



**COLLECTIVE AGREEMENTS –
DO THEY SERVE THE PURPOSE?
A ZAMBIAN CASE**

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ALICK CHILESHE KABWE

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the obligatory essay prepared under my supervision by Alick Chileshe Kabwe

ENTITLED

**COLLECTIVE AGREEMENTS – DO THEY SERVE THE PURPOSE?
A ZAMBIAN CASE**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations Governing directed research.

Signature:.....
STEVEN LUNGU
(SUPERVISOR)

Date:.....
27/12/2024

DECLARATION

I Alick Chileshe Kabwe Computer No. 99323796 do solemnly declare that this work represents my own ideas and is not a production of any other work produced or submitted by any other person to the University of Zambia or to any other Institution.

DEDICATION

This paper is dedicated to my late uncle for having inspired me to take education seriously. For this I will always remember him.

PREFACE

The Theme of this obligatory essay is ‘Do Collective Agreements serve the purpose with specific reference to Zambia’.

Chapter one covers the introductory part of the papers. Chapter two discusses the purpose of Collective Bargaining. Chapter Three looks at the main features of Collective Agreements in Zambia. Chapter Four is about the role relevant and effectiveness of Collectiveness of Collective Agreements. Chapter Five covers the erosion of the effectiveness and purpose upon which collective agreements are founded. Chapter six brings out observations and concluding remarks.

ABSTRACT

Collective Agreements regulate the Conditions of Service for represented employees and are binding on both the Union and Management. They have a force of law and hence can be enforced in the courts of law. In Zambia however, the employers especially the Government have tended not to respect the Collective Agreements which they themselves sign with trade unions. This has unfortunately resulted in litigations in Courts of Law. Sometimes the cases have taken too long to be resolved to the detriment of the employees. There is therefore need for Collective Agreements to be clothed with legal authority that would create checks and balances in such a way that abrogation would attract heavy penalties for the party concerned including senior or responsible officers of such employers.

ACKNOWLEDGEMENTS

In the first place I would like to thank my Secretary, Mrs Cordially Chiinya for typing the eye straining manuscripts and her attention to detail.

In the same vein, I would like to pay my tribute to Mr Steve Lungu who apart from supervising this work gave me valuable encouragement to soldier on even when the work seemed impossible to accomplish. To him I shall remain indebted.

I am also indebted to Mr Leemans Nyirenda who helped in proof reading the manuscript and ensure that the typing errors were corrected.

My thanks also go to my wife and children who stood by me when the going got tough as I pursued my studies at the University of Zambia. My wife deserves a special mention because she took over the running of the home as most of the time I was away from home attending evening classes.

Finally, I would like to thank my employers National Savings and Credit Bank for allowing me time off to attend classes as well as paying for my studies.

METHODOLOGY

The research has mainly utilised secondary source of data. It involved desk research reviewing library material, statutes, case law international instruments and documents.

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CHAPTER ONE

1.0 INTRODUCTION

In this chapter I will first introduce what collective agreements are and then discuss the principles governing the formation of Contracts of employment, nature of Collective Bargaining, types of Collective Bargaining and a historical perspective of Collective Agreements in Zambia.

Contracts of employment have been known to be law for many years as 'Master and Servant' contracts. There is no comprehensive definition of such a contract and the decided cases merely indicate a number of indicia or factors which are relevant to a finding that a particular contract is one of employment or "a contract of service". The presence or absence of any one such factor is not conclusive since the decision depends on the combined effect of all the relevant factors when those pointing towards employment are weighed up with those against.

The traditional approach of what constitutes a contract of service place most emphasis on the power of the employer to control the work of the employee and often contrast it with a contract with an independent contractor. The traditional distinction is that whereas the principal can merely direct what work is to be done by his agent (or independent contractor), the master may also direct how the work is to be done. The importance of the distinction between an employee and an independent contractor, agent, partner (or any legal person in another such relationship), is that certain legal rules apply to

the parties in a relationship of employment which do not apply to the latter relationships.

Some of the distinctive legal consequences of the employment relationship are:

1. An extensive duty (both at common law and statute) is placed on the employer to take reasonable care for the safety of his employee, to provide safe equipment and premises and a safe system of work.
2. An employer is vicariously liable for the faults committed by his employee in the course of employment whereas the person who engages an independent contractor is not normally liable for faults committed by him during the work he is contracted to do.
3. Many obligations are imposed on an employee by the employer as implied terms in the contract of employment which are not owed by an independent contractor
4. Some provisions confer benefits on employees such as employers' pension contributions towards employee's pension.

1.1 NATURE OF COLLECTIVE BARGAINING

The term Collective Bargaining was coined by Webbs¹ and was used to refer to negotiations concerning pay and conditions of employment between trade

¹ S & B Webb, *Industrial Democracy* (Longmans, London 1902)

unions on the one hand and either an employer or an employer's association on the other.

Many later writers² have pointed out that there are a number of different kinds of Collective Bargaining. There is, for example, nationally based collective bargaining which results in agreements covering the whole of one or more industries and workplace bargaining which results in agreements concerning a relatively small number of workers, probably only those working in one particular factory or even one particular work group. There is also bargaining which produces substantive agreement (that is agreements which deal with matters such as rates of pay, holidays and hours of work) and that produce procedural agreement such as recognition agreements (that is agreements which deal with how discussions on substantive matters should take place and how disagreements should be reconciled.).

Flanders' views on the nature of collective bargaining overlap with those of Webbs and other writers. Flanders discusses the work of Chamberlain and Kahn³ in which they argue that the three theories are held about the nature of collective bargaining.

The first is really the same as that which Flanders has called the classical view of Collective bargaining; it sees collective bargaining essentially as a means of contracting for the sale of labour.

² H A Clegg, *The systems of Industrial Relations in Great Britain* (Blackwell, Oxford 1970)

³ N W Chamberlain J W Kuhn, *Collective Bargaining*, (NC Graw Hill, New York 1965)

The second views collective bargaining as a form of industrial government; its principal function is to lay down the rules and set up the machinery for the government of industry.

The third views collective bargaining as a method of management: it stresses the functional relationship between Unions and Companies and suggests that they combine through collective bargaining, to make decisions from which they can both benefit.

These three theories are not mutually exclusive or incompatible. To a certain extent they can be seen as reflecting different stages in the historical development of collective bargaining. Flanders writes “Early negotiations were mainly a matter of fixing terms for the sale of labour; the agreements might consist of no more than standard piecework price lists. Later came the need for procedures for settling disputes on these and other issues between the parties, which sometimes took the form of setting up joint bodies possibly with an independent Chairman; this provided a foundation for the government theory. Only when eventually agreements were made on subjects that entered into the internal decision – taking process in a business enterprise was there a basis for the managerial theory of collective bargaining⁴.

1.2 TYPES OF COLLECTIVE BARGAINING – COMPARATIVE APPROACH

There are basically two types of Collective bargaining viz:

⁴ Flanders, OP. CIT PP 18 – 19

- (a) Voluntary nature; and
- (b) Legislative based

Traditionally, the hall mark of British Collective bargaining has been its voluntary nature'. Generally, Unions and employers have been left to establish their own bargaining machinery. However, in the United States of America the bulk of collective bargaining has a legislative base. The Wagner Act of 1935 which laid down the procedure for the registration of bargaining units and the recognition of bargaining rights.

In Zambia, collective bargaining is also statutory based and prescribes the nature of collective bargaining and its procedure.

According to KAHN-FREUD⁵ a collective agreement is an industrial peace treaty and at the same time a source of rules for terms and conditions of employment for the distribution of work and for the stability of jobs. Its two functions express the principal expectations of the two sides and it is through reconciling their expectations that a system of industrial relations is able to achieve that balance of power which is one of its main objectives.

To the two social functions of a collective agreement there correspond two actual or potential legal characteristics⁶ The agreement may be and in many countries is, a contract between those who made it, that is, between an employer or employers or their association or associations on the one hand and a trade union or unions on the other.

⁵ Sir Otto Kan – Freund QC, Labour and the Law, Second Edition, London Stevens and Sons (1977)

⁶ This view of the dual effect of Collective Agreements is now widely accepted – Flaunders and Cleggy, Systems of Industrial Relations – pg 55

At the same time, the agreement is also potentially and in many countries actually a legal code. In this country it is both a legally enforceable contract and a legally binding code provided all statutory procedures in its formulation and registration are followed. This is the basis upon which collective agreements are made.

1.3 COLLECTIVE AGREEMENTS IN ZAMBIA

The historical industrial legislation dates back to pre-colonial era. At the end of the British Colonial era in October, 1964, the new Republic of Zambia's attention was the focus on the sour spot of foreign domination, that of the sub-judication of the indigenous peoples to an inferior role in the economic, social and political field. Thus among the first colonial laws to be repealed was the Employment of Natives Ordinance. This brought the birth of the Employment Act 1965, CAP 512 of the Laws of Zambia.

A number of colonial statutes were amended to shed off their colonial trappings and racial orientation and the provision in the independence constitution of the new Republic that 'no law shall make any provision that is discriminatory either of itself or in its effects'⁷ was very significant in shedding off some of the colonial statutes. However, with the exception of the repeal of the employment of natives ordinance, most of the ordinances and regulations enacted during the colonial era were retained.

Almost ten years down the line, the Government allowed the former colonial laws⁸ to continue in force in matters relating to trade unions and the settlement of trade disputes. The colonial laws could not continue in the

⁷ Section 25 (i) Constitution of Zambia CAP XVI

⁸ The Trade Unions and Trade Disputes Act, CAP 507 and the Industrial Conciliation Act CAP 508

principle being the introduction of participatory democracy in industry as derived from Government Policy.

This brought about the birth of the Industrial Relations Act of 1971. The Act was passed to incorporate inter alia, the ideas mentioned above. In order to give workers unqualified right to form and belong to a trade union, the Act provided that every employee shall as between himself and his employer have the right if he so desires to take part in the formation of a trade union, or to be a member of such trade union. Where he is already a member of such trade union, he was now given the right to take part in the activities of the union and the right to election and to hold office in such a trade union. It was the 1971 Industrial Relations Act that recognized the Zambia Congress of Trade Unions as the sole representative mother body of Unions in the country where all unions were to be affiliated.

The enactment of the 1971 Industrial Relations Act became the hallmark of the revision of the labour laws in Zambia. All contracts of employment entered into through Collective Bargaining or Joint Industrial Council as it was then called were to be governed by provisions of the Industrial Relations Act. Although the 1971 Industrial Relations Act did address some of the facial trappings from the colonial past, the same was not compatible with demands of a multi party democratic state. The advent of multiple partism in the late 1980s meant that laws had to be amended to suit multi partism from the One Party Participatory Democracy and the Industrial Relations Act of 1971 was not spared. The Act was repealed and replaced with another statute the Industrial Relations of 1990.

This was further repealed and a new Act put in place which was the Industrial and Labour Relations Act of 1993 which is now in force.

Thus three months before a current collective agreement expires, the bargaining units are required to commence negotiations for the purpose of concluding a new collective agreement¹⁰

Where a Collective agreement is successfully concluded, it is signed by the collective bargaining unit. The signed agreement is then sent to the labour commissioner, who accompanied by his comments sends it to the Minister for ratification and approval. This procedure has changed from time to time at one time ratification/approval being done by the Industrial Relations Court¹¹ and at one stage requiring ratification/approval from the Prices and Income Commission set up by an Act of Parliament. When this procedure has been followed, the Collective Agreement has the binding force of the law and any breach of terms gives the party so aggrieved right to remedial action against the other party.

But the question is “how often are terms and conditions of Collective Agreements observed”?

This is the problem that this research is faced with and shall endeavour to establish in the succeeding chapters.

¹⁰ Industrial Relations Act, 1971, 1990 – Industrial and Labour Relations Act 1993.

¹¹ 1971 Act

CHAPTER TWO

2.0 PURPOSE OF COLLECTIVE BARGAINING

The fundamental principle '**pacta sunt servanda**', that contractual promises must be kept, is a very clear illustration.¹² The critical situations are those in which legitimate expectations clash. This is apt to happen where social powers support conflicting expectations, and it is at these neuralgic points that the rules of conduct become most acutely necessary. One of the primary purposes of law is the regulation of social power. The regulation of social power may involve an adjustment of conflicting expectations and the law may provide the rules designed to adjust conflicting expectations and to provide the sanctions for the enforcement of such rules. This can be said to be the main purpose of collective bargaining.

To harmonise workers' expectations with those of management.¹³

It is true that legitimate expectations of labour and those of management are normally in conflict.

2.1 **Conflicting Expectations as Source of Collective Bargaining**

Management can legitimately expect that labour will be available at a price which permits a reasonable margin for investment, and labour can equally legitimately expect that the level of real wages will not only be maintained but steadily increased¹⁴.

¹² Flanders, *Collective Bargaining. A theoretical analysis.*

¹³ Sir Otto Kan – Freund, *QC, Labour and the Law* P. 481977 Edition

¹⁴ *Ibid* Page. 49

Similarly, Management can claim a legitimate interest in obtaining for each job the most qualified worker available while labour can claim a legitimate interest in obtaining a job for each worker who is unemployed.

Management can and must always expect that the arrangements of society (through law or otherwise) ensure that labour is as mobile as possible in the geographical and occupational sense; labour must always insist that workers enjoy a reasonable measure of job security so as to be able to plan their own and their families' lives¹⁵.

Management expects to plan the production and distribution of goods or supply of services on a basis of calculated costs and calculated risks, and requires society to guarantee the feasibility of such planning by protecting it against interruption of these processes through work stoppages or strikes while labour realises that without the power to stop work collectively it is impotent and cannot get much from Management. It is from this background that interruption of work process will prove the necessary pressure to get the desired results from Management.¹⁶

Management 's interest in planning production and in being protected against its interruption is the exact equivalent to the worker's interest in planning his and his family's life and in being protected against an interruption in his mode of existence, either through a fall of his real income or through the loss of his job. Above all the

¹⁵ Ibid Page 50

¹⁶ Ibid Page 50

organisation has a mission statement, goals and objectives which it has to achieve. It is through collective bargaining that Management and employee expectations are harmonised¹⁷

Collective bargaining also protects the expectations of the consumer. One of the expectations of a consumer is that there will be an uninterrupted flow of goods and services, and it is at this point that the law may have to play an important role in reducing the number and the magnitude of industrial stoppages.¹⁸

The conflicting expectations of labour and of management are therefore reconciled through collective bargaining: Management and organised labour are able to create through collective bargaining a body of rules, and thus to relieve the law of one of its tasks. In Zambia these rules have the force of law after lodging the collective agreement with the labour commissioner for ratification by the Minister. The two sides then have at their disposal, rules which bind both sides and either side has the right to enforce these rules against the other.

In the light of what has been said it is not difficult to summarise the purposes of collective bargaining:

These can be summarised as:

(a) by bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of

¹⁷ Ibid page 51

¹⁸ Ibid Page 51

production, distribution, etc., should not be frustrated through interruptions of work.

(b) By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure.

(c) Management in collective bargaining has always been the maintenance of industrial peace over a given area and period, and that the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, of rewards, and of stability of employment.

2.2 Other Views on Purposes of Collective Bargaining

A number of authoritative writers have propounded on the purposes of collective bargaining.

In his book entitled Industrial Relations, Michael P Jackson¹⁹ quotes Flanders and explains that Flanders' view on the nature of collective bargaining overlap with those of a number of other writers; he discusses the work of Chamberlain and Kuhn²⁰ The three argue that three theories are held about the nature of collective bargaining. **The**

¹⁹ Michael Jackson, Industrial Relations. A Text book 1977. Goom Helm London, 1977, P117
²⁰ N W Chamberlain, J W Kuhn, Collective Bargaining (MC Graw Hill, New York, 1965, p117

first is really the same as that which Flanders has called the classical view of collective bargaining: It sees collective bargaining essentially as a means of contracting for the sale of labour. **The second** views collective bargaining as a form of industrial government. Its principal function is to lay down the rules and set up the machinery for the government of industry. **The third** views collective bargaining as a method of management. It stresses the functional relationship between unions and companies and suggests that they combine through collective bargaining, to make decisions from which they can both benefit.

These three theories are not mutually exclusive or incompatible. To a certain extent they can be seen as reflecting different states in the historical development of collective bargaining. Flanders writes:

”Early negotiations were mainly a matter of fixing terms for the sale of labour; the agreements might consist of no more than standard piecework price lists. Later came the need for procedures for settling disputes on these and other issues between the parties, which sometimes took the form of setting up joint bodies possibly with an independent chairman; this provided a foundation for government theory. Only when eventually agreements were made on subjects that entered into the internal decision-taking process of a business enterprise, was there a basis for the managerial theory of collective bargaining.”²¹

²¹ Michael Jackson, *Industrial Relations, A textbook*, 1977

Flanders believes that the managerial theory of collective bargaining has a great deal to offer. It stresses that labour is interested not only in the price gained through wages but also in the management of the enterprise. The only danger Flanders sees is that it might be imagined (as initially suggested, though later rejected, by Chamberlain) that **through collective bargaining trade unions are taking over or becoming part of the management function.** Such a view would be erroneous, for what unions are doing through collective bargaining is merely setting limits on management action. Management is confronted by demands from a variety of different groups wanting to fulfill their aspirations through the medium of the enterprise; work groups on the shop floor and functional groups within the managerial hierarchy, but also external groups – the suppliers of materials and of capital, shareholders and customers'. Management's task is to reach one decision which will 'bind all participants into the company's operations.'²²

However, Flanders' thesis has been criticised by Fox.²³ He argues that Flanders' criticism of the Webbs' notion of collective bargaining is erroneous. Fox suggests that Flanders made a number of errors in his comparison of individual and collective bargaining. First, Flanders used MacIver and Page's definition of an individual bargain... '... the process by which the antithetical interest of supply and demand, or buyer and seller, are finally adjusted [so as to end] in the act of exchange. The pitfall in this explanation, according to Fox, is that it is assumed that bargaining always ends "in the act of exchange'. In

²² Ibid Page 118

²³ A Fox, Collective Bargaining, Flanders and Webb.

many instances this is not the case: instead the negotiations are broken off and no exchange is concluded. As an alternative explanation Fox argues that individual bargaining should be viewed as having three distinct though normally sequential elements; first, a bargaining process during which the parties deploy arguments, present evidence and issue threats; second this element may or may not end in an agreement which adjusts the antithetical interest of buyer and seller, third, this element may or may not result in a contract into which both parties decide to enter. Fox recognises that in practice these elements may appear to be fused into a single process, but suggest that it is important to distinguish them for analytical purposes so as to emphasise that a contract may not be the end result of the bargaining process. Thus Fox argues that it is erroneous to suggest that individual and collective bargaining are different because one ends in a contract whereas the other ends in rule making; neither bargaining necessarily ends in agreement (in both cases this is a possibility, but no more).²⁴

A major conclusion of Flanders's line of reasoning is that the main function of collective bargaining and trade unionism is political rather than economic. The argument is that workers are concerned now just as much, if not more, with issues of management as they are with economic questions such as wage rates. Thus, Flanders gives support to Chamberlain and Kuhn's notion of 'managerial bargaining', through which workers try to influence decision making in the enterprise, and to the view that workers join unions, and unions

gain their **raison d'être**, from their non-economic activity (they represent an interest group and enhance the status of workers,: Fox recognises that the evidence on the motives of unions in undertaking bargaining and of workers in joining unions, is at times contradictory and inconclusive). However, he argues that the intensity of conviction, effort, and feeling which many trade unionists appear to invest in pay claims hardly seems to be given sufficient recognition and weigh in favour of Flanders analysis, and that with respect to theoretical formulations we should declare that the issue is still open rather than accept Flanders suggestion to foreclose it by downgrading the economic motivation and achievements of collective bargaining.

It is also important to remember that while Flanders views managerial issues as the major concern of collective bargaining, he only accords unions restricted scope in this area. The function of collective bargaining and unions is to lay down guidelines and conditions; unions should not attempt to take over managerial functions through collective bargaining.

In conclusion it can be said that the purpose of collective bargaining is mainly meant to harmonise management and employees conflicting expectations.

CHAPTER THREE

3.0 PURPOSE OF COLLECTIVE AGREEMENTS – A ZAMBIAN CASE

In this chapter, I begin by looking at what Collective Bargaining entails in Zambia, define Collective Agreements, then look at the historical aspects of the law relating to the regulation of Conditions of Service in Zambia. I then discuss the main purposes of Collective Agreements in Zambia.

Collective Bargaining may be defined as a process of joint or co-determination through negotiation by the bargaining unit of conditions or terms of employment.²⁵

The same act defines Collective Bargaining²⁶ as the carrying on of negotiations by an appropriate bargaining unit for the purpose of concluding a Collective Agreement.

According to the Industrial and Labour Relations Act²⁷ as amended, Collective Agreement means an agreement negotiated by an appropriate bargaining unit in which the terms and conditions affecting the employment and remuneration of employees are laid down.

²⁵ W S Mwenda, *Employment Law in Zambia: cases and materials*, UNZA Press 2004

²⁶ *Ibid* page 120

²⁷ (1993) as Amended by Act Number 30 of 1997 page 120

3.1 COLLECTIVE BARGAINING IN ZAMBIA

Having defined what Collective bargaining is and what a Collective Agreement is, it becomes imperative to discuss collective bargaining which results in Collective Agreements.

Collective Bargaining is part of the broader concept of Freedom of association in which members of the Union jointly and through their representatives negotiates for their terms and conditions of service. This invariably results in the signing of a Collective Agreement.

However, how do Collective Agreements come into effect? This is one of the questions that I intend to answer in this chapter.

Collective Agreements result from agreed terms and conditions of service. Early legislation in Zambia placed obligations on both employers and employees. It is therefore imperative to identify the general obligations placed upon the parties that give rise to contract of employment. The diverse dissimilarity of situations under which contracts of employment are performed often places difficult to categorise all the obligations that follow the conclusion of the contract. While it is accepted that different consequences may follow different types of contract of employment, it may be said that there are certain obligations which inevitably follow the conclusion of the contract.

Some of these obligations arise from the operation of general law and these should be observed. Some of the obligations arise from provisions of the contract itself and these too should be observed.

Besides the general obligations, there are particular obligations which may arise not from the general law or the contract itself, but from practice, custom etc in that particular type of employment. Where the custom or practice is well established and recognised, the parties to the contract are required to observe it. Zambia labour legislation has placed obligation on both the employer and employee. Most of these obligations are universal and recognised at common law and form the basis upon which terms and conditions of service in the collective agreement are founded upon.

3.1.1 Obligations of the employer

The employers obligations are varied but it will be worthy discussing some.

3.1.2 Obligation to provide work

Although the employer is generally under an implied obligation to provide work to his employee, it appears to be no duty on the part of the employer to do so. The employer's failure to provide an employee with some work should not originate from his attempt to render the employee redundant or be tantamount to a refusal to pay wages to the employee. The failure to provide work should be general and not confined to a particular employee as this would amount to a repudiation of the contract of employment with the particular employee.

3.1.3 Satisfactory working conditions and working mates

No particular rule of law of general application can be devised to regulate the conditions under which a worker should perform his work. The conditions under which, say, a miner thousands of metres underground, or an air hostess thousand metres above ground or an office director of a company work, are mostly different. The law therefore usually places upon the employer of labour general rather than particular obligations. The legislative tendency is usually to require the employer to take positive measures to safeguard employees' safety and health at work.

The Factories Act, 1966²⁸ requires that, 'every factory shall be kept in a clean state and free from effluvia arising from any drain, sanitary convenience or nuisance' But the special legislation passed to regulate conditions in such fields as mines, factories, quarries is dealt separately elsewhere. Here I will deal with those matters which affect employers generally.

Employers are generally required to provide their employees with safe tools and good work-mates. By good work-mates it is not meant kind, but normal and not of unsound mind or playfulness.

3.1.4 Supply of Tools and Materials

Unless the contrary is agreed or customary, the employer is expected to provide the employee with tools and uniforms, protective wear, (if any) necessary for his work. Where the employee provides these

²⁸ No. 2 of 1966, Chapter 514, section 19.

himself in whole or in part and the tools, uniforms or other protective wear are necessary in the performance of his duties, the employer should pay the employee a weekly or monthly or as the case may be, an allowance.

3.1.5 **Housing and Welfare**

An employer shall at all times and at his own expense cause every employee in his service to be adequately housed.²⁹ Where, however an employer is unable to provide adequate housing for an employee either because such housing is not available or for any other reason, the employer, simultaneously with the payment of his wages, shall pay such an employee in lieu of housing, the rent allowance.

3.1.6 **Supply of Water**

The Employment Act requires the employer to provide water for use of employees; both at work and in houses provided by the employer. The water need not be inside the house of the employee but should be ‘within a reasonable distance of each dwelling. Where the source of supply of water is, in the opinion of a Medical Officer, inadequate or not reasonably protected or accessible for use, the employer may be served by a proper officer, with an order in writing requiring that the defect is put right within such a reasonable time as may be specified. Failure to comply with these requirements constitutes an offence.

²⁹ Section 41 (1), Chapter 512. now repealed by Industrial and Labour Relations Act of 1993 as amended by Act No. 30 of 1977

3.1.7 Medical Attention

The requirement that the employer should provide medical facilities for his employees was a source of numerous prosecutions under the Employment of Natives Ordinance, Cap. 171.

The law has always required that every employer shall, during the illness of any employee use his best endeavours to provide such employee with medical attention and medicines. But this does not mean that the employer is liable for all the employee's medical treatments and medicines. In Section 43 (1) of the then Employment Act Cap 512, a proviso stated, 'Provided that nothing in this section unless otherwise agreed between the parties, shall be constructed to make the employer liable for the cost of any medicines, medical or hospital accommodation provided to any employee'. The following clause added:

Every employer shall, without expense to the employee, take reasonable steps to arrange for transport to hospital of any employee suffering from serious illness or accident not occasioned by wilful misconduct or of any member of the employee's family who has been authorised to accompany him to the place of employment and who becomes incapacitated by illness or accident not occasioned by wilful misconduct, and if any employer shall fail to arrange such transport a proper officer or medical officer may do so and all reasonable expenses incurred in so doing shall be recoverable from the employer as a debt due to the Government.

The above provision still applies to date as current law and is supported by some decided cases.

In the case of R V Newell³⁰ an African labourer, Mupisa, was injured in the course of his employment and the fact of his subsequent illness (which became serious) did not come to the knowledge of the accused European, who was manager of the company which employed Mupisa; until after two months. But during this period Mupisa was under the care of a medically orderly employed by the accused. He was charged under Section 50 of the Employment of Natives' Ordinance, Cap. 62 (later Sec. 80 of E.N.O Cap 171) which at the time of the offence was Section 32 (2) of the Employment Act. 1965. The accused said he did not know that the employee was ill. The Court (Hall J.) held that it is the duty of the employer to see that proper steps are taken to look after the natives working for him and to provide that employee with proper medicines. The employer cannot escape liability by saying that he did not know when he had taken no trouble to know.

3.1.8 **Obligation to pay**

The purpose, without qualification, of rendering services by the employee is to earn some reward. This may be in the form of a cash salary or in other form of payment, or partly in cash and partly in kind. Every employer is therefore required, before any employee commences employment or when changes in the nature of such employment takes place, to explain to such employee the rate of wages and conditions relating to such payment.

³⁰ (1932) 1 N.R.L.R.3

3.1.9 Offence on Wages

Any person who employs or continues in his employment any employee without intending to pay him, or without having reasonable grounds for believing that he can pay the wages of such employee as they become payable, is guilty of an offence.

3.2.0 To grant employee holidays with pay

The employer is required to grant his employees holiday (leave) with pay, which holidays shall include weekly rest fixed by law, agreement or by determination made in accordance with the minimum of wages councils and conditions of Employment Act, Chapter 506 or custom, or public holiday³¹ as declared under the Public Holiday Ordinance.³²

An employer and employee may enter into agreement concerning holiday with pay provided that such agreement does not contain conditions less favourable to the employee than those provided by the general law.

In the case of R V Tentani, and R V Nzulani³³, the accused was a carpenter employed by a store keeper. On 26 December (Boxing Day, a public holiday in colonial Northern Rhodesia) he absented himself from work. There was nothing in his contract requiring him to work on public holidays. His hiring was on monthly basis. In Nzulani's case, the accused was a driver employed by a farmer. On 23rd December, a Sunday, he absented himself from work and his contract did not require him to work on Sundays. His hiring seemed to be by month. MacDonell, J., said that a contract entered into between master

³¹ Section 15, Employment Act, Chapter 512

³² Chapter 510

³³ (1924) 4 N.R.L.R. 207

and servant must, like other contracts, be assumed to have been made with reference to the local law. Thus any matters arising therefrom on which the contract itself is silent must be taken as governed by the local law. The Court further observed that all laws must be interpreted reasonably. Thus it would not be reasonable to hold that a law appointing certain days to be holidays meant that all work was to cease on those days – some classes of work must necessarily be done each day. One must ask what was the purpose for which the contract of employment was made? Having ascertained it, one then asks, will that purpose be defeated or nullified by postponing a particular piece of work from a Sunday or public holiday to the day following? Commenting on Tentani, the judge said there was no evidence to show that the work he was engaged on, roofing iron sheets on a building, needed of necessity to be done on 26th December, rather than on the following day. His acquittal was confirmed. In the case of Nzulani, there was some evidence of urgency. He was required to do planting at the appropriate time. Thus his conviction was confirmed.

3.3.0 Obligations of the Employee

Obligations imposed upon an employee in the performance of his work are legion. The emphasis on the obligations may differ depending on the nature of work to be performed. The first obligation imposed on the employee is that unless with prior agreement or consent of his employer, the employee should personally perform or carry out the work. He is expected and required to carry out his work with care, being held liable for any damage he intentionally causes to his employer or third party, or even himself. The employee should

obey the orders relating to the execution of the work where such orders are not contrary to general law, morality or public policy.

3.3.1 **Employee must do work he is employed to do**

The performance of the contract of employment should be by the parties to the contract. There are some exceptions to this general rule, e.g. as in the case of The Sleep Comfort Bedding Co. V Laliemand & Williams (firm)³⁴, where the contract was performed by agents of one of the parties. In spite of such exception, it is cardinal rule of the contract of employment that the contract is performed only by the parties involved, Thus a man engaged as a driver cannot send his wife to report for duty even if she had certificates of competence to drive motor vehicles.

The Employment Act provides that no rights arising under any written contract of service shall be transferred from one employer to another unless the employee bound by such contract consents to the transfer and all the particulars are endorsed upon the contract by a proper officer.³⁵

In the case of R. .v Kambule³⁶, the defendant employee, a lorry driver, wilfully in breach of his duty, allowed one Chaima to drive a lorry of the defendant's employers which resulted in an accident. He was charged under Section 75 of the Ordinance – wilful breach of duty.

³⁴ (1954) 5 N.R.L.R. 696

³⁵ Section 35. Chapter 512, the word 'transferrable' would be preferable to 'transferred'. The provision is not intended to prohibit the transference of any rights arising from a contract of employment, but that the transferring should be endorsed by a proper officer.

³⁶ (1939) 2 N.R.L.R. 46.

In quashing a Magistrate's conviction, Robinson, A.C.J., said that Kambule had committed a breach of duty to his employer, '*but the facts must fit a penal provision before it is punishable. If the employer had given strict instructions that the defendant was to drive and no one else, then I think Section 74 (4) would be applicable.*'

In the case of R. v Alfred Kalushi³⁷, the accused who was employed as 'houseboy' wore his employer's blazer when having his photograph taken and forgot to return it. He had taken it without permission. He was charged under Section 74 (3).

The ejusdem generis rule, which is a rule of construction, requires that a clause in a statute or a phrase in a document where the word 'other' appears with certain words denoting things of the same genus, then the things covered by 'other' should be of the same genus. Could it be said that the 'other property' in Section 74 (3) included 'a blazer' in the class of horse, vehicles? The Court said no, except if the phrase had said 'any property whatsoever'. Kalushi was acquitted. In spite of the acquittal, which was on a technical point, the fact remained that an employee was not allowed to misuse his employer's property.

³⁷ Employment of Natives Ordinance, Chapter 171, Section 74 (3) 8 (a). (1957) 6. N.R.L.R. 61.

3.3.2 Not to refuse to work

Where the employer has work available for the employee of the nature the employee is engaged to perform, he will be in breach of his contract of employment if he refuses to do it.

In the case of R. v Mutelo Mekanika³⁸, the accused and three other fellow workers were given the task of cutting down a tree. It was noted by the Manager that they were loafing and he reprimanded them, warning them that their tickets would not be marked unless they got on with the job and finished the task. The accused thereupon stopped work and called upon the others to stop work, saying that they were not going to have their tickets marked; with the result that the whole gang of twelve men stopped work and only returned to work when the whole position was explained to them. The accused and the others, however, refused to carry on with their task.

The accused was charged at Kalomo of refusing to work and inciting others to stop work under Section 64 and section 72 of the Ordinance. The courts held that in spite of duplicity in the charge of refusing to work and inciting co-workers to stop work, the accused was properly convicted and his conviction was therefore confirmed.

3.3.3 Not to compete with Employer

It will be noticed that to restrain a former employee from engaging in any occupation or from being employed by any employer carrying on business undertaking similar to that of the employee's former employer, may be tempering with the employee's freedom of contract.

³⁸ (1953) 5 N.R.L.R. 666

In the case of African Lakes Corporation Ltd V John Murray³⁹ the court held that on the facts of this case, the covenant that is, the requirement that the defendant should not work for or get interest in any general dealers business “in Northern Rhodesia’ during the duration of the agreement with the plaintiff ‘goes very much further than is necessary for the adequate protection of the Plaintiff’s business. Had the restrictive covenant been so framed, e.g. that the defendant could not enter a similar business within a certain distance of any place where he had been employed, then I might have come to a different conclusion, but as it is there is no doubt in my mind whatsoever that the plaintiffs are not entitled to prohibit the defendant from being employed over such an extensive area. It is an oppressive covenant and I decline to enforce it.⁴⁰

3.4.0 MAIN PURPOSE OF COLLECTIVE AGREEMENTS IN ZAMBIA

The Industrial and Labour Relations Act of 1993 in its preamble states that the purpose of the Act is:

An Act to revise the law relating to trade unions, the Zambia Congress of Trade Unions, employers’ associations, the Zambia Federation of Employers, recognition agreements and collective agreements, settlement of collective disputes, strikes , lockouts, essential services and Tripartite Labour Consultative Council; the Industrial Relations Court; to repeal and replace the Industrial Relations Act, 1990; and to provide for matters connected with or incidental to the foregoing.

³⁹ (1947) 4N.R.L.R. 166.

⁴⁰ Palmer A J. at page 177.

It is from this background that it can be argued with some force that the main purpose of a Collective Agreement is to ensure that obligations imposed by the agreed terms and conditions of employment are adhered and respected. There are however other purposes upon which for example; a new Collective Agreement should be put in place. Either party to the Collective Agreement may in the course of the Contract of employment seek to amend the terms or conditions of that agreement.

It is the Collective Agreement that will provide for the restrictions upon variations, breaches or failure to honour obligations contained in these agreement. For example, the disciplinary code of conduct in the Collective agreement will spell out restrictions or offences which the employee is expected to refrain from doing or committing. These restrictions when varied have normally corresponding penalties.

Both employers and employees have tended to breach certain obligations and terms in some instances the breaches being fundamental resulting in termination or repudiation of the contract for unlawful cause.

It is these breaches, omissions, illegal acts and failure to meet obligations that is the hall mark of the purpose of collective Agreements; To harmonise the two parties employment relationships and provide for the enforcement of terms and conditions contained in these agreements; to provide for remedies and course of action upon variation; failure to honour, omission or breaches.

CHAPTER FOUR

4.0 THE ROLE, RELEVANCE AND EFFECTIVENESS OF COLLECTIVE AGREEMENTS

In this chapter, I discuss the role, relevance and effectiveness of Collective Agreements. I intend to demonstrate how relevant Collective Agreements have been and whether they have been effective.

As discussed in earlier chapters, the main role of Collective Agreements is to harmonise the conflicting interests and obligations of employers on the one hand and employees on the other. Once these conflicting interests and obligations have been harmonised, they give rise to agreed terms and conditions of employment. In Zambia, these terms and conditions of employment have to be reduced in writing, jointly signed as agreed and later lodged with the Labour Commissioner of the Ministry of Labour and Social Security.⁴¹

The Labour Commissioner then submits the Agreement together with his comments to the Minister after analysing the document.⁴²

Once the agreement has been registered by the Minister, it becomes a Collective Agreements and is legally binding and has the force of law.⁴³ This view was established in Kamayoyo V Contract Haulage in which the Supreme Court held that a Collective Agreement is a legally binding

⁴¹ Industrial and Labour Relations Act of 1993, Section 70 (i)

⁴² Ibid Section 70 (2)

⁴³ Kamayoyo Vs Contract Haulage (1982) ZR 13 (sc)

contract between the parties and that anything done outside these contractual agreements are of no legal effect⁴⁴

Similarly, a Collective Agreement was incorporated into the terms of employment that bound both parties.⁴⁵

From the above, it is clear that the role of Collective Agreement is to harmonise the relationships between employer and employee for the purpose of finding common ground.

This brings me to the issue of relevance of these agreements. Indeed, if employers and employees were to address their interests haphazardly, production would always suffer and the parties would be spending long periods trying to reach consensus or finding solutions.

Negotiations for terms and conditions of employment normally commence upon the signing of a Recognition Agreement,⁴⁶ or upon the expiration of an existing one. Once these terms and conditions have been agreed and signed, the agreement that is lodged with the Labour Commissioner which becomes law upon approval by the Minister and remains in force for a considerable period of time ranging from six months (half a year) to three years. During this period, the two parties merely observe these terms and no further negotiations take place until or unless one party gives notice in writing on the need to vary the terms. The two parties then have to observe the

⁴⁴ Ibid

⁴⁵ Pamodzi Hotel Vs Godwin Mbewe (1987) ZR 56 (sc)

⁴⁶ Industrial and Labour Relations Act 1993 as amended by Act No. 30 of 1997 Section sixty four (1) and (2).

procedure of varying a duly lodged and approved Collective Agreement as provided for in the Act.

If the employers and employees were to negotiate these terms on an ad hoc basis, the two parties relationship would be too complex. This is because:

- (a) there would be no uniformity – Each employee would want to bargain for his/her own terms and lack of uniformity for similar positions under similar circumstances would breed anarchy in large organisations.
- (b) Employers would incur a lot of costs in terms of time and opportunity costs.
- (c) Since the terms of such agreements arrived at between the parties would not be backed by law, the parties could easily abrogate such agreements thereby creating more disputes in the organisation.
- (d) There is a possibility that such agreements could be against public policy in some instances, even illegal as the same would not have been scrutinised by the Labour Commissioner.

It is from this background that Collective Agreements may be said to be relevant as they are a catalyst to smooth operation of the organisation and promote dialogue and harmony through the negotiations and observance of agreed terms and conditions of employment.

The relevance of Collective Agreements is reinforced by the fact that an aggrieved party is at liberty to bring an action against the abrogating party. The aggrieved party can bring an action in the Court of Law for breach of terms or conditions or indeed for breach of the entire agreement and the

court may order the abrogating party to compensate the other party or indeed order the other party to observe the terms. To that extent, Collective Agreements may be said to be effective. This view is supported by the fact that there are a lot of decided cases where the courts have ordered one party to observe the terms and/or conditions of employment.

In Pamodzi Hotel Vs Godwin Mbewe⁴⁷ The respondent was employed by the appellant as a waiter and supervisor. There was in existence a Collective Agreement incorporated into the terms of the employment which bound both parties. The Agreement provided a penalty of dismissal without any need for a previous warning for drunkenness.

On an allegation that the respondent was drunk on duty he was dismissed. He sought a declaration in the High Court that his dismissal was null and void. Evidence was adduced at the trial that he was found to be drunk by security guards and was seen by the Hotel Manager who from the smell of his breath and appearance, found he was not his usual self and concluded he was drunk.

The court found that under the Collective Agreement dismissal could only occur after a final written warning for a previous breach and as no warning had been given summary dismissal was unlawful. The appellant appealed.

The appellant argued that the reason for dismissal was satisfied under the Agreement on the evidence of a supervisor and one witness and that the degree of drunkenness for dismissal was not applicable in the case of

⁴⁷ (1987) ZR 56 (sc)

drunken driving. It was sufficient that the dismissal was carried out fairly as laid down in the collective Agreement.

Instant dismissal is justified if any employee is drunk. The state of drunkenness to justify the dismissal of an employee is not the same as the state which renders a person incapable of having proper control of a motor vehicle. It was sufficient under the Agreement to justify dismissal if there was drunkenness as evidenced by a supervisor and one witness. The decision to dismiss cannot be questioned unless there is evidence of malice or if no reasonable person could form such an opinion.

In Kamayoyo Vs Contract Haulage⁴⁸ the Supreme court held that a Collective Agreement is a legally binding contract between the parties and that anything done outside these contractual agreements are of no legal effect.

In Civil Servants Union of Zambia and the National Union of Public Service Workers Vs The Attorney General⁴⁹, the Industrial Relations Court held that the imposition of a wage freeze was illegal and violated the law governing Collective Bargaining.

Finally the effectiveness of Collective Agreements may be summed up by reference to the law that establishes Collective Agreements. This is the Industrial and Labour Relations Act of 1993.

⁴⁸ (1982) ZR 13 sc

⁴⁹ (1999) Application No. 2/1998 of the IRC (unreported)

Section 68 states that every Collective Agreement shall contain clauses, in this part referred to as statutory clauses, stipulating:

- (a) the date on which the agreement is to come into effect and the period for which it is to remain in force; and
- (b) the methods, procedures and rules for reviewing, amending, replacing or terminating the collective agreement.

Section 69 states that:

- (1) the Bargaining Unit shall:
 - (a) commence negotiations for the purpose of concluding a new collective agreement at least three months before the expiry of the current Collective Agreement.
 - (b) notify the Commissioner in writing, within fifteen days after the commencement of the negotiations, of the date on which the negotiations were commenced; and
 - (c) conclude and sign the collective agreement within three months after the commencement of the negotiations.
- (2) If the bargaining unit fails, or neglects without reasonable cause or excuse (the onus of proof shall lie on the bargaining unit) to commence negotiations or conclude the Collective agreement in the manner and within the period specified in paragraphs (a) and (c) of subsection (1), or to notify the Commissioner in the manner and within the period specified in paragraph (b) of subsection (1), every member of the bargaining unit shall be liable, upon conviction, to a fine not exceeding two thousand kwacha and may be prohibited from holding a position in the bargaining unit for a period not exceeding three months.

Section 70 states:

- (1) The parties to a collective agreement shall, within fourteen days of signing, lodge five signed copies of the Collective Agreement with the Commissioner.
- (2) The Commissioner shall, within fourteen days of receipt of the copies referred to in subsection (1) submit such copies, together with his comment to the Minister.

Section 71 states:

- (1) The Minister may, after considering a Collective Agreement lodged in accordance with section seventy-one together with the comments of the Commissioner received under subsection (2):
 - (a) direct that a copy of the Collective Agreement be returned to the parties together with his reasons for not directing the registration and give instructions to re-submit the Collective Agreement to the Commissioner, or
 - (b) direct the Commissioner to register the Collective Agreement
- (2) The Minister shall not direct the registration of a Collective Agreement unless he is satisfied that:
 - (a) the agreement contains the statutory clauses referred to in section sixty-nine; and
 - (b) the clauses in the agreement do not contain anything which is contrary to any written law.
- (3) Every Collective Agreement which has been approved by the Minister shall:
 - (a) come into force on the date on which it is approved or on a later date specified in the Collective Agreement

- (b) remain in force for such period as shall be specified in the agreement;
- (c) be binding on the parties to it, or in the case of a joint council, it shall bind every employer and employee engaged in the industry; and
- (d) be notified in the Gazette if it is a Collective Agreement negotiated and concluded by a joint council.

Section 72 states that the Parties to a Collective Agreement may by agreement vary the provisions of a Collective Agreement and the procedure set out in section seventy-one shall apply, with the necessary modifications, to the variation.

Section 73 states:

- (1) Where a bargaining unit is unable to conclude a new Collective Agreement before the expiration of the existing collective agreement, or where for any other reason the bargaining unit desires to extend the period during which the existing Collective Agreement is to remain in force, it may apply to the Minister in that behalf.
- (2) An application under subsection (1) shall be made not less than thirty and nor more than sixty days before the expiration of the existing Collective Agreement.

Provided that the Minister may, consider an application made at any time before the expiration of the existing Collective Agreement.

- (3) Any extension of an existing Collective Agreement which, was negotiated and concluded by a joint council shall be notified in the Gazette.

In summary it can be said that Collective Agreement are in general relevant and effective as courts have tended to enforce their terms when breached. However, as will be established in the next chapter, that employers have tended to completely disregard some of the provisions of Collective Agreements especially those relating to payment of salaries and allowance.

CHAPTER FIVE

5.0 EROSION OF THE EFFECTIVENESS AND PURPOSE UPON WHICH COLLECTIVE AGREEMENTS ARE FOUNDED

Its stated in our concluding remarks in the preceding chapter that it is not in all cases that Collective Agreements have been given legal effect.

In the last 5 years employers in Zambia have tended to disregard the terms and conditions of employment as contained in their respective Collective Agreements with impunity.

In this chapter I shall endeavour to demonstrate instances in which Collective Agreements have been violated by employers much to the detriment of the other party – the employees. There are instances when the employer has violated the terms of the Collective Agreement and the other party has taken the matter to court where the courts have ruled in favour of the employees and ordered the employer to enforce or abide by the terms of such Collective Agreement. Despites such court orders or judgements, many employers have tended to ignore these judgements leaving employees destitute of any further recourse to remedial action.

One of the main violators of Collective Agreements in Zambia has been Government itself which apparently is the largest employer in the country.

According to Section 71 (3) (c) of the Industrial and Labour Relations Act⁵⁰ a Collective Agreement that has been approved by the Minister shall bind the parties to it and it can only be varied by agreement of both parties and such variation must be lodged and approved by the Minister of Labour and Social Security.

One of the instances in which Government has abrogated the provisions of the Collective Agreement is to be found in the case of **Civil Servants Union of Zambia, The National Union of Public Service Workers and The Attorney General**⁵¹. In 1997, the two Unions (Applicants) began negotiations with the Government for improved salaries and conditions of service for 1998. They were asking for a salary increment of almost 200% to finally 40% across the board and 30 proposals on improvement to the conditions of service. These included increase in or inclusion of housing allowance, subsistence allowance, medicare, transport allowance, compassionate leave, etc.

The reaction of Government was that it was unable to meet these demands due to financial incapacity. The Government cited examples of the wage demand which would cost an extra K72.1 billion, only on unionised employees of the Government. The Government's tabulation of medical, Transport, Education and Cost of Living allowances came up to K221.5 billion. According to the Unions, Government just rejected their demands without giving counter proposals as the normal procedure in past negotiations. The Unions then felt that the reaction from the Government was unreasonable.

⁵⁰ Of 1993

⁵¹ Application Number 2 of 1998

After the rejection, a Collective Dispute was declared in accordance with the provisions of the Industrial and Labour Relations Act. Thereafter in accordance with section 76 (1) (b) of the Industrial and Labour Relations Act, A Board of Conciliators was appointed to resolve the issues. This Board began meeting on or about 20th November, 1997. After a series of meetings this board failed to resolve the impasse. The Unions maintained that Government was not negotiating in good faith as they never made any counter proposals.

On 30th January, 1998 in his Budget speech to the National Assembly the Minister of Finance, and Economic Development late Hon Penza announced that there would be a wage freeze for all employees in the Public Service. This was in fact done for the year 1998. In the meantime the Government's stance was that salaries and wages should and would be increased after a restructuring programme to reduce the bloated and inefficient civil service.

The Unions contention was that the Government's imposition of a wage freeze was illegal and contrary to section 69 (1) of the Industrial and Labour Relations Act. They added that it also contravened the International Labour Convention No. 98. on the Right to Organise and Collective Bargaining.

Lawyer for the two applicants Mr Kelvin Hangandu submitted that Government chose to break the law with impunity by refusing to respond to the Applicants proposals on or before 31st October 1997 on account of the wage freeze. He added that the Government's response was in contravention of the above section because it was obliged as a bargaining unit to commence negotiations and conclude a new collective agreement at

least three months before the date of expiry of the collective agreement in force. Mr Hangandu submitted further that the collective agreement for 1997 which was executed on 13th December 1996 ceased to have any effect on 31st December 1997. He added that the result of failure between Government and the two Unions to conclude a new Collective Agreement for the year 1998 meant that there was no Collective Agreement for the whole of 1998.

They therefore asked that the court makes an order under Section 78 (2) of the Industrial and Labour Relations Act for new conditions of service for the period between 1st January and 31st December 1998.

The court agreed with the Applicants that as a bargaining unit, the Government did contravene the section in issue. The Government 's explanation however was that this was due to lack of funds.

The Court stated that Zambia was a member state of the International Labour Organisation and had ratified various International Labour Conventions and Recommendations. One of these was International Labour Convention No. 151 (Concerning Protection of the Right to Organise and Procedures for determining Conditions of Employment in the Public Service). This convention was ratified by Zambia in 1980 and came into force on 25th February 1981.

On relevance to the issue at hand, was Article 8 thereof which states that; the settlement of disputes arising in connection with the determination of terms and conditions of employment in the public service shall be determined

through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure confidence of the parties involved.

The applicants also referred to International Convention No. 98 Concerning the application of the principles of the right to Organise and Bargain collectively.

Articles 4 states that:

“Measures appropriate shall be taken where necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisation with a view to the regulation of terms and conditions of employment by means of collective agreements”.

The court further noted that in Zambia, the Industrial and Labour Relations Act Cap 269 has clear provisions regarding negotiations and the procedure to be adopted when such negotiations fail. These do not include the unilateral imposition of wage freezes either on the part of the Government or indeed any other employer. In the instant case, the Government clearly breached its own laws and the International Conventions with impunity and in total disregard of the rights of the affected public workers. The Court therefore declared that the wage freeze was illegal and hence null and void. The Court further awarded the applicants 40% salary increment across the board which the Government ignored to pay without any reasonable cause. This is a clear example of how Collective Agreements have been violated with impunity and have been eroded and become ineffective.

In another case between Darison Chaala (suing in his capacity as General Secretary of and on behalf of the Civil Servants and Allied Workers Union of Zambia), Davies Chingoni (suing in his capacity as General Secretary and on behalf of the National Union of public Service Works Vs The Attorney General⁵², application Number 167 of 2003 the applicants sued Government for failure to honour the terms of the Collective Agreement in respect of Housing Allowance which was awarded to the workers in a Collective Agreement signed on 21st March 2003 which was also later duly lodged with the Labour Commissioner and approved by the Minister in line with the Industrial and Labour Relations Act⁵³

The Attorney General submitted from the Bar, and disputed the Industrial Relations Court's jurisdiction to entertain these proceedings, arguing that the "matter before the Honourable Court was a collective dispute" and that Applicants had in fact conceded to this fact. By reason thereof, the Attorney General contended that the proceedings were "premature" and would only have been entertained after the failure of conciliation under the Procedure for Settlement of Collective Disputes in Part IX of the Industrial and Labour Relations Act, 1993, sections 75 to 79: that the Court had no power to determine the proceedings until, and unless, a reference was submitted to it in accordance with section 78 of the Industrial and Labour Relations Act, 1993.

Summary of reply to Attorney General's jurisdictional plea

Counsel for the applicants submitted respectfully, on the Applicants' behalf, that no collective dispute had arisen pertaining to the Government's refusal to pay members of the Civil Servants and Allied Workers Union of Zambia

⁵² Application Number 167 of 2003

⁵³ Of 1993

and the National Public Service Workers housing allowance in accordance with the collective agreements signed between Government and the two Unions on 21st March 2003. It was submitted further that a collective dispute could not arise with respect to a signed collective agreement, which had been duly registered by the Labour Commissioner.

The applicants further argued that a collective agreement that had been duly signed and registered with the Labour Commissioner in terms of section 70 (1) of the Industrial and Labour Relations Act, “came into force on the date on which it was approved or on a later date specified in the collective agreement” and was binding on the parties to it. A duly registered collective agreement had statutory force, and was enforceable as though it were a contract. Since a collective agreement enters “into force” on the date on which it has been approved by the Minister of Labour and Social Security it is binding on the parties to it; no party to the agreement is excused from performing the liabilities imposed by the agreement, and any variations can only be effected by the mutual consent of the parties. The default of a party to honour the terms of a collective agreement does not give rise to a collective dispute under section 75 of the Industrial Labour Relations Act but renders the party in default liable to be sued in the Industrial Relations Court for enforcement of the agreement, under the procedure in Section 85 (1) and (9) of the Act. Proceedings for enforcement of a collective agreement must be instituted as “original” proceedings and the jurisdiction to determine such infringement is “exclusive” to the Industrial Relations Court.

They further stated that a duly registered collective agreement lays down the remuneration for employees, or their earnings. According to section 48(2) of the Employment Act “the wages of an employee shall be paid at regular intervals not being later than the fifth day following the date upon which they fall due”. An employer who defaults to pay the employee’s wages or any part thereof on demand, without reasonable excuse, in accordance with the provisions of Section 48 of the Employment Act, is guilty of an offence. The default to pay wages does not give rise to a collective dispute under section 75 of the Industrial and Labour Relations Act as otherwise payment of the employee’s remuneration would be indefinitely suspended and the strict liability imposed on the employer to pay the wages at regular interval would be rendered to be of no effect. Government’s default to pay housing allowance to members of the Civil Servants and Allied Workers Union and the Nation Union of Public Service Workers has not given rise to a collective dispute but both civil liability and criminal offence under the Employment Act, which the applicants reserved the right to prosecute.

It should be pointed out that this matter is still in court and no ruling has been made yet but it is apparent that Government’s disrespect for collective agreements has been established. Later in a press statement in the post newspapers of 4th April, 2004, Civil Servants Union and Allied Workers Union of Zambia (CSAWUZ) General Secretary Darison Chaala rightly advised Government to pay Civil Servants their Housing Allowances.

Mr Chaala said the Government should not cheat Civil Servants that the case of Housing Allowances for Civil servants was still in court. He said the Government was still bound by the collective Agreement and should therefore pay civil servants their due allowances.

He said, Government was just cheating workers that the matter was still in court. And that Government was bound by the collective agreement and should have therefore paid the Housing Allowances.”

Mr Chaala further said that the union would not renegotiate to reduce the Housing Allowances already bargained for.

He added that they had sent circulars to all their members to the effect that they demand that Government pays them their housing allowances.

In his opinion the agreement still stood and was still in force and government should respect it, and added that they had refused to renegotiate because it was immoral to reduce the conditions of service for workers.

He called on the Government to pay civil servants their due allowances as the delays were making it unpopular.

He said, the Government should stop the arrogance on their side and comply with the collective agreement adding that the arrogance was not helping them at all, it was just making them unpopular”.

Chaala also called on civil servants to be united and demand what belonged to them.

In the case between The Council of the University of Zambia Vs University of Zambia and Allied Workers Union (through its General Secretary Michael Kaluba)⁵⁴

The respondent Union representing some workers at the University of Zambia negotiated new salaries and other conditions of service with the representatives of the appellant and this was put into a Collective

⁵⁴ SCZ appeal No. 4 of 2004

Agreement. The said agreement was signed by the parties on 9th July 1998. In this agreement salaries and salary related items were backdated to 1st April 1998. This agreement was sent to the Labour Commissioner as required under Section 70 of the Industrial Relations Act to be registered. The Minister of Labour and Social Security declined to order the registration of the agreement under Section 71 on the ground that there was a wage freeze in the public service as a whole and all those institutions outside Government but dependent on subvention from the national treasury. The Minister refused to register the agreement because it was not capable of being implemented because of the wage freeze. The Complaint by the respondent in the Industrial Relations Court was that the Minister can only refuse to direct registration of the agreement if he is satisfied that:

- (a) the agreement does not contain the statutory clauses referred to in Section 68; and
- (b) The Clauses in the agreement do contain something which is contrary to any written law

As is provided for in Section 70 of the Industrial and Labour Relations Act. For the sake of clarity, I take the liberty to reproduce Section 68 of the Act which provides for statutory clauses and reads:

“Every Collective Agreement shall contain clauses, in this part referred to as statutory clauses, stipulating:

- (a) The date on which the agreement is to come into effect and the period for which it is to remain in force; and
- (b) The methods, procedures and rules for reviewing, amending, replacing or terminating the Collective Agreement”.

It was argued that the agreement sent to the Labour Commissioner contained the statutory clauses and that it contained nothing which was contrary to any written law. It was also argued that the wage freeze was no reason for refusing to register the agreements more so that the university indicated that it would find its own sources to meet the agreement. The answer by the appellant in the Industrial Relations Court was that it was agreed by the parties that it would pay the harmonised salaries when the government provided the funds and that the government had not provided funds and that it could not implement the agreement as it had not been registered by the Labour Commissioner.

The parties submitted detailed written submissions which they augmented in their oral submissions which submissions were taken into account in the Court's judgement. In considering this appeal the court generally looked at the law and later applied that law to the facts of the case. It was noted that Collective Agreement was defined in Section 3 of the Industrial and Labour Relations Act as to mean:

“An agreement negotiated by an appropriate bargaining unit in which the terms and conditions affecting the employment and remuneration of employees were laid down”.

The court also referred to Section 3 which defined Bargaining unit to mean:

the management of the undertaking and the Trade Union representing employees in such undertaking where Collective bargaining is at the level of an undertaking, other than an industry; and

The Court said what was to be in the Collective Agreement was provided for in Section 68 of the Act to which I have already alluded to above.

It was said once the bargaining units had agreed to all the requirements in Section 68, they were obliged to lodge the Collective Agreement, duly signed, with the Labour Commissioner within fourteen days of signing and the Labour Commissioner within 14 days of receipt of the same submits the agreement to the Minister who after considering a Collective Agreement lodged in accordance with Section 70 together with the comments of the Commissioner received under subsection (2) shall:

- (a) direct that a copy of the Collective Agreement be returned to the parties together with his reasons for not directing the registration and give instructions to re-submit the Collective Agreement to the Commissioner; or
 - (b) direct the Commissioner to register the Collective Agreement.
- (2) The Minister shall not direct the registration of a Collective Agreement unless he is satisfied that:
- (a) The agreement contains the statutory clauses referred to in Section sixty-eight; and
 - (b) the clauses in the agreement do not contain anything which is contrary to any written law.
- (3) Every Collective Agreement which has been approved by the Minister shall:
- (a) Come into force on the date on which it is approved or on a later date specified in the Collective Agreement.
 - (b) remain in force for such period as shall be specified in the agreement
 - (c) be binding on the parties to it

The Court then proceeded to look at the undisputed facts of the case against the law outlined above. It was noted that there was no dispute that the bargaining units of the appellant and the respondent met and negotiated for

new conditions of employment and remuneration for the employees and that the Collective Agreement was duly signed by the bargaining units. The Collective Agreement was also sent to the Labour Commissioner as required by the law and the Commissioner wrote the appellant reminding it that the salary schedule had not been attached to the agreement and the appellant duly sent the schedule. The Court agreed with the observation by the Industrial Relations Court that the Labour Commissioner had, per se, no business to inquire if the employer was capable of paying the salaries agreed upon. His function in as far as Collective Agreements were concerned was to make comments on them when received and then register them if directed by the Minister.

As provided under the law, the Minister on receipt of the Collective Agreement had either to register it or refuse to direct to have it registered under Section 71 (1). Under Section 71 (1) (a) the Minister may refuse to direct the registration of the Collective Agreement. It is only under this subsection that the Minister has an option whether to direct or not for any reasonable cause but it is mandatory to refuse if the agreement falls under Section 71 (2) of the Act. In the instant case the Minister refused to direct the Labour Commissioner to register the agreement and the law gives him that power under Section 71 (1) (a) of the Act and hence he refused and gave reasons for his decision, namely, that there was a government wage freeze in the public sector and institutions that were dependent on subvention from the national treasury and that the agreement when registered could not be capable of being implemented because of the wage freeze. He advised the parties to start fresh negotiations to cover the period from January 1999 and not backdated to 1998. Whether these were good reasons or not for refusing to register, was not canvassed in the Industrial Relations Court. The Court

said there were rules and procedures in challenging decisions of public officer or bodies. Whether the Industrial Relations Court has jurisdiction to order a Minister to direct the Labour Commissioner to register a Collective Agreement in proceedings commenced by a complainant was another issue which was not considered by the Industrial Relations Court. In any event that was not an issue in the appeal.

It was observed that the position of the Collective Agreement as agreed upon by the parties was that it was not registered and the Industrial Relations Court never ordered that it be registered. The Court asked what was the effect of non-registration of the agreement? It was concluded that it had no legal force. Under Section 71 (3) the Collective Agreement becomes effective under two instances. Before the two instances are evoked, the first condition is that it must be approved by the Minister as it is provided under Section 71 (3).

The Court concluded that there was therefore no agreement for 1998. Although the agreement reached by the parties satisfied Section 68, it was never approved by the Minister. Accordingly, the Court held that:

- (a) Although the agreement satisfied Section 68 of the Act, it was of no legal effect as it was not approved by the Minister.
- (b) Following upon (a) above, the Industrial Relations Court misdirected itself when it ordered the appellant to honour 58% harmonised salary increment and settling all other terms and conditions based on the 1998 unregistered Collective Agreement.
- (c) Having found that the Labour Commissioner had no powers to inquire into the ability of the employer to pay the agreed remuneration and conditions of service the court misdirected itself to rely on the same in

ordering the appellant to honour the 58% harmonised salary increment.

This case demonstrates that once a Collective Agreement has been registered, it becomes binding on the parties to it. Had the Collective Agreement been registered by the Minister, the Court would have held for the Appellant as the Collective Agreement has the force of law.

All this said, it is my considered opinion that it was wrong for the Government to abrogate the International Labour Convention Number 151 concerning the protection of the right to organise and procure for determining Conditions of employment in the public service. I also tend to agree with the arguments of the respondents that the agreement could only not be registered if some of its provisions were contrary to any written law. The Minister used the provisions of the Act not to register the Collective Agreement as a shield for him to champion the wage freeze which was declared by the Government in the Public Service which in itself had already been declared illegal in the Civil Servants Union of Zambia, the National Union of Public Service Workers Vs Attorney General already referred to above in this chapter.

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

From the preceding chapters, it can be learnt that the purpose of Collective Bargaining is to harmonise the conflicting expectations of the employer and those of the employees so as to maximise production and satisfy employees' needs and thereby, reduce disputes in the work place and create industrial peace.

This is normally achieved through Collective Bargaining which in turn results in the conclusion of an agreement which when registered with the Labour Commissioner and approved by the Minister becomes law.

However, it is clear from the preceding chapter that employers have tended to abrogate terms and conditions of Employment as contained in the Collective Agreements to the detriment of the other party, the workers.

What is also interesting is that even when the courts have passed judgements directing employers to honour the terms of the Collective Agreements, the employers have tended to abrogate these agreements. For example, in *Civil Servants Union of Zambia and another Vs Attorney General*, the Court ordered that Government pay the workers 40% across the board but Government ignored this and never paid. In the *University of Zambia* case, again the employer failed to pay due to Government's disregard for Collective Bargaining. By refusing to register the Collective Agreement on the pretext of a wage freeze which had earlier been declared illegal,

Government was guilty of violating the Industrial Labour Relations Act with impunity.

In view of the foregoing it is recommended that the Industrial Relations Court be given powers to review acts or omissions of Administrative organs. In short, the Industrial Relations Court should be given powers to judiciously review acts of Government and other administrative organs. Similarly, having established that Government is the main violator of Collective Agreements, it is also recommended that the lodging and registration of Collective Agreements be done by an independent body whose members shall be accountable to National Assembly.

This body can take the form of an Industrial Relations Tribunal. The functions of the Labour Commissioner and the Minister of Labour in respect of registration of a Collective Agreements should be done away with as the Minister of Labour is accountable to the President who is the Head of the Executive. The Minister, it has been established has tended to be biased towards Government as can be seen in the case of the University of Zambia. These recommendations can help check the erosion of Collective Agreements in Zambia which in some instances as cited in Chapter Five have been rendered ineffective.

The continued disrespect of Collective Agreements by Employers has led to Industrial unrest in the past. It must be emphasized that a good industrial climate is of paramount importance both from the economic and social point of view. Poor industrial relations do not only have unsettling effect on the industrial climate, but are a sure recipe for strikes which in turn adversely affect production through lost man hours, raise production costs, contribute to inflation and scare away prospective investors, a situation that should not be allowed in Zambia.

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