IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause Number 233 of 1999

Between

GRANGER NKHWAZI **Plaintiff**

And

COMMERCIAL BANK OF MALAWI LIMITED **Defendant**

CORAM: D F MWAUNGULU (JUDGE)

Kasambala, legal practitioner, for the plaintiff

Bandawe, legal practitioner, for the defendant

Balakasi, official court interpreter

Mwaungulu, J

JUDGEMENT

This action for wrongful and unfair dismissal arises after many developments and useful commentaries in employment law in Malawi. The action commenced several years after the 1994 Constitution which introduced fundamental rights in this area and an Industrial Relations Court. The Labour Relations Act effectuates the Industrial Relations Court and changes labour or industrial relations significantly. The Employment Act, passed recently, underscores requirements under binding international instruments and developments under Employment Acts in England and Wales. These developments, as we see shortly, introduce new approaches and thinking in Malawian employment law and industrial relations.

Interestingly, the common law, though slowly, at least in England and Wales, responds to these statutory, constitutional and international law developments in labour and industrial relations. Unfortunately, the Malawi common law drags despite leads (domestic and international) and possibilities industrial and labour relations generate. This case raises all these considerations. The employee's and employer's legal practitioners, to who I am grateful, brought ingenuity, intuition and industry and argued eruditely.

The Commercial Bank of Malawi Ltd, the defendant, terminated Mr. Nkhwazi's twelve years employment in the following circumstances. On 4th November, 1998 Mr. Mhango, a customer, called from the enquiries section for the plaintiff to cash a cheque for K300, 000.00. Mr. Nkhwazi, working in the ledgers section, said there was no problem if funds were available. Shortly afterwards, Mr. Mhango came and complained the cheque took long. Mr. Mhango suggested Mr. Nkhwazi collect the money. Mr. Nkhwazi advised Mr. Mhango to cancel the order for a bearer's cheque. Mr. Mhango returned to the counter and Mr. Nkhwazi to his section.

Shortly afterwards, Mrs. Mhango called Mr. Nkhwazi to collect the cash. Mr. Nkhwazi asked why she enquired because her husband brought the cheque. Mrs. Mhango said her husband asked her. Mr. Nkhwazi said the amount was large; she could not collect the money. Mr. Nkhwazi advised her to talk to the accountant, Mr. Ziyabu, because she, save for the husband's letter, had no identification. When she arrived, Mr. Ziyabu called Mr. Nkhwazi to the office. The plaintiff, Mrs. Mhango and bank officials went to General Alliances Ltd where Mr. Mhango worked. Mr. Mhango was not there. Mr. Nkhwazi and Mrs. Mhango went to Blantyre Police station. Mr. Nkhwazi returned to work.

On 9th November, 1998, the branch manager wrote Mr. Nkhwazi suspending him because Mr. Nkhwazi participated in a fraudulent cheque for K63, 000.00 Mr. Mhango drew on Mr. Mhango's current account. The suspension was pending investigations by the Head Office. He wrote that after the investigations, there would be a report which investigators would send to the Commercial Bank headquarters for appropriate action. On 1st December, 1998 the bank wrote Mr. Nkhwazi terminating the employment under clause 24.2 of the banks terms and conditions effective 1st December 1998. The reason given was that Mr. Nkhwazi negligently accepted cashing a cheque from a fraudster, Mr. Mhango.

Clause 24.2 of the bank's terms and conditions of service the bank relied on should be read with clause 24.1 and 24.3. Clause 24.1(3) reads:

"An employee may be summarily dismissed from the services of the Bank only when more than two written warnings have been given to an employee in terms of clause 24.2

within a period of twelve months."

Clause 24.2, titled 'termination after warning,' reads:

"Where the services of an employee prove unsatisfactory or in other reasonable circumstances, the Bank may give a written warning to such employee. Such written warning may be given in respect of the following offences:- Absenting oneself from the place appointed for the performance of ones work without leave or other legitimate cause for a period not exceeding four consecutive working days, presenting oneself unfit for the proper performance of ones work during working hours by reason of being intoxicated or otherwise, willfully neglecting or failing to perform ones work carefully and properly and overdrawing ones personal account contrary to clause 6.2 or other abuse of personal banking facilities."

Clause 24.3(1) reads:

"The Bank shall have the right to suspend an employee pending the result of an investigation of a criminal or disciplinary proceeding and during the period suspension the employee shall not be entitled to pay."

24.3 (2) of the suspension clause provides:

"If the suspension is not followed by a dismissal, the employee shall be reinstated in employment and shall be paid full salary and allowances for the period during which suspension took place."

Mr. Nkhwazi informed this court that, as employee, he could identify customers for the Bank. He said that the bank changed the rules after his termination and, I suppose, because of the incident. Unfortunately, this was the second time he identified somebody with similar results. Earlier, he identified, to a junior, a man who cashed K5, 000.00. From the testimony, the bank never blamed Mr. Nkhwazi for this. The junior erred. The bank dismissed the junior. The bank, it seems, warned Mr. Nkhwazi verbally. The bank produced a warning letter. The parties dispute whether Mr. Nkhwazi signed. There is no signature except for initials. Mr. Nkhwazi denied receiving it. The bank witness was unclear on how and when the bank sent it and if Mr. Nkhwazi signed, if at all. He said he never saw Mr. Nkhwazi sign anything before. He could not vouch the initials were Mr. Nkwazi's.

The bank official, however, conceded the warning never stopped Mr. Nkhwazi identifying clients. It warned him against identifying people he never knew. I find that

there was no warning given to Mr. Nkhwazi. The bank never called the bank official who worked on the transaction, the grave men of Mr. Nkhwazi's dismissal, to contradict Mr. Nkhwazi's testimony on what happened that day. There are unsubstantiated allegations Mr. Nkhwazi checked the accounts or ledgers and, if he had done so, he would have discovered the problem with Mr. Mhango's cheque. Mr. Nkhwazi is adamant all he did was identify the man. Somebody else checked the ledger. Mr. Nkhwazi in fact directed Mrs. Mhango to a senior bank official.

From the beginning the bank decided to follow the contract terms and terminated the employment that way. That perception dominates the bank's position. The bank contends, probably correctly, that, on the law up to the action, the bank's termination is impeccable and within the law. The employer insists Mr. Nkhwazi's conduct was reprehensible and, having been repeated, entitled them to dismiss him. The bank, however, never took that course. Instead it terminated his employment. This contrasts what Mr. Nkhwazi contends. Mr. Nkhwazi argues his conduct never justified dismissal or termination. He asserts that the bank breached terms of the contract. Beyond this, it is said for Mr. Nkhwazi that, on the law now, the bank's action was unlawful and breached rights the Constitution and international laws Malawi acceded to proffer employees.

It is difficult, I must say, to decide matters occurring before vast developments in industrial relations and employment law. One could argue, particularly about the Employment Act, effective after the action, that the Court applies statutory changes retrospectively. The common law however is dynamic and sensitive to wider trends in society. If ascertained, the common law integrates the changes into common law thought and spirit. Courts are more confident where legislative intervention evidences these social dynamics. In Marinho v S.G.S. Blantyre Ltd. Civ. Cas. No. 508 of 1996, unreported, this Court approved Lord Justice Jenkins' statement in Vine V. National Dock Labour Board [1956] 1 All. E.R. 1, 10:

"At the risk of reiterating views expressed in my judgment on other subject matters, it seems appropriate to repeat that in matters of practice and discretion it is essential for the courts to take into account all the important changes in the climate of general opinion which is so hard to define but so plainly manifests itself from generation to generation. In that behalf account must, inter alia, be taken of the trend of the views of the legislature expressed on behalf of the community in its enactments and also of the trend of judicial decisions."

His Lordship, on the impact of the Industrial Relations Act in England and Wales, said:

"Over the last two decades there has been a marked trend towards shielding the employee, where practicable, from undue hardships he may suffer at the hands of those who may have power over his livelihood - employers and trade unions. So far has this

now progressed and such is the security granted to an employee under the Industrial Relations Act 1971 that some have suggested that he may now be said to acquire something akin to a property in his employment. It surely is then for the courts to review and where appropriate to modify, if that becomes necessary, their rules of practice in relation to the exercise of discretion such as we have today to consider so that its practice conforms to the realities of the day."

The impact of the Employment Acts on the common law in England and Wales, and indeed elsewhere, harbingers similar traits in the Malawi common law.

The conventional approach, a common law approach, is that an employer acts lawfully by terminating according to the contract. Consequently, a termination with notice, as here, does not redound to an action in damages. There are decisions of this Court and the Supreme Court of Appeal, some cited to me, to that effect: Agricultural Development and Marketing Corporation of Malawi v Shaba, M.S.C.A. Civ. App. No. ..... of …, unreported; Nyirenda v Import & Export Company of Malawi (1984) Ltd., Civ. Cas. No. 23 of 1989, per Mtambo, J., unreported; and Chihana v Council of the University of Malawi, Civ Cas. No. 20 of 1992, per Mtegha, J., unreported). In Bamusi v National Bank of Malawi Ltd. Civ. Cas. No. 47 of 1997, unreported, Mtambo, J., referred to a statement by Barry, J., in Barber v Manchester Regional Hospital Board [1958] 1 All ER 322, 329 that Villiera, J., approved in Mwalwanda v Press (Holdings) Ltd (1981-83) 10 MLR 321, 329:

"The law, I think, is clear: in ordinary circumstances, by giving the appropriate notice, a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so."

That, fortunately, was in 1958. Even if it was not Barry, J., qualified the rule with the words 'in ordinary circumstances.' There are, therefore, circumstances where the principle does not apply.

Besides, that case and those cited can be distinguished. The plaintiff's case is like Tomlinson v London, Midland and Scottish Railway Co [1944]1 All ER 1278; and Gunton v Richmond-upon-Thames London Borough, [1980] IRLR 321. The defendant gave a reason for termination. No doubt, the plaintiff's conduct, according to the conditions of employment and dismissal letter, promised investigations. There is no evidence the bank conducted them. There were limitations to the banks powers where there was a reason for termination. The employment contract is a regulated contract by legislation and the common law.

Tomlinson v London, Midland and Scottish Railway Co and Gunton v Richmond-upon-

Thames London Borough, hold that, where there are contractual safeguards which the employee expects, the employer breaches the contract and wrongfully terminates the contract if she overlooks the procedure. It makes no difference that the employer terminates according to the contract. The employer, in principle, contracted to terminate according to the contract and to afford the employee, where appropriate, substantive and procedural fairness. Where the employer explicitly or tacitly terminates for misconduct, the employer's election to terminate according to the contract or to afford the employee procedural and substantive fairness under the contract must depend on principle and the circumstances of the case. The principle must be one leaning towards affording the employee procedural and substantive fairness. The employer can then say to all and sundry that she has done the right and fair thing. The circumstances are difficult to circumscribe. They will reflect the gravity of the conduct, the nature of information between the parties and the duration of employment. The list is not exhaustive.

Even if there are no contractual safeguards, courts, notwithstanding Lord Reid's suggestion in Ridge v Baldwin [1964] AC 40, 65 and Malloch v Aberdeen Corporation [1971] 2 All ER 1278, that courts will not readily not do so, now readily imply natural justice principles in employment cases, particularly where the employer ascribes reasons relating to the employee's conduct or capacity for terminating the employment. In Stevenson v United Transport Union [1977] 2 All ER 941 Buckley, L.J., in words Woolf, L.J., approved in R v British Broadcasting Corporation, ex parte Lavelle, [1982] IRLR 404, said:

"In our judgment, a useful test can be formulated in this way. When one party has a discretionary power to terminate the tenure or the employment of another or an office or a post or a privilege, is that power conditional on the party invested with the power being first satisfied on a particular point which involves investigating some matter on which the other party ought in fairness to be heard or to be allowed to give his explanation or put his case? If the answer to the question is yes, then unless, before the power purports to have been exercised, the condition has been satisfied after the other party has been given a fair opportunity of being heard or of giving his explanation or putting his case, the power will not have been well exercised."

According to the conditions of employment, the bank suspended the plaintiff pending investigations. There is no evidence of the criminal investigations, if there were any, after the letter of suspension. The bank has not proffered evidence on the outcome of its own disciplinary proceedings, if the bank carried investigations at all. The bank, therefore, gave no fair opportunity to the plaintiff to be heard, give his explanation to the matter or put his case. The plaintiff was entitled to expect these investigations under the contract and the letter of suspension. These investigations were important for another reason.

Under the conditions of service, the results of the investigation determine the

plaintiff's employment with the bank. If investigations did not result in dismissal, the bank is obligated, under the conditions of employment, to re-employ the employee. The bank could not dismiss the plaintiff summarily because, as seen, the bank never warned - if the bank warned, it was only once - the employee. The bank could not dismiss summarily without the disciplinary procedure. Mr. Nkhwazi was entitled, under the contract of employment, to expect such a process. In McClelland v Northern Ireland General Health services Board, [1957] 2 All ER 129, the employer limited the grounds for dismissal. The Court held that, unless the employer dismissed for gross misconduct, he could not dismiss for misconduct he permitted. It seems to me that once the employer has prescribed a procedure for dismissal, he is precluded to resile from that process.

If the employer overlooks enquiry procedures before terminating employment the employee is entitled, according to Gunton v Richmond-upon-Thames London Borough, to damages assessed up to when the employer could lawfully terminate the contract. This assumes, of course, the procedure vindicates the employer. The procedure could very well vindicate the employee. This loss must be compensated somehow. Hodgson, J., in Dietman v London Borough of Brent, [1987] IRLR 259 thought that the damages should be assessed to the day the employer would have complied with the procedure.

On the common law principles I have laid, the bank, despite terminating by notice under the contract of employment, was in breach of contract in terminating the contract of employment without following the procedures under the contract if it terminated for reasons it gave. Moreover, the reason given is not reasonable in the circumstances.

The evidence shows nothing to associate the fraud with the plaintiff. The plaintiff was a data-capturing clerk. He was not responsible for ledgers where the forged cheque transaction occurred. Somebody else handled the crucial aspects of the particular transaction. Mr. Mhango had been to a teller. The teller was the one to effect the cash payment. The fraudster, if he was one, played on all bank officials including the plaintiff. In fact the plaintiff was meticulous and appreciated the limited help he could give to the customer and referred Mr. Mhango to those who could help on problems the client raised. The plaintiff could not have known, from what I learnt in this Court, and detect the fraud because the ledgers were already affected. The employer, could at common law, have raised and proved another reason at the trial. The employer has, not in my judgment, raised any here. The plaintiff, on the common law, as explained should recover damages assessed for up to the time when the bank would have complied with the procedure.

Apart from section 57 of the Employment Act, the citizen's entitlement, under section 31(1) of the Constitution, to fair labour practice allows reconsideration of the common law principle that the employer could terminate lawfully if she acts according to the contract by giving notice to the employee as a fair labour practice. The principles and laws of contract base on mutuality both at the commencement and discharge of the contract. Mutuality entails, in my judgment, that the principles of offer and acceptance,

critical to the formation of the contract, may be as important at termination of the contract. Where parties mutually agree to terminate the contract, according to its terms, few problems arise. Problem arise, and more critically in the contract of employment, where that mutuality is absent.

The problem is critical, in my judgment, where the employer terminates the employment, albeit according to the terms, for reasons concerning the employee's conduct. The situation results in a conflict between two principles: the principle of freedom of contract or freedom to contract on the one hand and principles of natural justice. The principles of natural justice, apart from the Constitution, are cardinal to our justice system and, where necessary, receive deserved attention from courts. The principle that an employer can, at common law, lawfully, without giving reasons or giving the employee a chance to be heard, terminate a contract if done according to the agreement in every case including where the employer will override an employee's natural justice rights cannot be countenanced today because of the courts disposition to respect natural justice principles and rights citizens have under the 1994 Constitution. Employers today, as a fair labour practice, seeing the importance, include principles of natural justice in employment contracts. An employer cannot, by simply terminating a contract, override the employee's rights to a fair hearing on reasons the employer decided to terminate the employment.

The duty to apply principles of natural justice, in my judgment, does not only arise where the employer gives reasons for termination. It arises in any case, even if the employer does not state the reasons for termination, where the employer terminates for the employee's conduct. The duty base on the broader principle that where one is to affect another's rights adversely for a reason, the other reasonably expects to be satisfied of the reason. One has a duty to justify. The other has a legitimate expectation for the justification. Where the conduct is clear to both parties, the duty is not onerous. Where there is disagreement, a fair hearing becomes the employer's justification for terminating the employment. Once the fair hearing proves the reason, the employer can dismiss summarily or terminate the contract of employment in terms of the agreement. If the termination is for a reason, in my judgment, principles of natural justice apply. The employer cannot override the principles by simply terminating the contract according to its terms. Our common law should, if not already developed that way, develop that way.

Apart from this common law development the 1994 Constitutions makes international law and international human rights law part of our law and an aid to interpretation of the constitution and human right provisions in our constitutions. Courts have to consider whether overlooking natural justice principles where the termination is clearly for reasons by simply terminating the contract according to its terms is a fair labour practice under our Constitution. In our understanding of fair labour practice in our Constitution and in deciding whether an employees termination without notices is a fair labour practice the Termination of Employment Convention Malawi ratified on 1st October 1996, is valuable help. Natural justice principles apply where the employer

terminates the contract, where there is a reason, whether or not the employer gives the reason for termination. This is in spirit with article 1 of the convention:

"The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be give effect by laws or regulations."

Under Article 4 of the Convention, the employment of an employee shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.

This convention is part of our law because of section 211(2) of the Constitution.

"International agreement entered into before the commencement of this constitution and binding in the Republic shall form part of the law of the Republic, unless Parliament provides otherwise"

The bank here was under an obligation, apart from the contract and the common law as developed, to give the employee an opportunity to meet the allegations against him.

This common law position should now be seen in the light of two significant inroads on the law. The first relates to the statutory interventions through the Labour Relations and the Employment Acts. The plaintiff's action, as seen, arises in between the two Acts. For this case, details of the Act are unnecessary. Section 64 of the Labour Relations Act is important for creating powers of the Industrial Relations Court. The Employment Act, however, brings significant changes to the common law. For purposes of this case, the Employment Act opens a possibility that a termination with notice, that is even if terminated lawfully under the contract, is an unfair dismissal. Section 57 (1) of the Employment Act provides:

"The employment of an employee shall not be terminated by an employee unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking."

This is a clear provision. Like the whole Act, this section affords an employee protection unheard of at common law. In my judgment, it is no valid reason that the employer is terminating according to the contract. The employer can only terminate in accordance

with the section.

Under Section 57 of the Employment Act, therefore, the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity. The following reasons do not constitute valid reasons for dismissal or for the imposition of disciplinary action, (a) an employee's race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities, (b) an employee's exercise of any of the rights specified in part II of the Labour Relations Act, © an employee's temporary absence from work because of sickness injury, (d) an employee's exercise or proposed exercise of the right to remove himself from a work situation which he reasonably believes presents an imminent or serious danger to life or health, (e) an employee's participation or proposed participation in industrial action which takes place in conformity with the provisions of Part V of the Labour Relation Act, (f) an employee's refusal to do any work normally done by an employee who is engaged in industrial action, or (g) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of laws, regulations or collective agreements. Under section 58 of the Employment Act, a dismissal is unfair if it is not in conformity with section 57 of the Act.

The Common law of England on employment law has developed considerably. Recognition of employment rights as creating property rights and changes in perception of labour and industrial relations introduced Employment Acts mainly to answer common law inadequacies. The Employment Acts greatly influences the conventional common law wisdom and remedies in employment disputes

On the latter, conventional wisdom that on an unlawful or wrongful dismissal, remedies only redound in damages because there can be no specific performance of the contract of employment of employment, is now replaced by that courts now are more susceptible and likely to grant injunctions and declaratory judgments barring unlawful dismissals in purely, not office holders, mind you, private law employment. Courts have done so because they have been astute to let parties abide by the terms of their contract, particularly where, like here, the employer has agreed to certain procedures before termination and on the readiness of courts to bring natural justice principles in purely private employment.

The influence has not been one way. The Employment Acts have, particularly in relation to grounds of dismissal, codified the Common law. The Employment Acts of England and Wales greatly influenced our Employment Act and the Labour Relations Act. On the

particular question here, whether a lawful termination can be unfair dismissal, under the Employment Acts in England and Wales, such a termination can be unfair dismissal triggering statutory compensation akin to ours under the Employment Act.

This matter arose before the Employment Act and the Labour Relations Act but after the 1994 Constitution. This Court, however, must determine the matter after the two statutes. The Employment Act and the Labour Relations Act, apart from introducing seismic changes in employment and labour relations law, introduced statutory remedies beyond the common law and statutes it repealed. The Court cannot apply the statutory remedies retrospectively.

The second way in which the common law position should now be seen is that even these statutes came in the context of elaborate fundamental rights affecting the workplace countenanced in our Constitution and international instruments, some referred to by counsel, to which Malawi is a signatory. One must therefore consider how these rights in the Constitution and the international instruments affect the Common law and statutory remedies where the action, like here, bases on the general law and allegations that the employer at the same time violated fundamental rights under the Constitution and various international instruments to which Malawi is a party.

The constitutional right to fair labour practice, in my judgment, entitles citizens of this country, where the employer or employee violates the right, to a fair and adequate remedy. Section 31(1) of the Constitution provides:

“Every person shall have the right to fair and safe labour practices and to fair remuneration”

Section 41(3) the Constitution provides:

“Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedom s granted to him by this Constitution or any other law.”

Section 46(3) of the Constitution provides:

“Where a court referred to in subsection (2) (a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms, and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and

freedoms from being unlawfully denied or violated."

Section 46(4) of the constitution provides:

"A court referred to in subsection (2) (a) shall have the power to award compensation to any person whose rights or freedoms have been unlawfully denied or violated where it considers it to be appropriate in the circumstances of a particular case."

Fair labour practice, to my mind, entails that the compensation the Constitution expects for violation of a right must be just and equitable. The Constitution entails that the compensation must be effective, adequate and full. The court must not give bonus or make payments beyond compensating the person whose rights are violated. The compensation must be just and equitable in all the circumstances of the case and considering the losses the victim suffered.

The remedy for wrongful dismissal of an employee at common law is a claim for damages. The damages are very small. They are no more than what the employee would receive if the employer terminated according to the contract, principally, the period the employer could have given notice under the contract. Legal commentators agree that these damages are small (Harvey on Industrial and Employment Law, Butterworths, 1994). In Irani v Southampton and South-West Hampshire Health Authority, Warner, J., said:

"If I were to decline an injunction..., I would in effect be holding that, without doubt, an authority in the position of the defendant is entitled to snap its fingers at the rights of its employees under the (procedure) ... It means that for the price of damages --- and the authorities show the damages at common law for wrongful dismissal are not generous --- a health authority may ... ignore the (procedural) requirements."

Inadequate remedies, among other things, are matters English law addressed in the Employment Protection (Consolidation) Act, 1978 and the Employment Act 1980. Today employment is viewed differently than the past.

"The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the Contracts of Employment Act 1963and the RPA (both now repealed and replace by the EP © A) it marked a trend towards recognising that the employee has an interest in his job that is akin to a property right. A person's job can no longer be treated purely as a contractual notice. So it provides a greater element of job security that is afforded at common law. However, the fact that the employee ultimately has no legally enforceable right to his job back if he is found to have been unfairly

dismissed indicates that the security provided is limited." Harvey on Industrial Relations and Employment Law

The Employment Protection Act 1980 introduced a statutory right. In

W Devis & Sons Ltd v Atkins (1975) 11 ITR 15, 22 Phillips, J., said:

'... The expression "unfair dismissal" is in no sense a common-sense expression capable of being understood by the man in the street, which at first sight one would think it is. In fact, under the Act, it is narrowly and to some extent arbitrary defined. And so the concept of unfair dismissal is not really a commonsense concept; it is a form of words which could be translated as being equivalent to the dismissal "contrary to statute" and to which the label "unfair dismissal" has been given.'

Sir John Donaldson, President of the National Industrial Relations Court in England and Wales comments on how the Act handles damages:

"In our judgment, the common law rules and authorities on wrongful dismissal are irrelevant. That cause of action is quite unaffected by the 1971 Act which has created an entirely new cause of action, namely the 'unfair industrial practice' of unfair dismissal. The measure of compensation for that statutory wrong is itself the creature of statute and is to be found in the 1971 Act and nowhere else. But we do not consider that Parliament intended the court or tribunal to dispense compensation arbitrarily. On the other hand, the amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle."

He also outlines the statutory principles on which compensation is awarded:

"The court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle. The principles to be adopted emerge from the section. First, the object is to compensate, and compensate fully, but not to award a bonus, save possibly in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or a tribunal. Second, the amount to be awarded is that which is just and equitable in all the circumstances having regard to the loss sustained by the complainant. 'Loss, in the context of the section, does not include injury to pride or feelings. In its natural meaning the word is to be so construed, and that this meaning is intended seems to us to be clear from the elaboration contained in sub-s (2). The discretionary element is introduced by the words 'having regard to the loss'. This does not mean that the court or tribunal can have regard to other matters, but rather that the amount of the compensation is not precisely and arithmetically related to

the proved loss. Such a provision will be seen to be natural and possibly essential, that the amount of compensation is not precisely and arithmetically related to the proved loss. Such a provision will be seen to be natural and possibly essential, when it is remembered that the claims with which the court and tribunals are concerned are more often than not presented by claimants in person and in conditions of informality. It is not therefore to be expected that precise and detailed proof of every item of loss will be presented, although, after making due allowance for the skills of the persons presenting the claims, the statutory requirement for informality of procedure and the undesirability of burdening the parties with the expense of adducing evidence of an elaboration which is disproportionate to the sums in issue, the burden of proof lies squarely on the complainant."

I said all this to state what should be the court's approach for matters arising after 1994, when the Constitution created fundamental rights affecting labour and industrial relations and practice and domesticated international human right law and international labour and employment law, and when in 2000 our Labour Relations Act and the Employment Act adumbrated these rights and gave them statutory force. First, the Common law cannot ignore these developments and escape accusations of irrelevance. Secondly and much more so for termination of employment, the Termination of Employment Convention Malawi ratified, in article 1, requires, in the absence of statutes or regulations, courts to give effect to its provisions. On the specific point, a termination of employment, even if in accordance with the contract, could in certain respects be an unfair labour or industrial practice and hence unlawful. It would be unlawful and wrongful, for example, if there was compromise of principles of natural justice whether or not the contract refers to the principles. This approach applies with equal force to damages awarded at common law for wrongful dismissal.

The Constitution and international human right law and international labour law presuppose adequate compensation, which the common law admittedly, through its damage regime, inadequately provides. The plaintiff premises the action on violation of both the general law and violation of constitutional rights. Compensation under section 46 (4) of the Constitution transcends damages recoverable at Common law for wrongful termination of employment. The principles to govern such awards are to be developed. For now I am content to say that the Employment Act indicates the legislative approach where courts, including the Industrial Relations Court, may draw guidance. For that reason the plaintiff shall recover in full one month's salary for every year served.

Made in open court this 21st Day of November 2003 at Blantyre.

D F Mwaungulu

JUDGE