

DISCIPLINARY PROCESS AND TERMINATION OF CONTRACTS OF EMPLOYMENT:

A CRITICAL REVIEW OF THE ZAMBIAN JURISPRUDENCE

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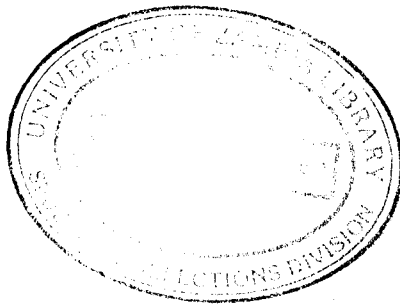
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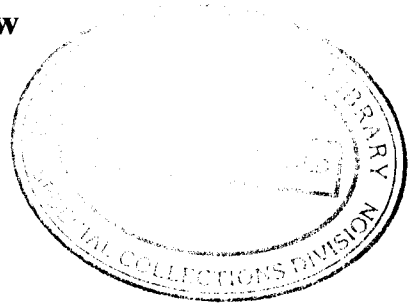
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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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DISCIPLINARY PROCESS AND TERMINATION OF CONTRACTS OF EMPLOYMENT:

A CRITICAL REVIEW OF THE ZAMBIAN JURISPRUDENCE

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16/05/2012

Date

**DISCIPLINARY PROCESS AND TERMINATION OF CONTRACTS OF EMPLOYMENT:
A CRITICAL REVIEW OF THE ZAMBIAN JURISPRUDENCE**

BY

LUFUNGULO CHANSI ANDREW

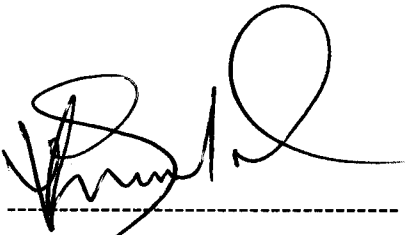


**A Directed Research essay submitted to the School of Law at the University of Zambia in partial
fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LL.B)**

DECLARATION

I, Lufungulo Chanshi Andrew, do hereby declare that this essay represents my own authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged.

I therefore bear the absolute responsibility for the contents, errors, defects, and any omissions therein. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing of the author.

A handwritten signature in black ink, appearing to be 'Lufungulo Chanshi Andrew', written over a horizontal dashed line.

Signature

11-05-2012

Date

DEDICATION

To my lovely daughter, **Bwalya Lydia Lufungulo**. The demands of my study towards the Bachelor of Laws Degree have greatly deprived you of considerable attention, yet even at a tender age you have shown immense understanding and belief in what I have aimed to achieve. I thank you for your understanding and may the almighty God continue to richly bless you.

Mum and Dad, I have always drawn great inspiration from you and in your own distinct but inspiring ways you have made me who I am today. I am scared to mention the numerous wonderful things you have done for me for I know that I shall never be able to pay back in my lifetime.

My family, Busiku Gomba Lufungulo, Succeed Mubanga Lufungulo, Tapiwa, Charles, Sarah, Kaoma, Lance and all of you Aunties, Uncles and Cousins too numerous to mention in the limited space of this dissertation, I thank you for always being by my side and encouraging me to reach greater heights. You have maintained your belief in me even in times when I thought I was unable to perform.

Auntie Bwalya Lydia Lufungulo Chembo, you have always gone out of your way to do great things for me. You left the entire flock behind and went out there to locate and bring back the lost sheep. No words can aptly describe how grateful I am. May the good Lord continue to richly bless you.

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ABSTRACT

An essential attribute of a successful labour regime demands that the law, as an instrument of social balance, must seek to provide protection to the parties to a contract of employment, more particularly an employee who stands the risk of being arbitrarily dismissed at the whims of his superior master. Such protection is essential for purposes of safeguarding the vital economic interests that derive from a contract of employment. It is in view of this background that this research has endeavored to review the procedural requirements that the employer is required to follow prior to terminating an employee's contract of employment by way of dismissal.

This study has observed that although the law of dismissal in Zambia has attempted to stipulate instances in which an employee's contract of employment may not be terminated by way of dismissal without affording the employee an opportunity to be heard, there remains an urgent need for the labour regime to clearly stipulate the principles to be taken into account by the Courts when faced with a question of fairness or justification of dismissal from employment. The paper has thus thoroughly reviewed the varying approaches that have previously been adopted by the Courts in addressing the question of justification of dismissal from employment. The author has undertaken a thorough review of a wide range of case law on the subject, noting in particular that while the law of dismissal has overtime significantly evolved in a bid to provide adequate safeguards to vulnerable employees, there still remains an urgent need for the labour regime to clearly stipulate the principles to be taken into account by the Courts when faced with this important question of justification of dismissal. The author has observed that there is need for urgent legislative intervention aimed at defining the extent to which an employer must satisfy

himself regarding the employee’s culpability of the alleged misconduct prior to reaching a decision to terminate such employee’s contract of employment.

In concluding the research has highlighted a number of vital recommendations aimed at addressing the foregoing concerns. Notable among these include the need for the legislature in Zambia to prescribe the burden to be discharged by the employer for purposes of justifying termination of employment by dismissal; and the need for the Supreme Court of Zambia to deliver consistent Judgments so as to ensure certainty in the law of dismissal and thus enhance the level of employment security in Zambia. The research has also noted that the *Zambian Courts* must recognise the need to exercise caution in importing foreign principles into the *Zambian labour regime* so as not to allow external legislative proclamations, unsupported by adequate internal safeguards, to indirectly manifest their force and influence the development of the law of dismissal in Zambia. Further, the procedural requirement to observe rules of natural justice must be strengthened by requiring that all contracts of employment, whether oral or in writing, shall not be terminated on grounds of misconduct without affording an employee an opportunity to be heard. Addressing these concerns would undoubtedly go a long way in fostering positive development of the law of dismissal, and would ultimately enhance the levels of protection conferred on vulnerable employees in Zambia.

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Chapter One

1.0 General Introduction

Zambia, like most African countries, is grappling with increasing unemployment resulting in escalating levels of poverty.¹ One of the essential means of countering this devastating social and economic problem is through the provision of secured employment aimed at providing an important source of income and mitigating the levels of poverty in the country.² Such employment is secured by means of a contract of employment which essentially stands as the foundation regulating the symbolic relationship between an employee and the employer.³ A contract of employment is a significant instrument from which rights and duties of the employer and employee are derived, and as such provides an essential backbone for a sound economic wellbeing of an individual.⁴

The importance of securing employment in Zambia cannot be simply overlooked. Naturally, an employer and an employee do not have equal bargaining powers in an employment relationship. An employee ordinarily stands in a weaker position in relation to his employer, hence requires the protection of the law in securing his economic interests deriving from the employment relationship. The law thus seeks to protect employees' interests by setting out certain minimum standards applicable to employment relationships and putting in place effective mechanisms for regulating such essentials as wages and other terms and conditions of employment.⁵ Further and more importantly, the law seeks to ensure that an employee is adequately protected from arbitral

¹Patrick Matibini et al, *The Criminal Justice System in Zambia: Enhancing the Delivery of Security in Africa*, (Pretoria: Institute for Security Studies, 2009), xiii.

² Harry Collins, *Justice in Dismissal: The Law on Termination of Employment*, (Oxford: University Press, 1992), 2.

³ Sithole W. Mwenda, *Employment Law in Zambia: Cases and Materials*, (Lusaka: UNZA Press, 2004), 1.

⁴ Mwenda, *Employment Law in Zambia*, 1.

⁵ Ibid., 5.

dispossession of his rights as may arise under a contract of employment.⁶ In this regard the law demands that an employee must not be dismissed without a lawful cause and without following the prescribed procedure.⁷

As earlier alluded to, a contract of employment creates a consensual relationship between an employer and an employee on terms agreed by the two parties subject to limitations imposed by common law and statute.⁸ Such a contract creates binding relations between the employer and the employee on various terms and conditions including the mutual obligation to respect the term of duration of the contract of employment. The law also recognizes and stipulates the various consequences that may follow unilateral termination of a contract of employment prior to expiry of the contractual term or completion of the contractual task. One instance under which the rights of an employee may be curtailed is by termination through dismissal. In such as a case the employer terminates, without notice or payment in lieu of notice, the employee's contract of employment due to the latter's breach of a fundamental term, express or implied, in which instance the dismissed employee stands to lose the right to benefits that are yet to accrue under the respective contract of employment.⁹

The foregoing right to dismiss an employee must however be exercised cautiously and in accordance with the law, so that an employee does not stand to bear the risk of being arbitrarily dispossessed of the vital rights arising under the contract of employment. There is need for adequate legal safeguards meant to ensure that a reason or disciplinary cause must always support a dismissal, and further the employee must be given the right to exculpate himself in

⁶ George Davenport, *ILO Termination of Employment Digest*, (Geneva: International Labour Office, 2000), 5.

⁷ Davenport, *ILO Termination of Employment Digest*, 41.

⁸ Steven H. Gifis, *Barron's Law Dictionary*, (USA: Barron's Legal Guides, 2005), 106.

⁹ *Agholor v. Cheesebrough (Zambia) Limited* (1976) Z.R. 1 (H.C.)

accordance with the rules of natural justice. Article 4 of the International Labour Organisation Convention No. 158 of 1982 (Termination of Employment Convention) provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination. An employer who does not have adequate grounds to support the dismissal of an employee and who does not follow the laid down procedure exposes himself to challenge in the Courts of law for wrongful, unfair or unlawful dismissal.¹⁰ It is in this regard inevitable that the Courts will from time to time be called upon to determine the legality and/ or fairness of any discharge of an employee through dismissal.

1.1 Statement of the Problem

The economic and social consequences arising from loss of employment through dismissal cannot simply be overlooked. An employee stands in a weaker position in an employment relationship hence the need for the law to provide protection aimed at safeguarding the employee who stands the risk of being arbitrarily dismissed at the whims of the more superior employer. Dismissal, as earlier noted, occurs where the employer terminates an employee's contract of employment without notice.¹¹ The consequence of such dismissal is that where an employee is dismissed and the dismissal is considered to be fair or justified, the employee loses the right to benefits under the contract of employment other than those that may already have accrued.¹² On the other hand if the employer dismisses an employee and the employee considers the dismissal to be unlawful, wrongful or unfair, the employee may challenge the dismissal by bringing an action in the courts of law. Thus disputes may and do arise between employers and employees requiring the Courts to determine the legality and/or fairness of dismissal from employment.

¹⁰ ILO Convention No. 158 of 1982, Article 4

¹¹ Mwenda, *Employment Law in Zambia*, 41.

¹² *Agholor v. Cheesebrough (Zambia) Limited* (1976) Z.R. 1 (H.C.)

A question that however arises is what principles do the Courts take into account in determining the question of fairness, and to what extent must the employer satisfy himself that the conduct of the employee is indeed in breach of his obligations arising under the contract of employment? Furthermore, must the Court uphold the employee's dismissal even when evidence is subsequently adduced indicating that the employee did not in fact commit the alleged breach?

The Courts in Zambia have in recent decisions held the view that provided the employer had reasonable grounds to believe that the employee may have committed an act amounting to a fundamental breach of the terms of the contract of employment, and that such belief was sustained after conducting reasonable investigations, dismissal arising therefrom will be upheld as being justified and fair. In this regard, the Supreme Court of Zambia has stated in the case of *Chimanga Changa Limited v. Stephen Chipango Ngombe* that:

.....the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. 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.¹³

It is the efficacy in the foregoing approach that this research has endeavored to evaluate, particularly the fairness and protection conferred to an employee who is dismissed on the basis of erosion of trust in the employment relationship regardless of whether or not such employee did in fact commit the alleged misconduct or offence. The author has thus found it prudent to evaluate the basis and rationale behind the reasonable investigations approach.

Further, the author has found it necessary to examine the extent of legislative intervention in the law of dismissal presently obtaining in Zambia. Thus a thorough examination of the domestic

¹³ Supreme Court Judgment No. 5 of 2010

legislative framework governing employment relations in Zambia, including provisions of the Employment Act¹⁴ section 25 and section 26A has been inevitable.

Section 25 of the Employment Act provides for ‘summary dismissal proper’ by stipulating that whenever an employer dismisses an employee summarily and without due notice or payment in lieu of notice, the employer must within four days of such dismissal deliver to a labour officer a written report of the circumstances leading to, and the reasons for such dismissal. Section 26A on the other hand provides for ‘procedural dismissal’ in that it prescribes that an employer shall not terminate the services of an employee on grounds related to conduct or performance of the employee without affording the employee an opportunity to be heard on the charges laid against him.¹⁵

Attractive as the provision in Section 26A may appear to be, one remains to wonder the extent to which this enactment remains practically relevant in enhancing employment security particularly for the vulnerable employees who stand the risk of being arbitrarily dismissed at the whims of their superior employers. One significant concern about the efficacy of Section 26A of the Employment Act is that although this provision attempts to introduce a statutory requirement to observance rules of natural justice, its scope of application is severely limited as the provision only applies to oral contracts by virtue of falling under Part IV of the Employment Act, which part specifically deals with oral contracts. It is therefore vital for the study to extend to an examination of the manner in which Section 26A of the Employment Act has been construed by the Courts in Zambia so as to examine its practical relevance towards enhancing employment security in Zambia.

¹⁴ Chapter 268 of the Laws of Zambia

¹⁵ The Employment Act Chapter 268 of the Laws of Zambia, Section 26A

A further area of concern regarding the extent of protection conferred on an employee is premised on the nature of the Zambian legal system. Zambia's legal regime has a dual character hence international standards relating to employment protection embraced by Zambia by way of ratification are not automatically executed at the domestic level. A treaty or convention only becomes binding as domestic law in Zambia once Parliament has passed a special enabling statute enacting the treaty as part of 'municipal' (internal) law.¹⁶ Regrettably however, Zambia has so far not domesticated most of the international instruments, including those intended to promote and secure employment security at the international level. This state of affairs has adversely compromised the extent to which such international instruments are of practical relevance for purposes of enhancing the employee's employment security in Zambia.

The factors highlighted above pose a serious compromise on the nature and extent of protection conferred to an employee who is dismissed by his employer particularly on the basis of 'erosion of trust in the employment relationship', regardless of whether or not such employee did in fact commit the alleged misconduct or offence.

1.2 Objectives of the Study

The main objective of the study is to thoroughly examine the principles, if any, taken into account by the Courts when determining the question of fairness or justification of unilateral termination of a contract of employment through dismissal. The study has in this regard sought to highlight the principles employed by the Court from a case law perspective, and has also examined the extent of legislative intervention intended to enhance the employee's protection in cases of dismissal in Zambia. Specifically, the study has attempted to review the legislative

¹⁶ Matibini et al, *The Criminal Justice System in Zambia*, 16.

framework and case law relating termination of employment in Zambia, in which regard the author has reviewed the various procedural safeguards which the law obliges the employer to comply with in all cases where dismissal from employment is contemplated, including the requirement to undertake investigations and to conduct hearings prior to dismissing an employee.

The study has thus concluded with a thorough assessment of the adequacy of the principles or factors taken into account by the Courts in determining fairness or justification of unilateral termination of a contract of employment by way of dismissal, in which regard key weakness in the law of dismissal have been identified and a number of recommendations have been highlighted

1.3 Significance of the Study

This research is particularly significant in view of current unprecedented levels of unemployment resulting in escalating poverty levels in Zambia. The study has adopted the view that there is need for the law to ensure that the employee is adequately protected from arbitral dispossession of the vital rights arising from a contract of employment and which are undoubtedly essential to the economic wellbeing of every employee. The Courts, as custodians of the law, must ensure that the employee's interests are adequately protected so that no employee is deprived of his economic interests by being dismissed without a lawful cause.

This study is particularly useful as it has thoroughly examined the adequacy of protection conferred by the Courts in safeguarding an employee's economic interests arising under a contract of employment, and in so doing the research has ultimately sought to contribute to the national objective of seeking to ensure that vulnerable employees are provided with secured employment so as to mitigate the levels of poverty in the country.

1.4 Methodology

The study has mainly been carried out in the Library, though both primary and secondary sources have been resorted to. The primary sources consulted include a plethora of jurisprudence relating to employment matters as well as literature such as textbooks, journals, articles, and various domestic and international legal instruments. In addition, information and articles from the internet, official documents of national, regional and international bodies such as the International Labor Organisation (ILO) and reports have also been consulted. And in very restricted cases unpublished literature has been resorted to.

1.5 Conclusion

Chapter one of the study has highlighted the significance of ensuring employment security particularly for purposes of protecting the interests of vulnerable employees who otherwise stand the risk of being arbitrary dismissed from employment at the whims of the employer. The author has noted that employment provides a vital means of livelihood for humankind and as such, there is need for the law to provide safeguards requiring, for instance, that any dismissal from employment must be justified and founded on the law.

The statement of the problem has highlighted that the Courts are entrusted with the vital role of resolving disputes that may and do often arise between employers and employees as to justification of dismissal from employment. It is therefore essential that clarity must be had as to what principles do the Courts consider in determining whether or not dismissal is justified; and to what extent must the employer satisfy himself that the conduct of the employee indeed warrants termination of the contract of employment by way of dismissal? These questions are addressed in the preceding chapters.

Chapter Two

2.0 Introduction

A contract of employment provides an important basis upon which the rights and duties of the parties to an employment relationship are defined. It provides an important means of securing employment and as such, stands as an essential backbone for the sound economic wellbeing of an individual. Just as the law provides for the manner in which the relationship between the employer and employee may come into existence, the law also stipulates the modes and manner in which an employment relationship may be brought to an end.

Two aspects are significant in determining the legality or otherwise of a purported termination of a contract of employment. Firstly, one has to consider whether or not the termination is effected in conformity with the terms and conditions of the contract of employment; and secondly, one must determine whether or not the termination has been effected in conformity with procedural requirements which may demand that the employer observes rules of natural justice in coming to a decision to terminate the contract of employment.

It is from this perspective that this chapter has attempted to examine the nature of a contract of employment, the manner in which such a contract may be lawfully terminated, and the procedural safeguards which ought to be adhered to by the employer whenever termination of a contract of employment, particularly by way of dismissal, is contemplated.

2.1 The Nature of a Contract of Employment

The relationship of employer and employee is according to common law, a voluntary relationship which the parties may enter into on terms laid down by the parties within limitations

imposed only by the general law of contract.¹⁷ Whether or not in any given case the relationship of master and servant exists is a question of fact, but generally the relationship imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done.¹⁸ Such a relationship is characterised by a contract of service, express or implied, whereby the employee undertakes to serve the employer and to obey his reasonable orders within the scope of the duty undertaken.¹⁹

A contract of employment may either be oral or written, although it is usually advisable that such contracts be in writing for obvious but very important reasons of clarity. Contracts of employment must therefore be worded clearly to avoid ambiguity or misinterpretation in the event of a dispute arising.

Whether oral or written, a contract of employment will usually consist of three essential elements. Firstly, a contract of employment will comprise of those express terms agreed upon by the employer and employee; secondly, a contract of employment is governed by a wide range of common law principles which the law presumes the parties must have intended to govern their relationship although not expressly incorporated into the contract; and thirdly, a contract of employment will naturally be regulated by such terms as may be imposed by statute.

2.2 Termination of a Contract of Employment

A contract of employment, just like any other contract, invariably has to come to an end at one time or the other.²⁰ It has in this regard been rightly observed that “every well drafted contract

¹⁷ Fredrick Mudenda, “The Right to be Heard on Dismissal from Employment in Zambia: A General Overview” Draft Article for LAZ Journal Volume (2009), 3.

¹⁸ 25, *Halsbury's Laws of England*, 3rd Edition (London: Butterworths and Co., 1958), paragraph 871, 447.

¹⁹ *Ibid.*, paragraph 872, 448.

²⁰ Mwenda, *Employment Law in Zambia*, 34.

must have a clause stipulating how and when such a contract may be terminated by either party. This is in recognition of the consideration that contracts of employment should never be converted into contracts of slavery”.²¹ Generally, therefore, a contract of employment may come to an end on expiry of the agreed term, completion of a specified task, resignation, retirement, frustration, death of the employee, or indeed dismissal.²²

The common law position regarding dismissal is that an employee who holds himself out as being skilled to do a certain type of work impliedly undertakes that he will exercise reasonable skill or competence in that work, so that he can be dismissed summarily if he fails to display such skill or competence.²³ Further, in a master and servant relationship, a master can terminate the employee’s contract of employment at any time, even with immediate effect and for any reason or none. If the employer terminates the contract outside the provisions of the terms and conditions, then he is in breach and therefore liable in damages for breach of contract.²⁴

Dismissal, it ought to be noted, may be classified into ‘summary dismissal proper’ which in Zambia is regulated by Section 25 of the Employment Act; ‘procedural dismissal’ which is provided for in Section 26A of the same Act, as well as ‘constructive dismissal’ which is governed largely by common law principles.

In terms of Section 25 of the Employment Act, the law requires that whenever an employer shall dismiss an employee summarily and without due notice or payment of wages in lieu of notice, such employer shall, within four days of such dismissal, deliver to a labour officer in the District in which the employee was working, a written report of the circumstances leading to and the

²¹ Darlington A. Banda, *A Guide to Employment in Zambia*, (Lusaka. Friendich Elbert Stiftung, 1999), 43.

²² See The Employment Act Chapter 268 of the Laws of Zambia, Section 36

²³ *Agholor v Cheeseborough Ponds (Z) Ltd* (1976) Z.R. 1

²⁴ *Contract Haulage Ltd. v Kamayoyo* (1982) Z.R. 13

reasons for such dismissal. In terms of Section 26A of the Employment Act, an employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him. This latter provision, though confined to oral contracts in terms of application, is of vital importance in that it modifies the common law position relating to dismissal by imposing a duty on the employer to observe rules of natural justice.

2.3 Dismissal and the duty to observe Rules of Natural Justice

Dismissal essentially allows an employer to terminate an employee's contract of employment without notice.²⁵ This will occur where an employee has breached either the express or implied terms of the contract of employment. The law however does require in certain instances that in effecting such dismissal the employer must observe rules of natural justice, also known as procedural rules of fairness, meant to ensure fairness and reasonableness in the employer's decision making process. It follows therefore that a clear understanding of what constitutes 'natural justice' is vital to any attempt to evaluate the procedural requirement of fairness and extent of enforcement of rules of natural justice in employment relations.

2.3.1 The Principle of Natural Justice

Although there is no concrete and specific definition encompassing 'natural justice' as to provide a very clear guideline, it is nonetheless universally acknowledged that natural justice is made up of "the rules of fair play originally developed by the courts of equity to control the decisions of inferior courts".²⁶ Basically rules of natural justice are made up of two fundamental elements. The first element is well captured in the Latin maxim *nemo judex in causa sua* which translates

²⁵ *Agholor v Cheesebrough Ponds (Zambia) Limited* (1976) Z.R. 1

²⁶ C. F. Padfield, *Elements of Public Law*, (London: Butterworths, 1980), 252.

as ‘no man shall be judge in his own cause’.²⁷ Simply put this element entails that the adjudicator must have no interest whatsoever in the outcome of the proceedings.²⁸

The second element is that every man should be given an opportunity to make representations before judgment is passed on him. This principle is summed up in the Latin maxim *audi alteram partem* which literally translates as ‘let the other side be heard’.²⁹ This latter element gives rise to the duty to act fairly, to listen to arguments, and to reach a decision in a manner which is untainted by bias. It demands that before judgment is passed on anyone, such a person must be given the opportunity to present his case and make representations and arguments for his case. Indeed, as observed by Fortesque J. in the case of *R v. Chancellor of University of Cambridge*, “even God did not pass sentence upon Adam before he was called upon to make his defence”.³⁰

2.3.2 Right to be heard on dismissal from Employment

The principle of natural justice requiring that every man should be given an opportunity to make representations as to his side of the case before he is punished constitutes a fundamental aspect of the law governing employment relations. This principle imposes a duty on the employer to observe rules of natural justice when making punitive decisions particularly in cases where dismissal is contemplated. The precise nature of the obligation to observe rules of natural justice however varies depending on whether the relationship between the employer and employee is one of master and servant founded on common law, or whether it is an employment relationship governed by statute, or indeed if the relationship arises in respect of employment at the pleasure. While there is generally no requirement that the employer must observe rules of natural justice at

²⁷ Mudenda, “Right to be Heard on Dismissal,” 5.

²⁸ *Dimes v. Grand Junction Canal* [1852] 3 HLC 759

²⁹ *Ibid.*

³⁰ [1723] 1 STR 557

common law and also in respect of employment at pleasure, the law does require that in all cases where an employee cannot be dismissed unless there is something against him, dismissal can only be effected after affording the employee an opportunity to present his case.

In *Ridge v. Baldwin*, Lord Reid in considering the scope of application of rules of natural justice in cases of dismissal distinguished three classes of cases: firstly, he noted cases of dismissal of a servant by a master in a pure master and servant relationship governed by the law of contract and in which there is no right to be heard; secondly, Lord Reid identified cases where an office is held at the pleasure of the appointing authority, in which case the appointing authority is at liberty to dismiss the employee without being bound to observe rules of natural justice; and thirdly, he noted cases where a man cannot be dismissed unless there is something against him, in which case he has the right to be heard.³¹

2.3.3 No right to be heard in a Master and Servant Relationship

Primarily, the position at common law is that in a pure master and servant relationship there is no duty on the employer to have regard to rules of natural justice when dismissing an employee.³² Provided the employer has terminated the services of the employee in a manner laid down in the contract of employment, he is not bound to accord the employee a chance to be heard.

In *Rainee Engineering Co. Limited v. Baker* it was held that:

....the law regarding master and servant relationships is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or none. But if he does so in a manner not warranted by the contract, he must pay damages for breach of contract.³³

³¹ [1963] 2 All E.R. 66 at pp 71-72

³² *Ridge v. Baldwin*[1963] 2 All E.R. 66 at p. 71

³³ (1972) Z.R. 156

Lord Reid further pointed out in *Ridge v. Baldwin* (cited above) that the question in a pure master and servant relationship does not at all depend on whether the master has heard the servant in his defence; it depends solely on whether the facts emerging indicate breach of the contract of employment.³⁴

Thus in so far as application of rules of natural justice is concerned, the position at common law is that the master is empowered to terminate the employee's services and in doing so there is no duty on the employer to give the dismissed employee reasons for his dismissal or an opportunity to make representations. If the employer dismisses the employee in a manner that contravenes the terms of the contract of employment, he is only required to pay damages.

2.3.4 Right to be heard on dismissal from employment governed by Statute

Where a contract of employment is governed by a statute which specifically provides that an employee may only be dismissed if certain procedures are followed, an improper dismissal is null and void for failure to adhere to such stipulated procedure.³⁵ In *Kangombe v. Attorney-General*, Silungwe J. held that the dismissal of an employee contrary to the procedural statutory provisions stipulated in the Teaching Service Regulations was null and void.³⁶

Similarly in the case of *Contract Haulage v. Kamayoyo*, the Supreme Court of Zambia observed, *inter alia*, that where there is a statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is *ultra vires*; and where there is some statutory authority for a certain procedure relating to dismissal, a failure to

³⁴ [1963] 2 All E.R. 66 at pp 71-72

³⁵ *Contract Haulage v. Mumbuna Kamayoyo* (1982) Z.R. 12

³⁶ (1972) Z.R. 177

give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in those circumstances is null and void.³⁷

In the case of *Miyanda v. Attorney-General*, the appellant joined the army as a Cadet Officer during the currency of the Defence Act 1955 which provided, *inter alia*, that officers could only be dismissed after they had been given an opportunity to be heard on any allegations against them.³⁸ The Supreme Court of Zambia upheld the appellant's right not to be dismissed without notification and without affording him an opportunity to exculpate himself.

A comprehensive statement regarding the position where there is a statutory requirement to observe rules of natural justice was given by Lord Wilberforce in the case of *Mallock v. Aberdeen* wherein he pointed out that:

One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant' cases, which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects of the relationship may be called that of a master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in dismissal being declared void.³⁹

2.4 Procedural dismissal under Section 26A of the Employment Act

Section 26A of the Employment Act provides that an employer shall not terminate the services of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him. Thus where the employer contemplates dismissing an employee and the basis for such dismissal is

³⁷ (1982) Z.R. 12

³⁸ (1985) Z.R. 185

³⁹ [1971] 1 WLR 487

misconduct or performance, then the employee has to be accorded a chance to exculpate himself and explain his side of the case.

The effect of Section 26A has therefore been to substantially alter the position at common law by introducing an employee's right to be heard in cases in which the employer would otherwise have had a right to terminate the employee's services without being obligated to observe the rules of natural justice. As noted by Mwenda, "Section 26A is important because an employee whose contract has been terminated may challenge such termination on the ground that the real reason for such termination was his conduct or performance and that therefore rules of natural justice should have been applied."⁴⁰ In *Tolani Zulu and Musa Hamwala v Barclays Bank of Zambia Limited*, the Supreme Court of Zambia in construing Section 26A noted that the gist of this provision is that the conduct or performance of the employee which is questioned must arise or relate to his work and he must be given an opportunity to be heard.⁴¹

In terms of what constitutes a 'hearing' under Section 26A, the Supreme Court of Zambia has observed in *Mumba v. Telecel (Zambia) Limited* that it is not mandatory for the employer to conduct an oral hearing; the employee is given an opportunity to be heard on charges leveled against him when he is charged and asked to exculpate himself.⁴² 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 leveled against him.

Similarly in the case of *Sitali v. Central Board of Health* the Supreme Court of Zambia considered what amounts to a 'hearing' within the meaning of Section 26A and held that a

⁴⁰ Mwenda, *Employment Law in Zambia*, 41.

⁴¹ Supreme Court Judgment No. 17 of 2003

⁴² Supreme Court Appeal No. 156 of 2005

‘hearing’ for purposes of disciplinary proceedings is not only confined to the physical presence of an accused and giving oral evidence.⁴³ The Court noted that 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 defence either orally or in writing. And in *Zambia Corperative Federation Finance Services Limited v Phiri*, the Supreme Court of Zambia equally observed in respect of an exculpatory letter that “although on the face of it the rules of natural justice were not complied with, however, looking at the exculpatory letter written by the plaintiff, one would conclude that there was observance of rules of natural justice”.⁴⁴

It is to be noted however that in terms of scope of application, Section 26A only applies to oral contracts by virtue of falling under Part IV of the Employment Act. This position was clarified by the holding of the Supreme Court of Zambia in *Barclays Bank (Z) Ltd v Zambia Union of Financial Institution and Allied Workers* wherein it was held in respect of the application of Section 26B (which equally falls under Part IV of the Employment Act) that:

Section 26(B) of the Employment Act as amended by Act No. 15 of 1997, is found in Part IV of the Act [sections 16-27]. Section 16 of the Act provides that the provisions of this part shall apply to oral contracts...In enacting this provision Parliament intended to safeguard the interest of employees who were employed on oral contracts of service which by nature would not have any provision for termination of employment...⁴⁵

2.5 Right to be heard enshrined in a Disciplinary Code or Collective Agreement

It needs to be noted that other than the statutory prescription for the right to be heard in Section 26A (above), the duty of an employer to observe rules of natural justice prior to dismissing an employee may be imposed by the respective disciplinary code or a collective agreement. Such disciplinary code or collective agreement may specify for instance the kinds of misconduct

⁴³ Supreme Court Appeal No. 178 of 1999

⁴⁴ Supreme Court Appeal No. 93 of 2001

⁴⁵ (2007) Z.R. 106; Also see *Chilanga Cement v. Kasote Singogo*, Supreme Court Judgment No. 13 of 2009

which would justify dismissal and it may also prescribe the relevant procedure, including the duty to observe rules of natural justice, to be followed where dismissal is contemplated.

In *Zambia Airways Corporation Limited v Gershom Mubanga* the Supreme Court upheld the High Court's finding to the effect that the respondent had been wrongfully dismissed on the basis that the Disciplinary Code and Grievance Procedure governing his employment had not been correctly followed in that the charges both original and additional were not in the prescribed form and were not made by the appropriate supervising officer.⁴⁶ Similarly in *Pamodzi Hotel v Godwin Mbewe* the Supreme Court of Zambia held that it was sufficient that the dismissal was carried out fairly as laid down in the Collective Agreement.⁴⁷ In that case the Supreme Court of Zambia also considered in obiter the case of *Contract Haulage Limited v Kamayoyo* wherein it indicated the view that where there was a Joint Industrial Council Agreement which has statutory effect in a contract of employment and which provides for a certain procedure to be followed before dismissal, any breach of the procedure resulting in a dismissal might well result in a declaration that the dismissal was null and void.⁴⁸

2.6 No right to be heard where employee committed an offence warranting Dismissal

Notwithstanding the above, in a situation where it is not in dispute that the employee has committed a wrong and as a result he is dismissed without following the laid down procedure, no injustice will arise from a failure to comply with such laid down procedure. This position was established in the case of *Glynn v. Keele University and Another* wherein the House of Lords held that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is subsequently dismissed, no injustice arises from a

⁴⁶ (1990-1992) Z.R. 149 (S.C.)

⁴⁷ (1987) Z.R. 56 (S.C.)

⁴⁸ (1982) Z.R. 13

failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal, or a declaration that the dismissal was a nullity.⁴⁹

In Zambia, the Supreme Court has on this subject substantially followed the holding of the House of Lords in the *Glynn case* (above). In the case of *Zambia National Provident Fund v. Chirwa* the Supreme Court allowed the appeal holding particularly that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is so dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for a declaration that the dismissal is a nullity.⁵⁰

Similarly in *National Breweries Limited v Philip Mwenya* the Supreme Court of Zambia relying on its earlier decision in the *Chirwa case*, reiterated the position that where an employee has committed an offence for which he can be dismissed, no injustice arises from failure to comply with the laid down procedure.⁵¹ And in the case of *Africa Supermarkets Limited (T/A Shoprite Checkers) v Mhone* the Supreme Court of Zambia held, again relying on its decision in the *Chirwa case*, that “it is trite law that rules of natural justice do not have to be observed in an employer/ employee relationship where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal.”⁵²

2.7 No right to be heard where Termination in accordance with Conditions of Service

Where termination of a contract of employment is effected in accordance with the conditions of service, there is no legal requirement to observe rules of natural justice. In the case of *Yamba v*

⁴⁹ [1971] 2 All E.R. 89

⁵⁰ (1980) Z.R. 70

⁵¹ Supreme Court Judgment No. 28 of 2002

⁵² Supreme Court Appeal No. 162 of 2001

*Food Reserve Agency, the Supreme Court of Zambia pointed out that issues of rules of natural justice do not arise where termination was in accordance with the conditions of service which provide for notice or payment in lieu of notice.*⁵³

However, it is worth noting that although there is no requirement that the employer must afford an employee a right to be heard where termination of employment is in accordance with the conditions of service, the Supreme Court has nonetheless held in *Atlas Copco (Z) Ltd v Mambwe* that where there are allegations of incompetence and misconduct, the notice clause should not be used as a camouflage to conceal the real reason for termination as the Court has power to delve into or behind the reasons given for termination to redress any real injustices discovered.⁵⁴

2.8 Natural Justice under the ILO Convention No 158 of 1982

The International Labour Organisation (Termination of Employment) Convention No 158 of 1982 also seeks to foster the procedural requirement to observe rules of natural justice in employment relations by providing in Article 7 that the employment of a worker shall not be terminated for reasons related to conduct or performance before he is provided with an opportunity to defend himself.

However, although Zambia has ratified the ILO (Termination of Employment) Convention No. 158 of 1982 among many other international instruments, a litigant cannot rely on its provisions due to the problem of internalisation or domestication. The Supreme Court of Zambia has in this regard held in the case of *Zambia Sugar Plc v Nanzaluka* that it is trite law that international instruments on any law, although assented to or ratified by a state cannot be applied in the

⁵³ Supreme Court Appeal No. 33 of 2003

⁵⁴ Supreme Court Appeal No. 137 of 2001

country unless they have been domesticated.⁵⁵ It follows therefore that due to non domestication, Article 7 of the ILO Convention No. 158 of 1982 cannot be relied upon by a litigant in Zambia in the event of breach by the employer of the obligation to afford an employee a right to be heard.

2.9 Conclusion

This Chapter has reviewed the nature of a contract of employment and has further given a detailed account of the procedural requirement to observe rules of natural justice in employment relations, particularly in cases of dismissal from employment. The following features of the law of dismissal currently obtaining in Zambia are worth noting:

Firstly the study has highlighted that at common law, it is regarded that in a pure master and servant relationship there is no requirement to observe rules of natural justice, and that the employer can terminate the services of an employee without having regard to rules of natural justice if he so wishes. It has however been noted that in Zambia there has been a modification to the foregoing common law position in that Section 26A of the Employment Act (which applies only to oral contracts) now requires that an employee shall not be dismissed on grounds of conduct or performance without being accorded an opportunity to present his case.

Secondly it has also noted, through a review of various case authorities, that where employment is supported by statute which provides for a certain procedure to be adhered to prior to dismissing an employee, it would be a breach of natural justice should such procedure be disregarded. Nevertheless where it is not in dispute that the employee committed an offence for which the appropriate punishment is dismissal, there would be no remedy even if the rules of natural justice have been disregarded.

⁵⁵ Supreme Court Appeal No. 82 of 2001

Having reviewed the nature of a contract of employment and the procedural rules governing termination of such contracts, it now remains to assess the extent and manner in which the Courts in Zambia have enforced the requirement that the employer must act fairly by affording the employee an opportunity to make representations before passing a punitive judgment in the form of dismissal from employment. The subsequent Chapter therefore seeks to address the question as to what principles do the courts take into account in determining the question of fairness, and to what extent must the employer satisfy himself that the conduct of the employee is indeed in breach of the obligations arising under the contract of employment.

Chapter Three

3.0 Introduction

Dismissal, as earlier noted, allows an employer to terminate an employee's contract of employment in instances where the employee conducts himself in a manner that contravenes the terms, express or implied, of the contract of employment.⁵⁶ Where however the dismissal is effected in circumstances considered as unfair or in contravention of the law, the dismissed employee may bring a wrongful or unfair dismissal claim against the employer. A significant question that often arises is what principles do the Courts take into account in resolving the inevitable dispute that often arises between the dismissed employee and the dismissing employer as to justification or otherwise of a purported dismissal? This Chapter has attempted to address this question by reviewing the precise role of the Court in resolving disputes relating to dismissal, in which regard a critical review of both the Zambian and English jurisprudence on the subject has been undertaken. The author has also examined the extent to which the legislature in both jurisdictions has supplemented the common law by defining the principles to be employed by the Courts in determining whether or not a purported dismissal is justified.

3.1 Justification of Dismissal - The Role of the Court

The Courts are entrusted with the vital responsibility of resolving disputes that may and do often arise between employers and employees regarding the question of justification or otherwise of an employee's dismissal from employment. The role of the Court must however be carefully distinguished from that of the employer who is the competent authority vested with power to discipline an employee in all such cases where disciplinary action is warranted. An employer may thus properly be vested with power to investigate an allegation made against an employee,

⁵⁶ Mwenda, *Employment Law in Zambia*, 41.

and where a right to be heard exists, to afford the employee with an opportunity to show cause why disciplinary action should not be taken against him or her, after which the employer may properly dismiss the employee if, following the investigation and hearing process, the employer holds the view that the employee had breached his obligations under the contract of employment.

In the case of *Attorney-General v Richard Jackson Phiri*, the Supreme Court of Zambia sought to highlight the role of the Court in cases of dismissal wherein it categorically noted that it is not the function of the Court to interpose itself as an Appellant Tribunal within the domestic disciplinary procedures to review what others have done.⁵⁷ The duty of the Court is to examine if there was the necessary disciplinary power and if such power was exercised in due form. The Supreme Court thus held:

...the Court cannot be required to sit as a Court of appeal from the decision of the Employer to review its proceedings or to inquire whether its decision was fair or just or reasonable. In a case such as this, the Court ought to have regard only to the question whether there was power to intervene, that is to say, the question whether the Employer had valid disciplinary powers and, if so, whether such powers were validly exercised.⁵⁸

Thus where a dispute arises as to whether dismissal from employment is justified, the Courts in Zambia have in earlier decisions taken the position that its role is not to assess whether the view held by the employer as to the employee's breach of his obligations was fair, just or reasonable, but that the role of the Court is to simply examine whether or not the employer had in the circumstances the necessary disciplinary power and whether such power was validly exercised.

The above proposition, however, appears to be at variance with both the approach obtaining in the United Kingdom regarding the question of justification of dismissal, as well as the approach adopted by the Courts in Zambia in more recent decisions on the same subject. It is in view of

⁵⁷ (1988 - 1989) Z.R. 121 (S.C.); Also see *Kambatika v Zambia Electricity Supply Corporation Limited* Appeal No. 14 of 2000 (unreported)

⁵⁸ *Attorney-General v Richard Jackson Phiri* (1988 - 1989) Z.R. 121 (S.C.), 124

this variation that the author finds it necessary to undertake a comparative evaluation of the approach taken by the English Courts on the one hand, and the varying approaches adopted by the Zambian Courts regarding the question of justification of dismissal on the other.

3.2 Justification of Dismissal under English Law

It ought to be noted from the onset that the principles governing dismissal in England have evolved over time from a position where dismissal was solely governed by common law principles to the current era where there has been significant legislative intervention which now lays down guidelines as to what principles the Courts ought to employ in assessing the question of fairness or justification of dismissal from employment. The evolution of the law of dismissal in the United Kingdom is briefly reviewed below.

3.2.1 The Common Law Position

The general rule at common law is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to his employer, he may be dismissed from employment without notice.⁵⁹ Such dismissal may arise where the employee is culpable of sufficient misconduct in his capacity as an employee.⁶⁰ A major challenge however is that common law does not define the precise degree of misconduct which will justify dismissal. Thus although generally the onus of proof lies with the employer to establish that he was justified in law in dismissing the employee, there is no rule at common law defining the degree of misconduct which will justify dismissal.⁶¹ The absence of precise guidelines for determining the question of sufficient misconduct to justify dismissal leaves this important question to the subjective determination of the Courts, a position which may lead to uncertainty and

⁵⁹ *Sinclair v. Neighbour* [1967] 2 Q.B. 279

⁶⁰ *Boston Deep Sea Fishing Co. v. Ansell* [1888] 39 Ch. D 339

⁶¹ *Clouston v. Corry* [1906] A.C. 122

inconsistency in the law, and which may ultimately compromise the levels of protection conferred by the Courts to an employee faced with dismissal at the whim of the employer. Thus in order to fortify this undesired position, the legislature in the United Kingdom has intervened by prescribing the burden to be discharged by the employer in justifying dismissal.

3.2.2 Legislative Intervention in the United Kingdom

Legislation in the United Kingdom has supplemented and significantly modified the common law position regarding dismissal. Worth noting are the prescriptions in sub-paragraph 1 and sub-paragraph 8 of paragraph 6 of Schedule 1 to the *Trade Union and Labour Relations Act 1974* which provisions respectively provide for the existence of a ground of dismissal which would justify it, and the taking by an employer of the decision to dismiss an employee in a reasonable way. Sub-paragraph 1(a) of paragraph 6 of the said schedule provides:

In determining for the purposes of this Schedule whether the dismissal of an employee was fair or unfair, it shall be for the employer to show- (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal.

Sub-paragraph 8 of paragraph 6 of the aforesaid Schedule further prescribes that:

The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee.

The foregoing provisions were aptly construed in the case of *British Home Stores Ltd v Burchell*,⁶² and have since strongly influenced the development of the law of dismissal in the United Kingdom. This case has led to the birth of what has popularly come to be known as the *Burchell Test*, which lays down the fundamental principles now followed by the Courts in determining the question of fairness and justification of dismissal in the United Kingdom.

⁶² [1980] I.C.R 303 (E.A.T.)

It is worth noting also that the requirement that the employer acts 'reasonably' in dismissing an employee is equally prescribed in the *Employment Rights Act 1996, Section 98* (U.K) which equally stipulates that the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.⁶³

3.2.3 The Burchell Test

As noted above, the Burchell Test was laid down in the case of *British Home Stores Ltd v Burchell*.⁶⁴ In that case the appellants believed that the respondent employee had been involved in dishonesty relating to staff purchases, including the purchase of a pair of expensive sunglasses at an undervalued price. The respondent explicitly denied the allegations but the appellants dismissed her having inferred her dishonesty from statements given by her co-employees. She applied to the industrial tribunal which upheld her claim that she had been unfairly dismissed.

On appeal, the Employment Appeals Tribunal took into account the prescriptions of sub-paragraph 1 and sub-paragraph 8 of paragraph 6 of Schedule 1 to the *Trade Union and Labour Relations Act 1974* and noted the role of the Tribunal (Court) in the following terms:

What the Tribunal have to decide is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question entertained a suspicion amounting to a belief in the guilt of the employee of that misconduct at the time.⁶⁵

The presiding Judge, Anord J., further emphasized that this single question is essentially made up of three key elements (which now constitute the *Burchell Test*):

⁶³ The Employment Rights Act 1998, Sections 98(1), 98(2) and 98(4) (a) , construed in *Midland Bank plc v Madden*[2002] 2 All E.R at p. 741

⁶⁴ [1980] I.C.R 303 (E.A.T.)

⁶⁵ *British Home Stores Ltd v Burchell* [1980] I.C.R 303 (E.A.T.), 304

- 1) that there must be established by the employer the fact of his belief that the employee was guilty of the alleged misconduct;
- 2) that the employer must have had in his mind reasonable grounds upon which he sustained that belief; and
- 3) that the employer, at the time of forming the belief in question, must have carried out as much investigation into the matter as was reasonable in the circumstances.

Anord J. further defined the role of the tribunal as well as the standard of proof to be satisfied by the employer in cases of dismissal in the following terms:

It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only on the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is Reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.⁶⁶

The Burchell Test has been recited with approval in recent cases in the United Kingdom. In *Yorkshire Housing Ltd v Swanson*, Honorable Justice Cox DBE noted the following in respect of the respondent who had been dismissed on grounds of suspicion of misconduct:

It is common ground that the tribunal were required to ask themselves the following questions in this case: As at the time of the claimant's dismissal; did the respondent believe that the claimant was guilty of the misconduct alleged? If so, were there reasonable grounds for that belief? And at the time it formed that belief, had it carried out as much investigation as was reasonable in the circumstances?⁶⁷

And in the subsequent case of *Manor Oak (PMG) Ltd v A Kelly*, lady Smith J. also noted:

....in a case where an employee is dismissed on grounds of misconduct, the guidance provided in the case of Burchell is relevant: the single question (to which we have referred above) is made up of three elements namely; the fact of the employer's

⁶⁶ Per Anord J in *British Home Store Limited v Burchell* [1980] I.C.R 303 (E.A.T.)

⁶⁷ [2008] Appeal No. UKEAT/0057/07/JOJ

belief, the need for the employer to have had reasonable grounds on which to entertain that belief, and the need for the employer to have carried out a reasonable investigation by the time he formed his belief that the employee had committed the misconduct in question.⁶⁸

Thus in a nutshell the *Burchell Test* requires the employer to show that at the time he dismissed the employee, he had a genuine belief that the employee was guilty of the alleged misconduct; that this belief was held on reasonable grounds, and that such grounds were sustained after conducting a reasonable investigation. In determining whether or not dismissal was fair and justified the Court or tribunal is not concerned with whether the dismissed employee was guilty or innocent of the alleged misconduct,⁶⁹ but merely examines whether the employer had reasonable grounds for believing that the employee was guilty of misconduct at the time of the dismissal. These principles constitute the fundamental guidelines now followed by the Courts when faced with the question of justification of dismissal in the United Kingdom.

3.3 Approach adopted by the Zambian Courts in assessing Justification of Dismissal

Unlike the position obtaining in the United Kingdom, there appears to have been very minimal legislative intervention in the law of dismissal in Zambia. In particular the Employment Act and other pieces of legislation governing termination of employment in Zambia do not prescribe the precise principles and standard to be satisfied in determining whether or not dismissal is justified. The question of justification of dismissal has largely been left to the subjective determination of the Courts, a situation that has lead to considerable inconsistencies in the approaches taken by the Courts in so far as its role and the principles to be followed in determining the question of justification of dismissal are concerned.

⁶⁸ [2009] Appeal No. UKEATS/0070/08/BI; Also see *Midland Bank plc v Madden*[2002] 2 All E.R., 741-50

⁶⁹ The Tribunal noted in the *Burchell* case that the dismissed employee will not have been prosecuted and therefore there is in such a case no finding by a competent criminal court that the employee is guilty of the alleged misconduct or dishonesty.

Three notable distinct positions have over time been taken by the Supreme Court: on the one limb the Court has proceeded on the premise that allegations in respect of which an employee is dismissed must be proved;⁷⁰ in the second limb the Court has taken the view that the duty of the Court in cases of dismissal is to examine if the employer had the necessary disciplinary power and if such power was validly exercised (and not to interpose itself as an appellate tribunal to review whether the employer's view as to the employee's guilt was fair, just or reasonably)⁷¹; and in the third and more recent limb the Court has held that the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question: his function is to act reasonably in coming to a decisions to dismiss the employee.⁷² These varying approaches are examined in more detailed below.

3.3.1 Grounds upon which an Employee is Dismissed must be Substantiated or Proven

This Supreme Court of Zambia has in past decisions held the view that dismissal on grounds of misconduct must be on proven grounds. The Court has particularly held that the grounds upon which an employee is dismissed must be substantiated, so that failure by the employer to do so will render the dismissal unfair. In assessing whether or not dismissal is justified, the Courts have not been concerned with whether the employer had in his mind a genuine or reasonable belief as to the employee's guilt of the alleged misconduct, but have proceeded to examine whether the allegations made against the employee are substantiated. Thus in the case of *Bank of Zambia v Joseph Kasonde*⁷³ the respondent was dismissed on grounds of dishonest misconduct. He challenged the dismissal on grounds that the allegations against him where not proved. The

⁷⁰ See *Bank of Zambia v Joseph Kasonde* (1995-1997) Z.R. 28 (S.C.) – the Supreme Court upheld the finding by the trial Judge that the allegations against the plaintiff were not proved hence the dismissal was wrongful.

⁷¹ *Attorney General v. Richard Jackson Phiri* (1988 - 1989) Z.R. 121 (S.C.)

⁷² *Chimanga Changa Limited v Stephen Chipango Ngombe*, Supreme Court Judgment No.5 of 2010

⁷³ *Bank of Zambia v Kasonde* (1995-1997) Z.R. 238 (S.C.)

trial Judge found as a fact that the allegation of dishonesty was not proven hence held that the dismissal was wrongful. In outlining the special circumstances that warranted the ordering of the respondent's reinstatement, the Judge particularly noted that "dismissal based on misconduct must be on proven grounds". And on appeal the Supreme Court upheld the finding of the trial Judge, noting in particular that "the allegations against the plaintiff were not proved."⁷⁴

Similarly in *Zambia Airways Corporations Limited v Gershom Mubanga* the Supreme Court ordered reinstatement of the respondent on the basis, *inter alia*, that the allegations to the effect that he had used the appellant's aircraft for the carriage of personal goods as well as telex facilities without paying for the services were not proved against the respondent.⁷⁵ And in *Lusaka Engineering Company Ltd v Mukelabai*, a belief held by the appellant that the respondent employee had joined an illegal strike was not sufficient to justify the respondent's dismissal.⁷⁶ In light of evidence adduced to the contrary, the dismissal was held to be wrongful hence the respondent was awarded damages.

Clearly the foregoing cases illustrate that in determining whether or not dismissal was fair and justified, the Court was concerned with whether the allegations against the dismissed employee were proved as opposed to the question whether the employer had reasonable grounds for believing that the employee had committed the alleged misconduct.

3.3.2 The Role of the Court is not to interpose itself as an Appellate Tribunal

In contrast to the above approach in which the Supreme Court required that allegations against the dismissed employee must be proven, the same Court has in this limb of cases proceeded on

⁷⁴ Per Chirwa JS at page 239

⁷⁵ (1990-1992) Z.R. 149 (S.C.)

⁷⁶ Supreme Court of Zambia Appeal No. 12 of 1992 (Unreported)

the basis that the role of the Court in cases of dismissal is to simply examine whether or not the employer had in the circumstances the necessary disciplinary power and whether such power was validly exercised, and not to assess whether the view held by the employer as to the employee's guilt was fair or just or reasonable.⁷⁷ The Supreme Court has in this regard noted that it is not the function of the Court to act as an appellate tribunal to assess whether the employer's decision as to the employee's guilt was fair or just or reasonable.

In the case of *Attorney General v Richard Jackson Phiri* the Supreme Court of Zambia held in respect of the respondent's challenge of his dismissal from the civil service that once the correct procedures have been followed, the only question which can arise for the consideration of the Court would be whether there were in fact facts established in support of the employer's exercise of disciplinary power, for any exercise of powers will be regarded as bad if there is no substratum of fact to support the same. The Court defined its role in the following terms:

...the Court cannot be required to sit as a Court of Appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or just or reasonable. In a case such as this, the court ought to have regard only to the question whether there was power to intervene, that is to say, the question whether the Public Service Commission had valid disciplinary powers and, if so, whether such powers were validly exercised.⁷⁸

And in *Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango* the Supreme Court of Zambia similarly held that "it is not the function of the Court to interpose itself as an Appellant Tribunal within the domestic disciplinary procedures to review what others have done. The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised in due form".⁷⁹

⁷⁷ *Attorney General v Richard Jackson Phiri* (1988 - 1989) Z.R. 121 (S.C.)

⁷⁸ *Ibid.*, 124.

⁷⁹ Supreme Court Judgment No. 7 of 2006

3.3.3 The function of the employer is to act Reasonably in reaching a decision to Dismiss

Recent decisions by the Supreme Court of Zambia have shown a radical departure from both the requirement that the employer must prove or substantiate the allegation of misconduct leading to dismissal, and from the proposition that it is not the role of the Court to inquire whether the employer's decision in dismissing the employee was fair, or just or reasonable, but instead the Court now appears to emphasize on the need for the employer to act 'reasonably' in reaching a decision to dismiss an employee. This position is highlighted in the case of *Chimanga Changa Limited v Stephen Chipango Ngombe* wherein the Supreme Court of Zambia held that the employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question; his function is to act reasonably in coming to a decision.⁸⁰ This pronouncement, interestingly, appears to be more inclined towards the approach currently obtaining in the United Kingdom. Thus a critical review of cases in which the Court has taken this approach is necessary in order to appreciate the basis, rationale and impact, if any, of this diversion on the extent of protection conferred by the courts to an employee who is faced with dismissal from employment in Zambia.

3.4 Conclusion

This Chapter has attempted to review the role of the Court in assessing justification of dismissal from employment. The Chapter has reviewed the practice currently obtaining in the United Kingdom on the one hand and the Zambian practice on the other. It has been observed that the common law position relating to dismissal in the United Kingdom has been substantially supplemented and modified by legislative intervention. It has in this regard been observed that under the law obtaining in England, dismissal is justified where the employer is able to show that

⁸⁰ Supreme Court Judgment No. 5 of 2010

at the time he dismissed the employee, he had a genuine belief that the employee was guilty of the alleged misconduct.

In contrast, the study has shown that there has been very minimal legislative intervention in the law of dismissal in Zambia. The existing legislation does not outline the precise principles to be employed by the Courts in determining whether or not dismissal is justified in any given circumstances. The question of justification of dismissal has in Zambia been left to the subjective determination of the Courts, a situation which has resulted in varying approaches being employed by the Courts over time.

It has however been observed that in more recent decisions, the Supreme Court of Zambia has sought to adopt an approach similar to that obtaining in the United Kingdom, particularly emphasizing that the employer must act reasonably in reaching a decision to dismiss the employee. The author has thus examined the reasonable investigations approach in the subsequent Chapter, with a view of highlighting the basis, rationale and impact, if any, of the said approach on the extent of protection conferred by the Courts to an employee who is faced with dismissal from employment at the whims of the employer.

Chapter Four

4.0 Introduction

The Supreme Court of Zambia has recently held in the case of *Chimanga Changa Limited v Stephen Chipango Ngombe*⁸¹ that dismissal from employment is justified provided the employer carried out investigations as a result of which he reasonably believed that the employee is guilty of misconduct. The Court has in particular held that the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. The Court has also noted that the function of the employer is to act reasonably in coming to a decision to dismiss the employee. This Chapter endeavors to evaluate the approach taken by the Court in the afore-cited case. The author has in this regard attempted to identify the basis of the foregoing legal proposition, its rationale and the impact it may have on the extent of protection conferred by the Courts to a vulnerable employee who is faced with dismissal from employment at the whims of his employer. The author has further sought to identify the strengths and weaknesses, if any, which this development may bring to the law of dismissal from employment in Zambia.

4.1 The case of *Chimanga Changa Limited v Stephen Chipango Ngombe*

The case of *Chimanga Changa Limited* involved an appeal from the decision of the Industrial Relations Court allowing the Respondent's claim that he was wrongly and unfairly dismissed from employment by the Appellant. The Respondent was employed by the Appellant company as a truck driver whose responsibilities included delivery of mealie meal to various destinations. The procedure at the company was that before a truck left the premises for deliveries, it passed

⁸¹ Supreme Court Judgment No. 5 of 2010

through a weigh bridge. On the material date, the Respondent was sent to deliver 427 bags of mealie meal to different parts of Ndola. He testified that on the date in question, he proceeded to make the assigned deliveries without passing the truck through the weigh bridge due to congestion, and that the warehouse supervisor told him to just go without passing the truck through the weigh bridge. The Respondent later returned to the warehouse with some undelivered 100 bags most of which were later found to be under weight. The Respondent was subsequently called and asked to explain which he did. He was thereafter placed on indefinite suspension and a week later he received a letter of dismissal.

In seeking to justify the dismissal on appeal, one of the arguments advanced by counsel for the Appellant was that the Appellant not only complied with the rules of natural justice, but also carried out investigations upon which they established the Respondent's culpability of the preferred charge. Counsel for the Appellant contended that there was evidence indicating that the Respondent was entrusted with 427 bags of mealie meal for delivery to various destinations, all of which were checked and verified as to their condition and quantity prior to being loaded on the truck. Counsel also pointed out that the reweighing of the 100 bags was witnessed by the Respondent, the Union Chairman and his Vice, the Chief Security Officer and the Human Resources Officer. Accordingly, counsel argued that this was a transparent process which established that there was a loss and/ or discrepancy in the remaining mealie meal. Counsel for the Appellant further indicated that in the letter of dismissal, it was intimated that the Appellant's investigations had revealed that the Respondent had connived with lorry mates to drain mealie meal from the customer's bags.

In support of his submission, counsel for the Appellant referred the court to two passages by the learned authors of *Selwyn's Law of Employment*, 4th Edition wherein it is stated:

There are certain limits to the extent an employer may make enquires into an incident, particularly if the charge is a serious one, such as theft, for there may well be an improper interference with the process of justice.... The important thing is that the employer does not have to prove that an offence took place, or even satisfy himself beyond reasonable doubt that the employee committed the act in question. The function of the employer is to act reasonably in coming to a decision.⁸²

The second passage that the counsel referred the Court to states:

At the end of the day the employer must satisfy the three fold test laid down in *British Home Stores v Burchell*. First the employer must show that he genuinely believes the employee to be guilty of the misconduct in question; second, he must have reasonable grounds upon which to establish that belief; thirdly, he must have carried out such investigation into the matter as was reasonable in the circumstances.⁸³

Counsel for the Appellant thus concluded by submitting that the trial Court overlooked the fact that the Appellant not only complied with the rules of natural justice, but also carried out reasonable levels of investigation in the case.

In delivering Judgment on the point, the Supreme Court of Zambia made the following observation at pages 24-25 of its Judgment:

The Appellant seems to have been satisfied, on the basis of its investigations, that the Respondent was responsible for the siphoning of mealie meal from the bags which were underweight. On this issue Mr. Matibini referred us to *Selwyn's Law of Employment* 4th Edition. According to this literature, what is crucial is that an employer carried out investigations as a result of which he reasonably believed that the employee is guilty of misconduct.⁸⁴

The Court further proceeded to hold that:

The Appellant therefore believed, from its investigations, that the Respondent was responsible for the loss. According to the learned authors of *Selwyn's Law of*

⁸² Norman Selwyn, *Selwyn's Law of Employment*, 4th Edition (Oxford: University Press, 2000), 169.

⁸³ Ibid.

⁸⁴ *Chimanga Changa Limited v Stephen Chipango Ngombe*, Supreme Court Judgment No. 5 of 2010 at p. 25

Employment, the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. 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.⁸⁵

The Supreme Court thus concluded that the dismissal was not wrongful as the Court was satisfied that the Appellant carried out its investigations on the basis of which the Respondent was dismissed.

4.2 A Critical Analysis of the approach adopted by the Supreme Court

Two significant aspects of the above Judgment are worth examining: firstly, the basis of the holding that the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question, but that his function is to act reasonably in coming to a decision; and secondly, the efficacy in the pronouncement that the rationale behind this is that an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens. These aspects are examined below.

4.2.1 The Reasonable Investigations Approach

It is apparent from a critical review of the case of *Chimanga Changa Limited* as well as the proposition advanced by the learned authors of *Selwyn's Law of Employment 4th Edition* that the principle that the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question but that his function is to act reasonably in coming to a decision has its roots in the English law of dismissal. Interestingly, however, counsel for the Appellant in the case of *Chimanga Changa Limited* opted,

⁸⁵ Ibid., 25 -26.

in disregard of the existing precedents as may be seen in the various rulings of the Supreme Court on the question of justification of dismissal, to argue the case on the basis of the authority of the learned authors of *Selwyn's Law of Employment 4th Edition* which literature evidently seeks to advance the position of the law of dismissal currently obtaining in the United Kingdom.

As earlier alluded to, the learned authors of *Selwyn's Law of Employment 4th Edition* have addressed the issue of justification of dismissal by adopting the threefold test laid down in English case of *British Home Stores v Burchell*.⁸⁶ This test requires that firstly the employer must show that he genuinely believes the employee to be guilty of the misconduct in question; secondly, that the employer must have reasonable grounds upon which to establish that belief; and thirdly, that the employer must have carried out such investigations into the matter as were reasonable in the circumstances. Thus provided these three elements are satisfied, dismissal arising there from is upheld as justified by the Courts.

It needs to be pointed out that although on the face of it one may find it desirable and convenient to adopt the Burchell test as the Supreme Court did in the *Chimanga Changa Limited case*, caution ought to be exercised in so doing particularly in view of the fact, as earlier alluded to, that the law of dismissal in England has to a great extent been modified by legislative intervention. In particular, the Burchell test was designed to give force to the provisions of sub-paragraph 1(a) and sub-paragraph 8 of paragraph 6 of the *Trade Union and Labour Relations Act, 1975*, which provisions have also been replicated in the section 98(4) of the *Employment Rights Act, 1996* of the United Kingdom dictating that dismissal is justified provided the employer held a genuine belief of the guilt of the employee provided such belief was held on

⁸⁶ [1980] I.C.R 303 (E.A.T.)

reasonable grounds and the employer carried out such investigation into the matter as was reasonable in the circumstances.

It follows therefore that the consequences of endorsing the threefold test by the Supreme Court of Zambia in the *Chimanga Changa case* are twofold: on the first and more positive note, the test lays down concrete guidelines to be followed by the Courts when tasked with the enormous but fundamental duty of resolving inevitable disputes that often arise between dismissed employees and the dismissing employer particularly with regard to justification of a purported dismissal. On the second and seemingly negative note, endorsement of the threefold test as enunciated in *Burchell* case may be viewed as one undesired instance where English legislation (particularly passed after 17th August 1911) is allowed to indirectly manifest its force into the Zambian legal regime hence influencing the development of the law of dismissal in Zambia.⁸⁷ In an ideal situation therefore, it would be prudent for the Zambian legislature to enact legislation that will supplement the common law and provide concrete guidelines as to what principles the Courts should employ in addressing the question of justification of dismissal in Zambia.

Further, it needs to be stressed that adoption of the *Burchell test* of reasonableness by the Courts in Zambia ought to be exercised with caution and within clear and well stipulated guidelines. This is in view of the fact that while the test lessens the burden of proof to be discharged by the employer (i.e. the employer need not prove or substantiate the allegation), it may nonetheless have the devastating potential of compromising the extent of protection conferred by the Courts to an employee who is faced with dismissal at the whims of the employer. Clearly, the test of

⁸⁷ See The English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia, Section 2

reasonableness if not properly administered has the potential of stripping off the means of livelihood of an employee who is in no way culpable of the alleged misconduct.

4.2.2 Erosion of Trust in the Employment Relationship

It is interesting to note the pronouncement made by the Supreme Court in the *Chimanga Changa Limited case* as regards the rationale behind the proposition that the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question but that his function is to act reasonably in coming to a decision, which rationale is stated in the following terms:

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.

While it remains true that an employment relationship is anchored on trust and that once such trust is eroded the very foundation of the employment relationship weakens, one remains to wonder the extent to which the Courts would confer protection to vulnerable employees if an employee should be dismissed solely on the basis of 'erosion of trust in the employment relationship', regardless of the absence of positive actions taken by the employer to review the circumstances surrounding such erosion of trust in the said relationship. Undoubtedly, one would argue and more conveniently so that basing a decision to dismiss an employee solely on erosion of trust would seriously compromise the level of protection conferred to the employee.

It would appear, from a closer review of the *Burchell case*, that a more rational basis for the reasonable investigation approach would be that stated by Anold J. in his holding to the effect that the employer is not a competent tribunal to determine the guilty or innocence of an alleged employee, hence in assessing whether or not dismissal is justified, the Court should not be concerned with whether the dismissed employee was guilty or innocent of the offence he is

charged with, but that the Court must only be concerned with the question whether the employer had reasonable grounds for believing that the employee had committed the misconduct in question. Anold J. thus put the point in the following terms:

It is important always in these cases to bear in mind, as we bear in mind and choose to say, that on no view of the matter did the industrial tribunal, nor does this tribunal, adjudicate upon the guilt or innocence of Miss Burchell. Miss Burchell has never been prosecuted. Miss Burchell has never had any finding against her by any tribunal, certainly not by this tribunal, that she is guilty of any offence of dishonesty which the employers believed she had committed.....She is entitled to go ahead as a person who has not been convicted of, or charged with, any criminal offence.⁸⁸

4.3 Conclusion

This Chapter has reviewed the case of *Chimanga Changa Limited v Stephen Chipango Ngombe* with a view of identifying the basis, rationale and impact of the proposition of reasonable investigation employed by the Courts in assessing justification of dismissal in Zambia. It has been observed that despite there being precedents indicating the earlier position of the Supreme Court as regards the burden to be discharged by the employer in justifying dismissal and the role of the Court in assessing justification of dismissal, the Supreme Court endorsed the position of the law currently obtaining in the United kingdom, which position was enunciated in the English case of *British Home Stores v Burchell*⁸⁹ and has since been articulated by the learned authors of *Selwyn's Law of Employment 4th Edition*. The author has observed that while this approach may have the benefit of introducing important guidelines regarding what principles the Courts ought to employ in assessing the question of justification of dismissal, the development also brings with it the negative consequence of indirectly allowing English legislation to have a bearing on the development of the law of dismissal in Zambia. The author has also observed that the adoption of the reasonable investigations approach, while having its own benefits, must be

⁸⁸ Per Anold J. in *British Home Stores v Burchell* [1980] I.C.R 303 (E.A.T.)

⁸⁹ [1980] I.C.R 303 (E.A.T.)

employed with considerable caution as it may have the potential of compromising the extent of protection conferred by the Courts to vulnerable employees particularly for purposes of ensuring employment security. The author has in this regard observed that it would be desirable for the legislature in Zambia to formulate precise legislative guidelines laying down the principles to be employed by the Courts when faced with the question of justification of dismissal.

Chapter Five

5.0 GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 Concluding Observations

Enhanced employment security aimed at providing and sustaining an employee's source of income and ultimately mitigating the levels of poverty undoubtedly stands at the core of every viable economy. The devastating economic and social consequences arising from loss of employment have over the years prompted the gradual development of legal safeguards meant to curb arbitral termination of contracts of employment at the whims of the employer, particularly in view of the fact that employees stand in a weaker position as compared to that of the employer in an employment relationship. A key safeguard which the law seeks to provide is by seeking to ensure that dismissal from employment is justified and is within the confines of the law, failing which an affected employee may challenge his dismissal in the Courts of law for being unfair, wrongful or unlawful. The Courts have in this regard endeavored to develop key principles which are taken into account in determining the question of justification of dismissal from employment.

In Zambia, the question of justification of dismissal has to a large extent been left to the subjective determination of the Courts, a situation which has lead to considerable inconsistencies in the approaches adopted by the Courts in so far as the Court's role and the principles to be followed in determining the question of justification of dismissal is concerned. While on the one hand the Courts have proceeded on the premise that allegations in respect of which an employee is dismissed must be substantiated or proved;⁹⁰ the Courts have in other cases taken the view that

⁹⁰ Bank of Zambia v Joseph Kasonde (1995-1997) Z.R. 28 (S.C.)

the duty of the Court in cases of dismissal is only to examine if the employer had the necessary disciplinary power and if such power was validly exercised, and not to interpose itself as an appellate tribunal to review whether the employer's view as to the employee's guilt was fair, just or reasonable.⁹¹ And in the more recent cases the Supreme Court of Zambia has gone further to engage itself in the task of reviewing whether the view held by the employer as to the employee's guilt was reasonable so as to justify the resultant dismissal, in which case the Court has held that the employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question: his function is to act reasonably in coming to a decision to dismiss the employee.⁹²

Thus a critical review of the law of dismissal currently obtaining in Zambia highlights a number of weaknesses most notable of which include the following: Firstly, whereas there has been significant legislative intervention in the law of dismissal in England, which intervention is aimed at setting clear guidelines to be followed by the Courts in resolving the question of justification of dismissal, little legislative intervention has been put in place for purposes of supplementing or modifying the law of dismissal in Zambia. This situation has undoubtedly left the Courts with no clear guidelines as to what principles they ought to employ when faced with the vital question of justification or fairness of dismissal in any given circumstances. The existing Zambian legislation does not outline the precise principles to be employed by the Courts in determining whether or not dismissal is justified. The question of justification of dismissal has thus been left to the subjective determination of the Courts, a situation which has resulted in varying approaches being adopted by the Courts hence depriving potential litigants with the

⁹¹ Attorney General v. Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C.)

⁹² Chimanga Changa Limited v Stephen Chipango Ngombe, Supreme Court Judgment No.5 of 2010

requisite certainty in the labour regime upon which such parties may make informed decisions as to the legality or otherwise of any contemplated termination of contracts of employment.

Further, although Section 26A of the Employment Act attempts to modify the common law position by imposing a requirement that an employer shall not terminate the services of an employee on grounds related to conduct or performance without affording the employee an opportunity to be heard on the charges laid against him, the efficacy of this provision is compromised by the limitation in terms of the scope of its application: Section 26A has been strictly construed by Supreme Court of Zambia as only applying to oral contracts by virtue of falling under Part IV of the Employment Act.⁹³ This has resulted in the vast majority of vulnerable employees who serve under written contracts of employment being unable to utilize the protection conferred by this otherwise well intended provision.

It is also worth noting that although Zambia has ratified the ILO (Termination of Employment) Convention No. 158 of 1982 which equally seeks to enhance employment security, a litigant in Zambia cannot rely on its provisions due to the problem of internalisation or domestication. As earlier indicated, the Courts have categorically held that international instruments on any law, although assented to or ratified by Zambia, cannot be applied in the country unless they have been domesticated.⁹⁴ It follows therefore that due to non domestication, the ILO (Termination of Employment) Convention No. 158 of 1982 and many such other international instruments whose objective is to enhance employment security cannot be relied upon by a litigant in the event of breach by the employer of an obligation contained therein. These weaknesses have severely compromised the level of protection conferred to vulnerable employees in Zambia.

⁹³ Barclays Bank (Z) Ltd v Zambia Union of Financial Institution and Allied Workers (2007) Z.R. 106

⁹⁴ Zambia Sugar Plc v. Nanzaluka, Supreme Court Appeal No. 82 of 2001

5.2 Recommendations

The weaknesses in the law of dismissal as highlighted above undoubtedly call for proactive action if the objective of protecting vulnerable employees and enhancing employment security is to become a reality. The following key recommendations are worth consideration:

Firstly, the legislature in Zambia must prescribe the burden to be discharged by the employer for purposes of justifying termination of a contract of employment by way of dismissal. Such legislative intervention will ensure that clearly stipulated guidelines are followed in all cases where the Courts are called upon to resolve the inevitable disputes as to justification or fairness of dismissal for employment. This will in essence eliminate the possibility of inconsistencies in approaches adopted by the Courts in so far as the principles to be employed in determining whether or not dismissal from employment is justified are concerned.

Secondly, the Supreme Court of Zambia, being the highest Court of the land, must strive to deliver consistent Judgments in so far as stipulating principles to be employed by the lower Courts when faced with the question of justification of dismissal is concerned. Such consistency in the pronouncements made by the highest Court will provide certainty and thus enhance the level of employment security conferred on employees who stand the risk of being subjected to the arbitral whims of their superior employers.⁹⁵

Thirdly the Courts in Zambia must realize the need to exercise caution in importing foreign principles into the law of dismissal in Zambia. For instance, while the threefold test of reasonableness in justifying dismissal has sufficient safeguards in legislative prescriptions in the

⁹⁵ Contrast the positions taken on the question of justification of dismissal in the cases of *Attorney General v. Richard Jackson Phiri* (1988 - 1989) Z.R. 121 (S.C.), *Bank of Zambia v Joseph Kasonde* (1995-1997) Z.R. 28 (S.C.), and *Chimanga Changa Limited v Stephen Chipango Ngombe*, Supreme Court Judgment No.5 of 2010

United Kingdom, there is no such legislative backing in Zambia and as such, may have the potential of compromising the extent of protection conferred to a vulnerable employee who stand to lose his means of livelihood regardless of whether or not he is innocent of the alleged misconduct. Further, the blind adoption of foreign principles has, as earlier indicated, resulted in an undesired situation whereby external legislative proclamations indirectly influence the development of the law of dismissal in Zambia.

Fourthly, the ambit of Section 26A which is meant to supplement the common law by introducing a legislative requirement for the observance of rules of natural justice must be extended to all contracts of employment as opposed to being confined to oral contracts only. There is need to enact a general legislative provision which will strengthen the requirement for observance of rules of natural justice regardless of the form or nature of the contract of employment under which one is employed.

And fifthly, the executive branch of government in Zambia must take proactive action in domesticating labour conventions meant to enhance employment security at the international level. Such domestication will ensure that dismissed employees are able to rely on these important instruments in challenging dismissals effected in breach of the obligations contained therein.

The foregoing recommendations, if promptly attended to, will go a long way in the fostering positive development in the law of dismissal in Zambia, and will ultimately enhance the levels of protection conferred to vulnerable employees thereby positively contributing to the country's objective of mitigating poverty through prevention of unwarranted loss of employment.

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