Act, all employees have a statutory right to be heard prior to dismissal based on misconduct or performance and this statutory right to be heard cannot be dispensed with. It was thus unfortunate that the Court of Appeal made such a general statement conflating contractual and statutory requirements.

Before discussing the scope of the opportunity to be heard, it should be emphasised that the judgment of the Court of Appeal has eroded the right of employees to dismiss employees who have breached their fundamental duty of trust and respect to the employer. The duty of trust and respect is as critical to the employment relationship as it is for all kinds of relationships. In *Chimanga Changa Limited v Stephen Chipango Ngombe*,[12] the Supreme Court stated that:

> …an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens.

In the seminal decision of *Stockdale v. The Woodpecker Inn Limited and Spooner,*[13] it was held:

> There is no fixed rule of law defining the degree of misconduct which will justify dismissal…The general rule is that if the servant does anything which is incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him, even though the incompatible thing is done outside the service…the relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully and if, by his own act, he prevents himself from doing so, the master may dismiss him…

The court went on further to state that:

> It is not necessary for employers to prove that they have in fact suffered by reason of a servant's conduct and that it would be sufficient if the employers might suffer seriously if they kept the servant in their employ…if a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service of the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or the reputation of the master and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant.

Based on the above, an employer is not expected to maintain employing someone who has undermined the trust in the employment relationship and/or failed to faithfully discharge his duties. In order words, the test for a serious offence that warrants summary dismissal of the employee as one which is inconsistent with the faithful discharge of his duty in the service or conduct by the employee which causes a severe breakdown of trust and confidence between

[12] (2010) 1 Z.R. 208 (S.C.).
[13] (1967) ZR 128 (HC).

the employer and employee. Faithful discharge of duty entails that the employee must not do anything that contradicts the duty of loyalty and trust or breaches any of his other duties to the employer.

By requiring employers to give an opportunity to be heard and follow the full disciplinary process despite clear evidence of a serious offence being committed or gross misconduct undermines the long held right that employers have held to dismiss employees who have breached their duty of trust and respect. This is however justified based on section 52(3) of the Employment Code which guarantees a right to be heard to all employees to be dismissed for misconduct or performance, which include serious offences.

At this point, it is pertinent to highlight what constitutes an opportunity to be heard. For the avoidance of doubt, there is no prescribed formula on how an employer should ensure fair procedure prior to dismissing an employee. In *Butler Asimbuyu Sitali v. Central Board of Health*,[14] the Supreme Court held:

> Hearing, for the purposes of disciplinary proceedings is not confined to physical presence of an accused (employee) and giving oral evidence. In our view, a submission of an exculpatory letter in disciplinary proceedings is a form of hearing. What is important is that a party must be afforded an opportunity to present his or her case or a defence either orally or in writing…

The Supreme Court thereby emphasised that for purposes of internal disciplinary proceedings, the physical presence of the employee and oral evidence are not always required or mandated. In *Mopani Copper Mines Plc v. Mathews Mpharo*,[15] the employee alleged wrongful dismissal because he was not afforded a physical oral hearing prior to his dismissal. The court held that the fact that he gave an exculpatory statement sufficed as fair procedure and his dismissal was not wrongful.

The *Matthews Mpharo* case is like the earlier case of *ZCF Financial Services Limited v. Happy Edubert Phiri*,[16] where it was held that if the employee writes an exculpatory letter this will suffice as a hearing and fair procedure. This was further expanded upon in *George Chisenga Mumba v. Telecel (Zambia) Limited,*[17] where the Supreme Court held that:

> We have pronounced ourselves before on this matter and we shall say it again that the employee is given an opportunity to be heard on the charges levelled against him when he is charged and asked to exculpate himself. There is no format on what an exculpatory statement should take but it is anticipated that the employee concerned will explain fully what transpired in relation to the allegations levelled against him with a view to vitiating those allegations.

In the *George Chisenga Mumba* case, like *Happy Edubert Phiri,* the Supreme Court confirmed that where an employee is given the opportunity to submit an exculpatory letter and the employer considers it before deciding, the mere fact that the employee is not present when the decision is made is immaterial as he was given an opportunity to be heard. This is the case unless the disciplinary code of the employer provides for more extensive procedures during

[14] (SCZ) Appeal No. 178 of 1999.
[15] SCZ Appeal No. 86/2017.
[16] SCZ Appeal No. 93/2001.
[17] SCZ Appeal No. 156 of 2005.

the disciplinary process. In *Rabson Sikombe*, Malila JS (as he was then) on behalf of the Supreme Court guided that: -

> … does not prescribe the procedure in which the employee is to be afforded the opportunity to be heard on a charge laid against him. In these circumstances, the provisions of that section are sufficiently complied with if an employee has had an opportunity in whatever way, to ventilate his views on an issue touching on his conduct or performance prior to the termination of his services.

The cardinal aspect of fair procedure is that the employer gives the employee an opportunity in some way to defend himself by responding to the charges laid against him - and it doesn't matter if it is in writing or in person. There is no prescribed manner relating to how the employee should be given a chance to be heard, if he is heard.

Crucially, an employee must at least present evidence or information demonstrating that she did not commit the offence that the employer has charged her with. The court held that if the employee does not give any explanation or an adequate justification but merely denies an allegation, the employer would be justified in dismissing such an employee.

Further to the above, the Court of Appeal has also confirmed that even after the employee has been given an opportunity to be heard, the employer must find the employee guilty of an offence before dismissal. In other words, there must be a basis for the dismissal that is supported by the relevant facts, circumstances, and evidence.

In *Chimanga Changa Limited v Stephen Chipango Ngombe*,[18] the Supreme Court asserted that:

> …(the) employer does not have to prove that an offence (was committed) 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. The rationale behind this is clear: an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens.

Based on the above, one important guideline to determine the fairness of an action taken by the employer in disciplinary proceedings, is whether the employer acted reasonably. Whether or not the employer acted reasonably, is a question of fact, that needs to be determined based on the circumstances of the case.

From *Chimanga Changa*, manner of determining whether or not a dismissal s substantially fair and reasonable is a two-stage-enquiry. The employer must show that:

a) the employee was dismissed for a substantial reason which is justifiable in law; and thereafter;
b) the disciplinary process or tribunal should decide whether the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee.

Therefore, when the employer is about to dismiss an employee based on misconduct, it must apply the two-pronged test elucidated above in that it must be satisfied that there is a substantial reason for dismissal which is justifiable in law. The above approach is similar that taken by the

[18] (2010) 1 Z.R. 208 (S.C.).

Supreme Court in *Chimanga Changa v. Stephen Chipango Ngombe*[19] and *Chilanga Cement v. Venus Kasito*.[20] Based on this two-staged process, from the onset, it must be determined whether based on the substratum of facts and evidence that the employee committed the offence.

The first part of the two-pronged test can be divided into three steps, namely:-

a) Firstly, the employer must show that he genuinely believed the employee to be guilty of the misconduct in question;
b) Secondly, the employer must have reasonable grounds upon which to establish that belief; and
c) Thirdly the employer must have carried out such investigation into the matter as was reasonable in the circumstances.

If the employer applies this approach they would have satisfied, on the first part of the staged process which requires the facts and evidence to support a finding that the employee committed an offence or breached his contract of employment, on a balance of probabilities. The burden of proof here is a balance of probabilities and that is why employment law only requires the employer to act which is fair and reasonable in the circumstances.

Moving to the second part of the two-pronged process, based on the conduct of the employee, the sanction meted by the disciplinary body was fair and reasonable in the circumstances. In summary, based on cases such as employer should also be satisfied on reasonable grounds that the employee is guilty of or committed the misconduct alleged and dismissal is the appropriate recourse.

The second stage of the enquiry is to critically engage in how the decision to dismiss was carried out. At this stage, the reasonableness of the employer's action will be reviewed, taking into consideration the actual reason for the dismissal; if mitigating circumstances where considered and other factors such as, whether the employer showed consistency and if any flexibility could have been shown.

The Court of Appeal in *African Supermarkets t/a Shoprite Checkers v. Bethel Mumba and Esther Banda,*[21] emphasised that this stage entails looking at all the circumstances. Mulongoti JA., delivering the judgment of the Court stated that:

> The question is not whether or not the employee was guilty or would have been found guilty if tried, but whether it was reasonable for the employer to dismiss taking into account all the circumstances of the case.

This accords with the view that a disciplinary charge need only be proved on a balance of probabilities. Once again, since the charges are brought in respect of an employment relationship created voluntarily by the two parties, the matter is civil in nature. In relation to a dismissal based on the conduct of an employee, the Employment Code Act merely provides that the dismissal must be for a valid reason.

[19] Selected Judgment No. 5 of 2010.
[20] Selected Judgment No. 61 of 2019
[21] CAZ Appeal No. 48/2018.

It is now clear that this decision must be fair and reasonable, this is clear from the case of *Chimanga Changa Limited v Stephen Chipango Ngombe*.[22] It is important to note here that the role of the employer does not extend to a burden of proving the employee committed the offence beyond reasonable doubt. In Bethel Mumba, the Court of Appeal endorsed the following: -

> The question is not whether or not the employee was guilty or would have been found guilty I tried, but whether it was reasonable for the employer to dismiss taking into account all the circumstances of the case.

From the above, the Court confirmed that the employee's sole obligation was to ensure that the facts and evidence demonstrate that in the circumstances, it is likely the employee committed the offence– and that dismissal was fair and reasonable. The obligation does not entail anything more, such as being completely certain the employee was guilty, but rather examining the facts and reach a decision, on a balance of probabilities.

As it relates to damages, the Court of Appeal confirmed that the employee was entitled to 24 months' salary as damages as he was dismissed in flagrant violation of the rules of natural justice in an abrupt manner. Whilst the author is pleased that the Court of Appeal's revised approach to the award of damages, it would have been helpful if the Court of Appeal gave more detail as to how damages should be awarded by the courts.

In cases such as *Alistair Logistics (Z) Limited v. Dean Mwachilenga*,[23] the Court of Appeal refused to confirm an award of 36 months' salary as damages, thus denying granting an employee exemplary damage. The Court of Appeal in a judgment delivered by Majula JA stated that: -

> We have meticulously examined the contract of employment in particular the termination clause 12 which is that the contract is terminable by either party giving the other one months' notice in writing or one months' pay in lieu of notice. Having exercised our minds as to the facts of this case, we have arrived at the inescapable conclusion that the award of 36 months' pay is inordinately high given the particular circumstances of the case and does greet us with a sense of shock. We are thus compelled to interfere with the said award bearing in mind the cases of Kawimbe vs The Attorney-General and The Attorney-General vs Fred Chileshe Ngoma. On this score we find merit in grounds 3 and 4 and uphold them. We accordingly set aside the award of 36 months' pay and in its place we award three months' pay as damages, to include housing allowance and interest at a commercial rate from the date of the judgment in the court below. (Emphasis author's)

The Court eventually granted the employee three (3) months' salary as damages, but without giving a comprehensive and sufficient justification for the same. This is unsatisfactory, primarily because the Court did not properly explain the basis for its award. In another case of *Spectra Oil Zambia Limited v. Oliver Chinyama*,[24] an employee's contract of employment without being given a valid reason. The Court of Appeal confirmed an award of twelve (12)

[22] (2010) 1 Z.R. 208 (S.C.).
[23] CAZ Appeal No. 232/2019.
[24] CAZ Appeal No. 18/2019.

months' salary of damages granted by the High Court but did not give guidance on why this award was justifies based on the facts.

The Court of Appeal awarded six (6) months' salary as damages where an employee was terminated without a valid reason in *Zambezi Portland Cement Limited v. Kevin Jivo Kalidas*.[25] Again, the Court did not give sufficient detail as to why this measure of damages sufficed. In another case involving the failure to give a valid reason, *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[26]the Court of Appeal awarded three (3) months' salary as damages, with the only justification being that the employee mitigated her loss by finding alternative employment.

In yet another case of *MP Infrastructure Zambia Limited v. Matt Smith Kenneth Barnes*,[27]the Court of Appeal substituted the Industrial Court's award of thirty (30) months' salary as damages with an award of two (2) months' salary as damages for unlawful termination of employment, mental distress and inconvenience caused to him by the sudden termination. in the circumstances of this case, the court held that the damages to be awarded in the circumstances were excessive as the employee was on a two-month contract and was already paid one month in lieu of service when his contract provided for one week's notice.

The recent approach of the Court of Appeal differs from their approach is cases such as *Standard Chartered Bank v. Celine Meena Nair*[28] and *African Banking Corporation v. Bernard Fungamwango*.[29] In these cases, the Court of Appeal confirmed thirty-six (36) months' salary as damages. In *Bernard Fungamwango*, the Court of Appeal considered the traumatic way his employment was terminated and diminished prospects of finding alternative employment in the banking sector. It is submitted that the approach in *Bernard Fungamwango* is favourable because the Court of Appeal clearly outlined the basis for the enhanced damages awarded.

From the above, the approach of the Court of Appeal on the issue of damages for employees who have suffered unfair, unlawful and/or wrongful dismissal or termination has not been very consistent, and in some cases lacked clarity. Firstly, damages for unfair and/or wrongful dismissal or termination should be based on the nature of the dismissal or termination and not the notice clause for termination provided for in the contract. This is because damages are to compensate an employee for the unfair and/or wrongful conduct on the part of the dismissal.

Secondly, section 52(2) of the Employment Code Act now provides that an employer must give a valid reason before termination of the contract of employment. This was not the case before. Previously, an employer could terminate employment for no reason or any reason. In such circumstances, a normal measure of damages equivalent to the notice period was appropriate because notwithstanding any unfair or wrongful dismissal, an employer was entitled to bring the contract to an end without having to give a reason.

Based on the above, the such the court could award damages equivalent to the notice period because the employer enjoyed the option to terminate at will and the notice period encompassed the loss to be suffered by an employee. Under the common law, an employer could terminate or dismiss for no reason, and this reflected in the common law remedy of

[25] CAZ Appeal No. 29 of 2019.
[26] CAZ/Appeal No. 129/2017.
[27] CAZ Appeal No. 102/2020
[28] CAZ Appeal No. 14/2019.
[29] CAZ Appeal No. 148/2020.

damages equivalent to the notice period. This common law approach was adopted in Zambia and worked well up until an amendment was made to the legislation.

The introduction of the requirement to give valid reasons prior to the termination or dismissal of an employee means that the common law position no longer applies. The position now is that an employer must accompany any termination with a valid reason, even when terminating with notice or payment in lieu of notice means that the orthodox normal measure of damages does not apply. Therefore, where an employer is guilty of wrongful or unfair dismissal or termination, compensation with notice pay would not be justifiable as an employer is no longer at liberty to terminate the contract without a reason, as was the case before. Therefore, the removal of the right to dismiss or terminate without a reason has equally taken away the normal measure of damages being salary equivalent to the notice period.

The Supreme Court in *Swarp Spinning Mills Limited v. Chileshe*[30] where it was held that: -

> 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, the termination may have been inflicted in a traumatic fashion which causes distress or mental suffering.

The approach above was equally adopted by the Court of Appeal in *Mark Tink and 6 Others v. Lumwana Mining Company*[31] where the Court of Appeal awarded 12 months' salary as damages based on the circumstances of the cases which were examined. In that case, the Court of Appeal considered the infringement of the employees right to be given a valid reason (which was not given) and the traumatic and abrupt manner their employment was brought to an end.

Based on the above, the circumstances of each case must be measured against the factors set out on assessing the quantum of damages in employment law. In earlier Supreme Court decisions, guidance was provided in the form of factors to be considered when awarding damages. These are: -

- that his/her employment was terminated in traumatic fashion;
- was the employment brought to an end in an abrupt manner;
- was the result of the blatant infringement and/or disregard of their rights, the rules of natural justice and/or their contract of employment;
- whether the termination or dismissal was carried out in an abrupt manner
- caused mental anguish, anxiety, inconvenience and stress; and
- the employee's future job prospects and the economy when awarding these damages.

In addition to considering the above, a court also must consider whether an employee has mitigated his loss or not. The Supreme Court in *Chansa Ng'onga v. Alfred H. Knight (Z) Limited*[32] confirmed the principle of mitigating one's loss which entails taking reasonable

[30] (2002) Z.R. 23 (SC).
[31] CAZ Appeal No. 41/2021.
[32] Selected Judgment No. 26 of 2019.

action to minimise or reduce the amount of loss when you have suffered loss from breach of contract or unfair conduct. Malila JS on behalf of the Supreme Court held that: -

> It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer as a result of an unlawful or wrongful act. A court will not make an award to cover losses that could reasonably have been avoided. Likewise, an employee is expected to search for other work.

The Court of Appeal equally in *Sarah Aliza Vekhnik* endorsed the following from the seminal decision of *Caroline Tomaidah Daka vs Zambia National Commercial Bank Limited Plc*[33] where Matibini J held that: -

> Thus if an employee is dismissed without notice, and obtains other employment, he must give credit for any earning from his new employment in respect of any payment for the period of notice he should have received. The burden is on the employer to show that the employee has failed to take reasonable steps to mitigate loss. This he may be able to do either by reference to a matter known to him, or by obtaining some form of discovery from the employee concerning attempts to seek alternative employment. Damages for breach of contract at common law are always subject to the rule that the innocent party must take reasonable steps to mitigate against the loss, which in this context involves looking for other suitable employment. Any earning from such employment or from self-employment can be deducted from the loss suffered.

Put simply, mitigating loss, means lessening or diminishing the effects and gravity of a serious or severe situation. Therefore, when courts award damages, the Supreme Court affirmed that they will only award the greatest possible loss an employee would face.

A court ought to weigh the above factors to determine the appropriate damages to be awarded. It would however be impossible to ascribe how many months' salary or the quantum to be awarded under each factor as this should be determined from the facts of each case.

In this case particular case, the award of twenty-four (24) months' salary of damages may be justified because it was clearly terminated in an abrupt manner as he was terminated without notice and the termination infringed his rights to be heard as enshrined in section 52(3) of the Employment Code Act. However, the Court of Appeal should have also interrogated the impact of the dismissal on the employee and whether it caused him mental anxiety, stress and inconvenience and how it affected his future job prospects. This would have comprehensively dealt with the full entitlement of damages for the employee in line with the guidance of the Supreme Court.

Conclusion

The decision in *Emporium Fresh Foods Limited t/a Food Lovers Market and Gourment Market Limited v. Kapya Chisanga* is a landmark decision in Zambia. The case aptly provides that considering the introduction of the Employment Code Act, an employee ought to be afforded an opportunity to heard prior to summary dismissal, notwithstanding the seriousness of the offence and the nature of the gross misconduct.

This article has however critiqued the approach of the Court of Appeal in continuing to state that an employer must follow the contractual provisions relating to disciplinary primarily

[33] 2008/HP/0846.

located in the disciplinary code or rules. It is submitted that the Supreme Court has aptly guided on this in several leading and reported decisions. The guidance has been that an employer need not follow contractual provisions where the employee has clearly committed a serious offence. The only imposition or variation is where statutory places a mandatory procedure – in such circumstances, the employer must abide.

Further, it is submitted that the Court of Appeal could have provided further clarity as it relates to the award of damages, particularly the way are granted and justified. It has been suggested that when the opportunity arises either the Court of Appeal or the Supreme Court should revise its guidance with respect to the award of damages in employment matters. The common law position on damages is no longer tenable and needs to be revised.

Lastly, it has been submitted that there is no longer a normal measure of damages, but that damages should be assessed solely based on the loss suffered taking into consideration the factors of whether the employer has infringed his right, inflicted termination in a traumatic fashion, caused mental anguish, anxiety, stress, and inconvenience and there has been a diminution in the employee's job prospects as a result of the employer's wrongful or unfair conduct. The factors should not be seen as exceptions to the general rule but elements to be used in awarding damages in all cases going forward.