

**A CRITICAL ANALYSIS OF THE REMEDY OF REINSTATEMENT
AWARDED BY THE COURTS IN EMPLOYMENT LAW.**

BY

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**Being a Directed Research essay submitted to the school of Law of the University of Zambia
in partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LLB).**

DECLARATION

I, **Angelica Tembo Kennedy, Computer Number 29058325**, do hereby declare that this Directed Research Essay is entirely based on my own findings 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 bear absolute responsibility for all errors, defects or any omissions herein.

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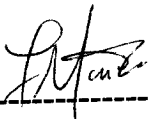
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**A CRITICAL ANALYSIS OF THE REMEDY OF REINSTATEMENT
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ABSTRACT

This paper critically analyses the remedy of reinstatement awarded by the courts in employment law. The main principles that the paper has analysed include inter alia reinstatement, special circumstances and discrimination in employment. This research is based on the crucial factor that the award of the remedy of reinstatement is an essential corollary of special circumstances. The method of the research is a qualitative interpretation of statutory provisions on reinstatement and case law. In approaching the subject matter the paper examines what exactly amounts to special circumstances to warrant an award of the remedy of reinstatement in the context of the Employment Law in Zambia. The paper further examines the appropriateness of the remedy of reinstatement in a legal environment such as Zambia's where the known vagaries of litigation are such that disposal of cases takes very long, heightened by the costs of trial and the adversarial relationship between the employer and the employee. Regard is therefore had to the various provisions of the law that address the remedy and audiences with key informants. A number of other documents and policy analyses of the field are used as a secondary research material.

The paper demonstrates through an evaluation of case law that even though statute has expressly provided for the remedy of reinstatement, it does not however address what special circumstances warrant the remedy of reinstatement. Further the instances of discrimination under statute are very limited. The paper also establishes that there exists a general lack of adherence to earlier set principles of the Supreme Court by the lower courts. This has resulted in inconsistencies in interpretation of what amounts to special circumstances to warrant the remedy of reinstatement. The underlying findings further show that there has been an overall shift in the employee/employer relationship owing to the changes in the social economic structure resulting in fewer claims of reinstatement.

The study recommends that parliament effects amendments to the regulatory framework by enactment of regulations that give indicators as and when to administer the remedy of reinstatement without taking away the discretionary power of the judges. The Judiciary should reaffirm the importance of providing consistency in the law through adherence to set principles. Further the instances of discrimination under statutory provision of the regulatory framework should be broadened. Lastly the recommendations also suggest an urgent technological upgrade of the system at the Judiciary in order that case law and information is availed to all interested parties.

Dedication

To my dear husband and friend Ignatius for all your sacrifices, the support you have given, and your belief in me, making it all possible for me to pursue my LLB. Thank you for holding my hand and walking with me through this journey. To my lovely children, thank you for your understanding. I can never thank you enough, am so lucky to have you all. I whole-heartedly wish you God's blessings.

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To the court, Joshua Kabwe, Arnold Kaluba, Joshua Mwamulima, and John Ngisi, thank you for all the courts deliberations and for being patient with me when I never understood, am reminded that nothing can be done without a great deal of assistance.

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TABLE OF INTERNATIONAL INSTRUMENTS

International Labour Organisation Convention No. 158 of 1982

CIII Discrimination (Employment and Occupation) Convention 1958

Declaration of Philadelphia Para 11(a) - Annex to the Constitution of the International Labour Organisation.

Employment Policy Recommendation, (No. 122)1964

Employment Policy Recommendation, (No.169) 1984

TABLE OF STATUTES

The Constitution of Zambia Chapter 1 of the Laws of Zambia

The Employment Act Chapter 268 of the Laws of Zambia

The Employment Amendment Act, No 15 of 1997

Industrial and Labour Relations Act, No. 27 of 1993 (as amended in 1997)

The Industrial and Labour Relations (Amendment) Act No. 30 of 1997

The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

The Minimum Wages and Conditions of Employment Act. Chapter 276 of the Laws of Zambia

TABLE OF CASES

- ANZ Grindlays Bank Zambia Limited v ChrispinKaona, SCZ Judgement No. 12 of 1995 (Unreported)
- Bank of Zambia v Kasonde (1995-1997) ZR, 28 (SC)
- Chagger v Abbey National Plc. & Hopkins of 2006,[2009] IRLR 86
- Contract Haulage Limited v MumbuwaKamayoyo, [1982] Z.R 13
- De Francesco v Barnum (1890) 45 Ch.D.430, 438
- Faidecy Mithi Lungu v Lonrho Zambia Limited, SCZ Appeal No.182 of 2000 (Unreported)
- Francis v Municipal Council of Kuala Lumpur, [1962] 3 ALL ER 633
- Hang'andu v Kafue District Council and Another, SCZ Judgement No. 90 of 2003 (Unreported)
- Malcolm Chileshe v Bank of Zambia, Complaint No.81/99 (IRC)
- Market Investigations v Minister of Social Security [1968] QBD 732
- Mukupamwilwa v Zambia Electricity Supply Company (Zesco), Application no.111 of 1998
- Nyoni v Attorney General (2000) ZR 65
- Performing Rights Society v Mitchell and Booker, [1924] 1 KB 762
- Raine Engineering Company Limited v Baker (1972) ZR 156 (CA)
- Ready Mixed Concrete v Minister of Pension and National Insurance, [1968] 2Q.B. 497
- Ridge v Baldwin [1963] 1 QB 539
- Stevenson, Jordan and Harrison v Macdonald and Evans [1952] 1T.L.R. 101 CA
- Westmin Resources Ltd. [1997], 63 L.A.C. 134 (Germaine)
- Zambia Airways Corporation Limited v GershomMubanga, (1990-1992) ZR 149 (SC)
- Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami SCZ Judgement No. 27 of 2004.
- Zambia Consolidated Copper Mines Limited v James Matale (1995-1997) ZR 144

LIST OF ABBREVIATIONS AND ACCRONYMS

ILO: International Labour Organisation

IRC: Industrial Relations Court

SCZ: Supreme Court of Zambia

HC: High Court for Zambia

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1. Chapter One

1.1 Introduction

A contract of employment regulates the relationship that exists between employer and employee.¹ When this relationship terminates, an employee may raise issues entitling him to an array of remedies that are available in employment law. The award of the remedy of reinstatement is an essential corollary of special circumstances and therefore mandates its protection and continued liveliness.² Indeed considerable literature has been written on remedies awarded for loss of employment worldwide. Notwithstanding this fact, the award of reinstatement as a remedy to loss of employment is still unsettled especially when it comes to determining what amounts to special circumstances.

Firstly, it is quite seldom that courts fashion an award of the remedy of reinstatement, and that is in keeping with the exceptional nature of the remedy.³ At the same time, it is widely accepted that arbitrators have the jurisdiction to order the remedy of reinstatement where an employee has provided the employer with cause for discipline but where discharge is an excessive response.⁴ This has been settled law. When the courts concludes that an employer's decision to discharge an employee was excess, when is an award of the remedy of reinstatement warranted and appropriate.

It is the objective of this study therefore, to critically examine the kind of exceptional circumstances that might warrant an award of the remedy of reinstatement, and whether the courts of law have indeed awarded the remedy of reinstatement only in these circumstances.

¹ Winnie Mwenda, *Employment Law in Zambia, Cases & Materials* (Lusaka: Unza Press 2011), 28.

² *Westmin Resources Ltd.* (1997), 63 L.A.C. 134 (Germaine)

³ Mwenda, *Employment Law in Zambia*, 127.

⁴ Mwenda, *Employment Law in Zambia*, 127.

Further this paper postulates that while reinstatement is a well-founded remedy for reparation in the field of contract, the realm of industrial relations owing to a variety of factors ranging from the personal nature of the relationship of employer/employee, the duration of relationship and the vagaries of the nature of litigation in the country, it is essential for legislation to set standards for the application of the remedy.

1.2 Statement of the problem

It is trite law that the remedy of reinstatement is granted sparingly, with great care, jealousy and with extreme caution by the courts.⁵ It is also widely accepted that the remedy of reinstatement is an appropriate arbitral response when an employee is discharged without just cause only in very exceptional circumstances.⁶ It is cardinal to note that while courts are endowed with the authority to administer appropriate remedies in cases of loss of employment, it follows that Zambia still does not have a set standard as to what principles to adhere to when it comes to determining special circumstances.

Despite a plethora of authorities to the determining of special circumstances, it follows that the Zambian legal jurisdiction has shown an appalling inconsistency in adherence to principles such as those expulsed in earlier cases such as *Zambia Airways Corporation Limited v Gershom Mubanga*,⁷ and the later case of *Bank of Zambia v Kasonde*.⁸ Since our system of jurisprudence is based on the doctrine of judicial precedent, the major advantage of providing consistency when sticking to precedents cannot be overemphasized.⁹ Munalula states that “it is nearly everywhere agreed that a successful modern legal system must make the law relatively

⁵ Bank of Zambia v Kasonde (1995-1997) ZR 28 (SC)

⁶ Francis v Municipal Council of Kuala Lumpur, [1962] 3 ALL ER 633.

⁷ (1990-1992) ZR 149 (SC)

⁸ (1995-1997) ZR 28 (SC)

⁹ Fredrick Mudenda, “The Award of Damages in Employment Cases in Zambia: A General Overview.” *The Law Association of Zambia Law Journal* no. 2 (1999-2000), 53

certain.”¹⁰ There is therefore urgent need to consider new legislation to effectively give credence to the notion of special circumstances and provide non-limiting guidelines to be followed in awarding the remedy of reinstatement. Further in a country like Zambia were cases on average take three to four years to be disposed of the appropriateness of the remedy of should be analysed.

The first question addressed in this paper, therefore, is what kind of exceptional circumstances warrant an award of the remedy of reinstatement. Then, having identified this, the second question is whether arbitrators have indeed awarded the remedy of reinstatement only in these circumstances or whether they have ordered this remedy in a broader set of circumstances and have thus expanded the application of the remedy. The third question addressed is whether or not the remedy of reinstatement itself is appropriate to the Zambian legal system.

1.3 Objective of the study

The main objective of this research is to critically analyse the award of the remedy of reinstatement by the courts for loss of employment. The specific objectives of the study will be to:

1. Assess case law and statutory provisions and the extent to which the courts have interpreted what amounts to special circumstances in awarding the remedy of reinstatement.
2. Analyse whether judges have indeed awarded the remedy of reinstatement only in these circumstances.

¹⁰ Margaret Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries* Rev ed. (Lusaka: Unza Press 2011), 4.

3. To clearly illustrate the effects of the non-adherence to principles expused in earlier cases.
4. To examine the appropriateness of the remedy of reinstatement in a country like Zambia
5. To recommend for essential legislation to set standards for the application of the remedy of reinstatement thereby avoiding inconsistencies in dispensation of justice.

1.4 Specific research questions

1. What is the rationale behind the award of the remedy of reinstatement?
2. What really amounts to special circumstances in awarding reinstatement?
3. How do the courts interpret the special circumstances in awarding reinstatement?
4. What is the appropriateness of the remedy of reinstatement to the Zambian legal system?

1.5 Significance of the study

This study is being advanced in an environment of heightened global competition and financial crisis resulting in mass layoffs, further there is a general lack of understanding of the nature of remedies amongst stakeholders and their entitlement thereof, specifically to the remedy of reinstatement. This has been exacerbated with the notion that special circumstances have to exist in order for an employee to be entitled to this remedy. Additionally, this study comes at a critical moment in time when the Zambian courts of law have exhibited a general trend of inconsistency in administering the remedy of reinstatement as evidenced from some recent judgements. This subject is therefore more topical than ever. It is important therefore, that this study is undertaken in order to highlight the inconsistencies in judgements passed and the resultant effect to those legally entitled to these remedies. In this regard, this paper will suggest

that even though the courts have the discretion to award the remedy of reinstatement, there should be statutory intervention through an amendment to the Industrial and Labour Relations Act¹¹ to embody regulations that set standards for the application of the remedy. This will direct the courts in determining whether or not to grant the remedy of reinstatement.

1.6 Definition of key terms

Employer: Is any person, or any firm, corporation or company, public authority or body of persons who or which has entered into a contract of service to employ any person.¹²

Employee: The Employment Act defines an employee as a person “who has entered into or works under a contract of service, whether the contract is express or implied, is oral or in writing.”¹³

Employment contract: Is a contract between an employer and employee for service and not for services.¹⁴ It is a contract of service or apprenticeship, whether express or implied, oral or in writing.¹⁵ The integration test developed by Lord Denning in the case of *Stevenson, Jordan and Harrison v Macdonald and Evans*¹⁶ outlines the test considered in order to determine whether or not an employee is indeed employed as part of the business and forms an integral part of the employment or whether such a person is only accessory to it.

Termination: Termination of employment is when an employee’s contract of employment with an employer ends. Employment may in general be terminated at common law either by dismissal, resignation or redundancy.¹⁷ If it is terminated by dismissal, that dismissal may at

¹¹ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

¹² The Employment Act Chapter 268 of the Laws of Zambia s3

¹³ The Employment Act Chapter 268 of the Laws of Zambia s3

¹⁴ Darlington Banda, *A Guide to Employment in Zambia* (Lusaka: Friedrich Elbert Stiftung 1999), 12.

¹⁵ Lord Hailsham. *Halsbury's Laws of England*, 4th ed. (London: Butterworths), 8.

¹⁶ [1952] 1 T.L.R. 101 CA

¹⁷ Mwenda, *Employment Law in Zambia*, 75.

common law be either lawful or wrongful. Further a dismissal whether lawful or wrongful may be challenged as being unfair by statute.¹⁸

Dismissal: An employee is treated as dismissed by his employer if firstly; the contract under which he is employed is terminated by the employer with or without notice. Secondly, if the employee is employed under a fixed term and the term expires without being renewed. Thirdly, if the employer terminates the employment contract with or without notice in circumstances that entitle him to terminate the contract, by reason of the employee's conduct.¹⁹ Dismissal unlike simple termination indicates a picture of wrong doing on the part of the dismissed employee.²⁰

Reinstatement: In a successful unfair dismissal case the court may order that an employee be reinstated. Reinstatement effectively means that, the employee goes back to their old job as if they have never been dismissed. This involves re-employing the employee on the same terms of employment with no loss of pay, pension rights or continuity of employment, and with the benefit of any pay rises or other improvements that they would have been enjoyed if he had not been dismissed.²¹ This is a primary remedy under section 108 of the Industrial and Labour Relations Act.²²

Re-engagement: Re-engagement involves the court making an order that the employee be given employment comparable to that from which they were dismissed or other suitable employment. This need not be with the same employer. It could be with an associated

¹⁸ Lord Hailsham, *Halsbury's Laws of England*, 276.

¹⁹ Lord Hailsham, *Halsbury's Laws of England*, 382.

²⁰ Mwenda, *Employment Law in Zambia*, 86.

²¹ Lord Hailsham, *Halsbury's Laws of England*, 382.

²² The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

employer.²³ It differs from reinstatement in that the employer takes the employee back under a new contract of employment and in a different capacity.²⁴

Unfair Dismissal Compensation: The remedy awarded in the vast majority of successful unfair dismissal claims is monetary compensation. This award compensates the employee for the loss suffered as a result of the dismissal in so far as the employer is responsible for this loss. As well as covering loss of earnings between the dismissal and the hearing and an estimate of future loss, the court will also consider matters such as loss of pension and other rights and any reasonable expenses incurred by the employee as a result of the dismissal.²⁵ Compensation for unfair dismissal falls under two main heads namely, the basic award which is calculated in the same way as a statutory redundancy payment and the compensatory award, which is intended to compensate the employee for the financial loss suffered as a result of the dismissal.²⁶

1.7 Research Methodology

The research methodology employed is of a qualitative nature. It includes desk research and field investigations in the form of interviews. The interviews with relevant officials from the Zambian Judiciary, advocates specialised in employment law were carried out for the purpose of ascertaining what really amounts to special circumstances.

Secondary data in the form of books, journals, scholarly articles as well as internet sources was also consulted with a view to disseminating current information on the subject matter. Reference is also made to international labour instruments. Additionally, reference has also been made to the jurisprudence set out by decided cases in various jurisdictions.

²³ Lord Hailsham, *Halsbury's Laws of England*, 382.

²⁴ Mwenda, *Employment Law in Zambia*, 135

²⁵ Lord Hailsham, *Halsbury's Laws of England*, 367.

²⁶ John Sprack, *Employment Laws and Practice* 1sted. (London: Sweet and Maxwell 2007), 165.

1.8 Limitation of the Study

Although the primary source of information for the study was desk research, four interviews were conducted. However, it proved logistically and financially difficult to conduct a lot of interviews with more judicial officers. Further, although adequate information on reinstatement was obtained from available literature and internet sources, it proved difficult to access case law on reinstatement. Nevertheless, this did not affect the quality of the study.

1.9 Chapter Layout

Chapter One

This chapter considers the fundamental aspects of the research. These include the statement of the problem, significance of the study objectives of the study, research questions, definition of concepts, the methodology, and limitation of the study.

Chapter two

Under the chapter, the study considers what constitutes a valid contract of employment. This is done as a result of the recognition that it is only where there is a valid contract of employment that the courts can make an order of reinstatement. The chapter also details the historical background to the remedy of reinstatement automatically leading us to a discussion of termination under statute and termination at common law. The chapter further looks at the regulatory framework that governs employment contracts in Zambia. It concludes by highlighting the international instruments that play a huge role in the promotion, formulation and development of government policies towards the attainment of freely chosen and full employment.

The essence of this chapter is to familiarise the reader to the employment contract, and in particular to provide a background to the rationale behind the remedy of reinstatement

particularly why it exists as a product of statute and not common law. Further to highlight the need to balance between the two conflicting interests of the employee and the employer.

Chapter three

In chapter three, the paper delves into statutory and case law on wrongful dismissal and unfair dismissal including a comparison of the remedies accorded for both. The chapter thoroughly considers various provisions of *Zambian statutes* that address the issue of reinstatement. The chapter critically examines what amounts to special circumstances in reinstatement. This is done with reference to cases on wrongful and unfair dismissal that have been decided on the foundation of the said provisions and which bring, into the light, the inadequacy of the law in that regard. The essence of this chapter is to acquaint the reader with the law on reinstatement vis-a-vis the requirement of special circumstances and how it relates to the problem of interpretation and lack of adherence to earlier set principles of law.

Chapter four

Chapter four examines the appropriateness of the remedy of reinstatement in an environment such as *Zambia's* where litigation takes very long heightened by the costs of trial and the adversarial relationship between the employer and the employee. A discussion of findings from interviews with judges, and advocates specialised in the subject matter is also included.

Chapter five

In Chapter five, the conclusion and recommendations on how the inconsistencies in the interpretation of what amounts to special circumstances by the courts when making orders of reinstatement can best be minimised are given.

2. Chapter Two

TERMINATION OF EMPLOYMENT BY THE EMPLOYER

2.1 Introduction

In understanding the general principles relating to the remedy of reinstatement for unfair dismissal, an overview of the contract of employment including how it terminates will be made. A brief historical background of the remedy of reinstatement will be included, in order to show how labour law has evolved since the 1970s. The chapter will further highlights why unfair dismissal is a product of statute and not of common law. The chapter will conclude by highlighting the regulatory framework of the employment contracts in Zambia and how international instruments play a role in the promotion, formulation and development of government policies towards the attainment of freely chosen and full employment.¹

2.2 The employment Contract

A contract of employment or service is an individual contract between the employer and the employee that regulates their symbolic relationship.² It is basically a contract of service or apprenticeship whether express or implied.³ This essentially means that for it to qualify to be an employment contract, it has to be one of service and not for services.⁴ This distinction is essential in that protection under the Employment Act,⁵ only applies to employment contracts of service and not for services. Further, the employer is vicariously liable for the actions of his/her employees and further in relation to this; a duty of care is also owed by the employer for the well-

¹ Employment Policy Convention No (122) 1964 and Employment Policy Recommendation, No. (169) 1984

² Winnie Mwenda, *Employment Law in Zambia: Cases & Materials* (Lusaka: At Unza Press 2011), 28.

³ Lord Hailsham. *Halsbury's Laws of England*, 4th ed. (London: Butterworths), 8.

⁴ *Market Investigations v Minister of Social Security* [1968] QBD 732,

⁵ Chapter 268 of the Laws of Zambia

being and safety of employees while they are carrying out obligations under their contract of employment.⁶ There are four main tests that the court uses to classify a contract of service. The control test first adopted, by McCardie J, in *Performing Rights Society v Mitchell and Booker*, stated that, “the final test lies in the nature and degree of detailed control over the person alleged to be a servant.”⁷

Due to its inadequacies the Organisation Test was devised by Lord Denning in *Stevenson, Jordan & Harrison Ltd v MacDonald and Evans*, where he stated that “under a contract of service a man employed as part of the business and his work is done as an integral part of the business but under a contract for services his work, although done for the business, is not integrated into it but only accessory to it.”⁸ Unfortunately, there was no assistance provided for the interpretation of integration or organisation, and, beyond this case, the test was barely used.

The insufficiencies of the earlier tests led the courts to adopt a multi factor approach by taking all the possible relevant factors into account and weighing them against each other to reach a decision. This is due to the realisation that the employment relationship is far more complex and there are a number of issues that require to be taken into consideration. In *Market Investigations v Ministry of Social Security*,⁹ for example, the court held an interviewer employed for short periods of time under a series of contracts of service as an employee because the extent and degree of control exercised by the company, no other factors being taken into account were consistent with her being employed under a contract of service.

⁶ Gwyneth Pitt, *Employment Law 6th ed* (London: Sweet and Maxwell 2007), 71.

⁷ [1924] 1 KB 762

⁸ [1952] 1 T.L.R. 101 CA

⁹ [1968] QBD 732

Further in *Ready Mixed Concrete v Minister of Pension and National Insurance*.¹⁰ a different emphasis was uncovered. In the case, the distinction was crucial from a tax point of view since, if the appellants were to be deemed as employers, they themselves would be liable to pay the National Insurance contributions of the employees being the lorry drivers. McKenna J then assessed the facts of the case against three conditions that he deemed to be required in order for the contract to be that of a contract of employment.

Firstly, skills must be provided in exchange for a wage, secondly, there should be an element of control exercised on the part of the employer and thirdly, the provisions of the contract ought to be consistent with a contract of service. McKenna J held, on the facts of the case, that the contract was one of self-employment. Key to his decision was that fact that the drivers were able to delegate their work, thereby punching holes in the fundamental requirement of personal service¹¹ The contract of employment is considered to be the most important document from which the rights and duties of the employer and employee are derived.¹² The contract essentially governs the relationship between the two parties hence the significance of the distinction.

2.3 Termination of the employment contract a general overview

Termination is a unilateral act that leaves the other party no choice but to accept. In this case the party terminating is not relying on a breach of any contractual term or misconduct on the part of the other party.¹³ The reason is basically that he or she wants to bring the contract to an end. Since it is a unilateral act either of the parties can terminate the employment contract. Employment may in general be terminated at common law either by dismissal or by resignation. If it is terminated by

¹⁰ [1968] 2 Q.B. 497

¹¹ Pitt, *Employment Law*, 74.

¹² Mwenda, *Employment Law in Zambia*, 28.

¹³ Darlington Banda, *A Guide to Employment in Zambia* (Lusaka: Friedrich Elbert Stiftung 1999), 43.

dismissal, that dismissal may at common law be either lawful or wrongful. A dismissal at common law whether it be lawful or wrongful may be challenged as being unfair by statute.¹⁴

An employee's termination of the contract of employment is called a resignation and such an employee is not under any duty to give reasons for the action.¹⁵ A similar action by the employer is simply called termination and like the employee, there is no obligation by law to give reasons. Where the employer gives reasons other than those recognised by the law, then such an employer may be compelled to justify those reasons because the courts may hold such an action not as a termination but amounting to a dismissal. Unlike termination where reasons are not necessary, a dismissal must always be accompanied by a reason or a disciplinary cause.¹⁶

The contract of employment can also terminate not at the initiative of the employer in certain circumstances such as by the expiry of a fixed term, by the death of the employee or in any other manner.¹⁷ As the ordinary law of contract is applicable to a contract of employment, the parties who enter the contract may also stipulate how it is to end.¹⁸ According to Banda, "every well drafted contract of employment must have a clause specifying how or when the contract may be terminated by either party."¹⁹ When such a clause exists it guarantees to each party the right to be able to bring the employment contract to an end provided there is necessary notice given. In the absence of any express stipulation as to duration or expiry, every contract of employment is treated as determinable by reasonable notice or if greater the statutory minimum period of notice.²⁰

¹⁴ Lord Hailsham, *Halsbury's Laws of England*, 276.

¹⁵ Banda, *A Guide to Employment in Zambia*, 43.

¹⁶ Banda, *A Guide to Employment in Zambia*, 43.

¹⁷ The Employment Act Chapter 268 of the Laws of Zambia s36 (1)

¹⁸ Lord Hailsham, *Halsbury's Laws of England*, 290

¹⁹ Banda, *A Guide to Employment in Zambia*, 43.

²⁰ Lord Hailsham, *Halsbury's Laws of England*, 288.

2.4 Unfair dismissal and the remedy of reinstatement: A brief historical background

In contracts of employment, it is inevitable that disagreements will arise because one or the other party is dissatisfied with some aspect of the other's performance. Initially common law regulated the employment relationship. Under common law, the only recourse for a dissatisfied party was to terminate the employment relationship. Clearly this was an easier option for an employer than for an employee. For as long as the contract was terminated lawfully, usually by giving notice of a certain length, no further remedies were available. It was also open to an employer to provide for disciplinary powers short of dismissal by express term.

The weak bargaining position of the employee meant that even where there was an agreement in place, there was no way of holding the employer to what was agreed. Common law ultimately left employees extremely unprotected as there was no restraint on the employer's ultimate punitive power of dismissal and employees could be lawfully dispossessed of their livelihood for no good reason.²¹ The only time the employee would have a remedy was if the dismissal was in breach of contract, in which case it was possible to sue for wrongful dismissal, although the remedy was limited in terms of its scope of protection.²²

A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment.²³ To qualify for this remedy, an employee had to satisfy two conditions namely that the employer terminated the contract without notice or with inadequate notice, and secondly, that the employer was not justified in doing so. Under common law it was and is still true that if reasonable notice to terminate the contract is given, then the contract is terminated lawfully and ultimately leaves the employee with no claim for wrongful dismissal. This is in spite of whether or not the employer has terminated the contract for a bad or arbitrary reason, or indeed no reason at

²¹ Pitt, *Employment Law*, 215.

²² Pitt, *Employment Law*, 215.

²³ Lord Hailsham, *Halsbury's Laws of England*, 309.

all. Additionally, there was no specific performance of an employment contract and injunctions against the employer could not be issued. To quote a typical judgement of Lord Justice Fry:

It would be invidious to keep persons tied to each other in business relations when the tie has become odious; or to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations.²⁴

This was seen as a major defeat of the common law position. The position changed with the introduction of statutory claims of unfair dismissal in England in 1971.²⁵ Its endorsement was twofold. The first was to promote fair labour practices by preventing an employer from terminating contracts of employment on certain specified grounds. The second was to provide the previously unavailable remedy of reinstatement where an employee had proved that he had been unfairly dismissed.²⁶ The General Conference also produced recommendation No. 119, on the Termination of Employment at the Initiative of the Employer. The fundamental principle was set out as follows:

Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.²⁷

Unfair dismissal unlike wrongful dismissal is therefore clearly a formation of statute which arose with the objective of promoting fair practices by providing the previously unavailable remedy of reinstatement where an employee is able to prove that he had been unfairly dismissed.²⁸ Mwenda writes that “The introduction of the remedy of reinstatement was a momentous departure from the common law practice of non-enforceability of contracts of employment by injunction or specific

²⁴ *De Francesco v Barnum* (1890) 45 Ch.D.430, 438

²⁵ Banda, *A Guide to Employment in Zambia*, 8.

²⁶ Banda, *A Guide to Employment in Zambia*, 8.

²⁷ George Clark, “Remedies for Unjust Dismissal: Proposals for Legislation” 36 (June 1970), 7-13.

²⁸ Mwenda, *Employment Law in Zambia*, 135.

performance, common law holding that a contract of employment is one of a personal nature.”²⁹This did not affect the common law position, but it gave employees an alternative statutory claim in specified circumstances.

In recent years statute law has intervened more directly in relation to disciplinary and grievance procedures. First the Employment Act under section 26A prohibits an employer from terminating the services of an employee on grounds related to the conduct or performance of an employee without affording such an employee an opportunity to be heard on charges against him.³⁰ The effect of section 26A is that whether by termination or dismissal an employee should be afforded the opportunity to be heard on charges levied against him. This fundamentally alters the position of common law that states that an employer has a right to terminate a contract of employment for any reason or none and without the application of natural justice as was clearly stated in the case of *Contract Haulage Limited v Mumbuwa Kamayoyo*,³¹ the Supreme Court of Zambia held inter alia, that where there is some statutory authority for a certain procedure relating to dismissal a failure to 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.

What the section has done is to remove any doubts as to when an employer may terminate a contract of employment without giving an employee an opportunity to be heard.³² Therefore it is clear that when it comes to broad grounds of conduct and performance the employee does indeed have a right to be heard. In the case of *Morris Mbalakao and Zambia National Provident Fund*

²⁹Mwenda, *Employment Law in Zambia*, 135.

³⁰ The Employment Act Chapter 268 the Laws of Zambia, s 26A(as amended by Act No. 15 of 1997)

³¹ (1982) Z.R. 13 (SC)

³² Banda, *A Guide to Employment in Zambia*, 43.

Board,³³ the Supreme Court of Zambia held that the common law applicable to Zambia in a master/servant relationship is that the relationship, even if brought about by an oral or written agreement can be terminated for good, bad cause or none at all. The court went on to further to state that in most cases the terms governing all these relationships indicate that there is a right to observe rules of natural justice and a right not to be thrown out of the job except on some rational ground.

Further the Industrial and Labour Relations Act³⁴ considers any dismissal falling within the realm of section 108 to be an unfair labour practice amounting to unfair dismissal. This section bars an employer from dismissing an employee on the grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status. Further breach of section 5 of the Industrial and Labour Relations Act is equally considered as an unfair labour practice entitling the Industrial Relations Court to decide whether such breach should attract damages, reinstatement or any other remedy.³⁵

2.5 Termination of employment: The regulatory framework

Due to the nature of the employment relationship, which is based on competing demands and interests thereby making such a relationship potentially conflict prone, the task of establishing guidelines for the sustenance of the relationship cannot be left to the parties alone. Conventional wisdom has demanded that a neutral third party with an overriding interest in labour relations must lay down the basic rules of behaviour for all the parties. This neutral third party has been assumed and accepted to be the state through its established institutions.³⁶

³³ SCZ Appeal No. 120 of 2000 (Unreported)

³⁴ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108

³⁵ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s5

³⁶ Banda, *A Guide to Employment in Zambia*, 1.

Most standards in force in the area of termination of employment arose out of the need to protect the worker. For this purpose a series of conditions to guarantee the fairness of dismissal were established, thereby putting an end to the discretionary power of the employer to terminate without stating a reason. Most current regulations dealing with employment termination require the fulfilment of not only prior procedural requirements before dismissal but also impose an obligation on the employer to substantiate the reason for justifying dismissal.³⁷ In other words there must be a reason which prevents the continuation of the contract.

From a legal perspective the employment contract may be seen as a bilateral legal transaction, the fulfilment and execution of which cannot be left to unilateral declaration and expressions of will by either of the contracting parties. Of course for much of the time the relationship between the employer and the employee will carry on without reference to the contract or the legislation. However, when the chips are down, if there is a problem, it will ultimately be resolved by reference to both the contractual arrangement and legislation which is predicted on the background of contractual principles.

Legislative provisions regulating termination of employment in Zambia are found in the Employment Act,³⁸ the Employment Amendment Act,³⁹ the Industrial and Labour Relations Act,⁴⁰ the Industrial and Labour Relations (Amendment) Act,⁴¹ Industrial and Labour Relations Act,⁴² the Minimum Wages and Conditions of Employment Act.⁴³ In addition collective agreements typically contain termination of employment provisions and are therefore considered to be an important source of employee regulation in Zambia for those persons that are covered by them. In

³⁷ The Employment Act Chapter 268 of the Laws of Zambia s 26A

³⁸ The Employment Act Chapter 268 of the Laws of Zambia

³⁹ The Employment Amendment Act No. 15 of 1997

⁴⁰ The Industrial and Labour Relations Act No. 27 of 1993 (as amended in 1997)

⁴¹ The Industrial and Labour Relations Amendment Act No. 30 of 1997

⁴² The Employment Act Chapter 269 of the Laws of Zambia

⁴³ The Minimum Wages and Ccnditions of Employment Act Chapter 276 of the Laws of Zambia

terms of the scope of the legislation regulating contracts of employment, the Employment Act,⁴⁴ extends to all employees except those in the Defence Force, Police Service and those in the Zambia Prison Service.⁴⁵ The Industrial and Labour Relations Act⁴⁶ excludes Judicial and Security services employees from the application of the Act by section 2(1).

International human rights instruments broadly acknowledge the theoretical framework underlying protection against arbitrary dismissal. Zambia has ratified more than forty three conventions including unfair dismissal conventions which are relevant to the protection of the employee against unfair labour practices.⁴⁷ Of these, thirty nine are in force. The International Labour Organisation (ILO) is the intergovernmental organisation dealing with labour issues. The principle of non-discrimination in labour relations is enshrined in the ILO constitution and many other instruments relating to human rights of employees at the workplace.⁴⁸ The constitution of the International Labour Organisation proclaims that all human beings have the right to pursue their material wellbeing in conditions of economic security.⁴⁹ The mission of the International Labour Organisation is to promote fair working conditions in all countries.⁵⁰

In the context of employment, the ILO has defined discrimination in the Convention Concerning Discrimination in respect of Employment and Occupation,⁵¹ as “any distinction, exclusion or preference, which has the effect of nullifying or impairing equality of opportunity of opportunity

⁴⁴ The Employment Act Chapter 268 of the Laws of Zambia

⁴⁵ The Employment Act Chapter 268 of the Laws of Zambia s2

⁴⁶ The Industrial and Labour relations Act Chapter 269 of the Laws of Zambia

⁴⁷ ILO at www.ilo.org (Accessed on 28/02/12)

⁴⁸ ILO Constitution available at www.ilo.org (Accessed on 05/02/12)

⁴⁹ Declaration of Philadelphia Para 11(a) Annex to the Constitution of the International Labour Organisation.

⁵⁰ Pitt, *Employment Law*, 24.

⁵¹ ILO Convention III: Discrimination (Employment and Occupation) Convention 1958, Preamble

or treatment in employment or occupation.”⁵² Under the convention, member states of the ILO undertake to declare and pursue policies designed to promote equality and eliminate all forms of discrimination in respect of employment.⁵³ This convention is premised on the basis that discrimination is a violation of human rights under the Universal Declaration of Human Rights.⁵⁴ The ILO under Convention 158 of 1982 is specific to issues relating to termination of employment.⁵⁵ The Convention provides for substantive fairness⁵⁶ and procedural fairness⁵⁷ in dealing with termination of employment based on reasons of incapacity, misconduct or operational requirement of the business.⁵⁸

2.6 Conclusion

An employee’s right not to be unfairly or unjustifiably dismissed is a modern cornerstone of the law relating to the termination of employment. This right is reflected in the various legislations outlined above. International human right instruments broadly acknowledge the right against arbitrary dismissal. This chapter has considered the general overview of the employment contract and how it terminates; it has also provided a brief historical background to the remedy of reinstatement. It has further highlighted the various efforts made to regulate and protect the right of an employee not to be arbitrary dismissed both at international and local level.

⁵² ILO Convention III: Discrimination (Employment and Occupation) Convention 1958, Article 1 (a) & (b)

⁵³ ILO Convention III: Discrimination (Employment and Occupation) Convention 1958, Article 2

⁵⁴ ILO Convention III Discrimination (Employment and Occupation) Convention 1958, Preamble

⁵⁵ ILO Convention 158 (Termination of Employment) Convention 1982, Preamble

⁵⁶ ILO Convention 158 (Termination of Employment) 1982, Article 4, provides that termination of employment must be based on valid reasons.

⁵⁷ ILO Convention 158 (Termination of Employment) Convention 1982 Article 7, provides that employees should be given an opportunity to defend herself or himself against allegations of incapacity to perform agreed work.

⁵⁸ ILO Convention 158 (Termination of Employment) Convention 1982

3. Chapter Three

AN ANALYSIS OF THE REMEDY OF REINSTATEMENT

3.1 Introduction

This chapter focuses on the statutory provisions and case law on wrongful and unfair dismissal in particular the remedy of reinstatement in Zambia. The chapter begins by looking at the statutory definition of unfair dismissal, which is a vital jurisdictional factor. Thereafter, a comparison between wrongful and unfair dismissal will be highlighted. The chapter will further examine the kind of exceptional circumstances that warrant an award of the remedy of reinstatement. An evaluation of recent case law will demonstrate how the courts have interpreted what amounts to special circumstances for reinstatement to be awarded. In addition the chapter will bring to light, the inconsistencies in the interpretation of what amounts to special circumstances by the courts.

3.2 Unfair dismissal

The Industrial and Labour Relations Act defines a dismissal contrary to statute or a statutory procedure as an unfair dismissal.¹ Banda² argues that, an employee has the right not to be unfairly dismissed by his employer. However, as evidenced from the preceding chapters, it is acknowledged that the previous common law approach of awarding damages in cases of wrongful dismissal based on a strict application of contract principles was insufficient to protect the employee against the perceived might of the employer.³ In a master-servant relationship the master may dismiss a servant for any reason, or for none. A master is

¹The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108 (3)

² Darlington Banda, *A Guide to Employment in Zambia* (Lusaka. Friedrich Elbert Stiftung, 1999), 8.

³ Gwyneth. Pitt, *Employment Law*, 6th ed. (London: Sweet and Maxwell 2007), 215.

however under no obligation to accord the servant procedural fairness prior to dismissal⁴ provided that he complied with the procedure under the contract; he is entitled to dismiss an employee for disciplinary reasons or incompetence.⁵

In cases where the contract is an indeterminate one, the employer can lawfully terminate the employee's contract by giving him/her the period of notice specified in the contract, or payment of money in lieu of the notice.⁶ When an employer wrongfully dismisses the employee by failure to give the required notice, upon a successful challenge of such dismissal, the employee's damages are limited to the remuneration he or she would have earned during the required notice period, this is however subject to the employee's duty to mitigate his or her loss.⁷

From the foregoing, it can be stated that unfair dismissal unlike wrongful dismissal is clearly a formation of statute with the objective of promoting fair labour practices. The rationale for unfair dismissal is to provide the previously unavailable remedy of reinstatement in situations where the employee is able to prove unfair dismissal.⁸ Thus employees have an alternative statutory claim from that under common law which holds the non-enforceability of contracts of employment.⁹

3.3 Comparison of wrongful dismissal and unfair dismissal remedies

As a result of the non-enforceability of contracts of employment by injunction or specific performance, unfair dismissal has been developed to remedy the rigidity of common law

⁴ *Contract Haulage Limited v Mumbuwa Kamayoyo* (1971) 1 WLR 487

⁵ Darlington Banda, *A Guide to Employment in Zambia*, 12.

⁶ The Employment Act Chapter 268 of the Laws of Zambia s 20-21

⁷ Pitt, *Employment Law*, 221-220.

⁸ Winnie Mwenda, *Employment Law in Zambia: Cases & Materials* (Lusaka: At Unza Press 2011), 136. 135

⁹ Mwenda, *Employment Law in Zambia*, 136.

remedies. Whereas an unfair dismissal is a product of statute a wrongful dismissal is a product of common law and one at the instance of the employer that is contrary to the terms of employment.¹⁰ When considering whether or not a dismissal is wrongful the form rather than the merits are considered, while an unfair dismissal looks at the merits of the dismissal. Additionally, an unfair dismissal in comparison to a wrongful dismissal entails that the courts examine the reasons for the dismissal to determine whether the dismissal was justified or not.¹¹

Where an employer fails to give the necessary notice to an employee, the dismissal maybe termed wrongful.¹² In these circumstances if the employee challenges the dismissal on the basis of lack of or inadequate notice the major remedy will be an award of damages calculated on the basis of notice period.¹³ Another category of wrongful dismissal is one that comprises a legal challenge on the basis of procedural error. A challenge of a dismissal on this basis if successful may entitle the employee to damages as well reinstatement.¹⁴

From the foregoing it is clear that the major drawback of an action for wrongful dismissal is that damages are limited to the notice period. Moreover where there is a challenge to the procedure in effecting the dismissal entitling an employee to reinstatement the courts have been reluctant to order specific performance of an employment contract.¹⁵ Unfair dismissal therefore comes in to remedy these inadequacies.

¹⁰ Mwenda, *Employment Law in Zambia*, 105, 135.

¹¹ Mwenda, *Employment Law in Zambia*, 136.

¹² Mwenda, *Employment Law in Zambia*, 105.

¹³ Pitt, *Employment Law*, 221-220.

¹⁴ Mwenda, *Employment Law in Zambia*, 105

¹⁵ *Ridge v Baldwin* [1963] 1 QB 539 as quoted in *Raine Engineering Company Limited v Baker* [1972] ZR 156 (CA)

The Industrial and Labour Relations Act,¹⁶ under section 108 stipulates what would amount to an unfair dismissal. The said section provides as follows:

No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on ground of race, sex, marital status, religion, political opinion or affiliation or social status of the employee.¹⁷

The above mentioned section is in line with the provisions of Article 23 of the Constitution of Zambia which provides as follows: “Subject to clauses (6), (7). And (8) a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority.”¹⁸

Further a dismissal based on discrimination for reasons that the employee exercised his trade union rights is equally prohibited under the Industrial Relations Act,¹⁹ breach of which is regarded as an unfair labour practice. Clark highlights the importance of this provision by stating thus:

One of the most important aspects of the question of job security is its relation with the principle of freedom of organisation. Such freedom must include at the very least protection from dismissal on grounds of union membership, attempts to organise one’s fellow workers, acting as a workplace representative, taking part in negotiations and bargaining and the industrial action by which alone collective bargaining can in the last resort be made effect.²⁰

Under the Act the employer has a statutory period of thirty days in which to lay a complaint against the employer before the court from the date of the occurrence of the unfair dismissal

¹⁶ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

¹⁷ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108

¹⁸ The Constitution of Zambia Chapter 1 of the Laws of Zambia Article 23 (2)

¹⁹ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s5

²⁰ George Clark, “Remedies for Unjust Dismissal: Proposals for Legislation” 36 (June 1970), 14.

provided such an employee has exhausted all the administrative channels available to him/her.²¹ Protection against arbitrary dismissals would be meaningless without the possibility of redress, in the event of a violation section 85(4) of the Act,²² gives the Industrial Relations Court a wide jurisdiction to inquire into any employment disputes.

Significant to section 108,²³ are the remedies available to the aggrieved employee. The section provides for the remedy of reinstatement of the worker to his or her position of employment.²⁴ This effectively means that the termination of employment is null and void.²⁵ If reinstatement is found to be inappropriate a finding of unfair dismissal may be remedied by financial compensation to the employee to offset the financial effects of the unjustified dismissal.²⁶ Another remedy available to an employee who has been unfairly dismissed is re-employment.²⁷ Depending on the gravity of the circumstances of the case, section 108²⁸ makes it clear that reinstatement or re-employment other than damages or compensation for loss of employment is the preferred remedy for unfairly dismissed employees.

It is important to note that the difference between reinstatement and re-employment is not explained in the Act.²⁹ Reinstatement, in its ordinary meaning suggests that the period of service between dismissal and resumption of service is deemed unbroken.³⁰ Whereas a re-employment order differs from an order of reinstatement in that it involves the court making an order that the employee be given employment comparable to that from which they were

²¹ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108 (3)

²² The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

²³ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

²⁴ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108 (3)

²⁵ Pitt, *Employment Law*, 270.

²⁶ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108 (3)

²⁷ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108 (3)

²⁸ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia s108 (3)

²⁹ The Industrial and Labour Relations Chapter 269 of the Laws of Zambia

³⁰ Mwenda, *Employment Law in Zambia*, 136

dismissed or other suitable employment. For re-employment, the employer need not be same the employee could be placed with an associated employer. Further the employer takes the employee back under a new contract of employment and in a different capacity.³¹

The way by which an employer terminates the employment services of an employee is significant for the court especially when it comes to considerations of whether or not an employee's contract of employment was lawfully terminated or whether it amounted to an unfair dismissal. To this end, termination of employment is when an employee's contract of employment with an employer ends.³² At common law employment may generally be terminated either by dismissal, resignation or redundancy.³³ If it is terminated by dismissal, that dismissal may either be lawful or wrongful. This said a dismissal whether lawful or wrongful may still be challenged as unfair under statute.³⁴

Under dismissal an employee is treated as dismissed in the following instances: firstly, where the contract under which he is employed is terminated without notice, secondly, where the employee is under a fixed term and the term expires without being renewed, and thirdly, where the employer terminates the employment contract with or without notice in circumstances that entitle him to terminate without notice by reason of the employee's conduct.³⁵ Dismissal unlike simple termination connotes a picture of wrong doing on the part of the dismissed employee.³⁶

³¹ Lord Hailsham, *Halsbury's Laws of England*, 4th ed. (London: Butterworths), 382.

³² Lord Hailsham, *Halsbury's Laws of England*, 276.

³³ Mwenda, *Employment Law in Zambia*, 75.

³⁴ Lord Hailsham, *Halsbury's Laws of England*, 276.

³⁵ Lord Hailsham, *Halsbury's Laws of England*, 382.

³⁶ Mwenda, *Employment Law in Zambia*, 35

Due to the introduction of unfair dismissal and the provisions in section 108 of the Industrial and Labour Relations Act,³⁷ employers have tried to evade liability by terminating employment contracts by way of notice and proper procedures put in place even though their action would in fact amount to a dismissal. Banda states that:

There is evidence to show that the practice of employment termination in Zambia is riddled with the nomenclature of meaning between termination and dismissal. Employers have in this country successfully terminated employment contract when in fact the action is one of dismissal for which the employee would otherwise have been eligible to a remedy with benefits all in an effort to evade the law as applies to dismissal.³⁸

Clearly, this explains the fact that most cases that have ended up in court with the remedy of reinstatement being awarded, did not start off as cases of unfair dismissal, instead most of them were originally cases of wrongful dismissal. To demonstrate the aforementioned, the cases of *Bank of Zambia v Kasonde*³⁹ and *Zambia Airways Corporation Limited v Gershom Mubanga*,⁴⁰ are fitting illustrations.

3.4 What amounts to special circumstances?

As earlier alluded to there is a general prohibition against termination of employment on ground of discrimination. Therefore, any dismissal that falls within the ambit of section 108 of the Industrial and Labour Relations Act⁴¹ is deemed to be an unfair labour practices and amounts to an unfair dismissal. The section provides as follows:

No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on ground of

³⁷ The Industrial and Labour Relations Act Chapter 269 of the laws of Zambia

³⁸ Banda, *A Guide to Employment in Zambia*, 7.

³⁹ (1995-1997) ZR 28 (SC)

⁴⁰ (1990-1992) ZR 149 (SC)

⁴¹ The Industrial and Labour Relations Act Chapter 269 of the laws of Zambia

race, sex, marital status, religion, political opinion or affiliation or social status of the employee.

It must be submitted at the very onset that the Act⁴² provides limited grounds for proving discrimination thereby disadvantaging employees whose cases may not fall within the ambit of the aforesaid. Further, the section⁴³ does not give clarity as to what exceptional circumstances warrant the award of reinstatement. In order to understand what amounts to special circumstances recourse will be had to case law.

Having laid down the provisions of section 108 of the Industrial and Labour Relations Act and its resultant remedies,⁴⁴ it is quite rare that courts grant an award of the remedy of reinstatement.⁴⁵ The exceptional nature of the remedy was reiterated in the case of *Francis v Municipal Council of Kuala Lumpur*.⁴⁶ Even though the remedy is exceptional, where circumstances warrant its invocation judges have the jurisdiction to order the remedy.⁴⁷ In light of the foregoing, the cardinal issue, which this researcher seeks to determine, is what exceptional circumstances warrant an award of the remedy of reinstatement when the courts conclude that an employer's decision to dismiss an employee amounts to an unfair dismissal.

In *Zambia Airways Corporation Limited v Gershom Mubanga*,⁴⁸ the issue of special circumstances came squarely before the Supreme Court. This was on an appeal against an order of the High Court declaring that the respondent had been wrongly dismissed and ordering reinstatement. The employee in this case had claimed that the Disciplinary Code and Grievance Procedure governing his employment had not been correctly followed. Further, that the

⁴² The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

⁴³ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia, s108.

⁴⁴ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

⁴⁵ Mwenda, *Employment Law in Zambia*, 127.

⁴⁶ [1962] 3 ALL ER 663

⁴⁷ Mwenda, *Employment Law in Zambia*, 127.

⁴⁸ (1990-1992) ZR 149 (SC)

the arguments and the evidence before it was satisfied that the trial judge had correctly found that the appellant failed to comply with the correct procedure and principles of natural justice were equally not followed. With regard to the question of exceptional circumstances, the Supreme Court agreed with the trial judge's decision and confirmed the order of reinstatement based on inter alia the following considerations:

- (i) There were a number of unsubstantiated charges levied against the employee
- (ii) There existed animosity against the respondent unjustified by his conduct
- (iii) Managing Director responsible for the vendetta against the respondent was no longer with the appellant organisation.

It can be inferred from the judgement of the Supreme Court that where the employers are maliciously vindictive against the employee, coupled with a failure to substantiate charges levied against him will provide for exceptional circumstances warranting an award of reinstatement.

In *Bank of Zambia v Kasonde*,⁴⁹ the respondent had been accused of dishonesty by his employer which was not proven and the dismissal therefore held wrongful by the High Court. The trial judge further found that special circumstances existed to justify the order of reinstatement. In an appeal by the defendant to the Supreme Court, the court had on the occasion an opportunity to state the general principle of law vis-a-vis the remedy of reinstatement. From the case the learned trial judge found that there were special circumstances due to the following:

- (i) The allegations against the plaintiff were unsubstantiated
- (ii) The fate of the other players she should have worked with if they were exonerated was unknown

⁴⁹ (1995-1997)ZR 28 (SC)

unknown

- (iii) The defendant was a public institution and did not adhere to the principles of fair play.
- (iv) The judge further stated that dismissal based on misconduct must be proven on all grounds in this case it was not proved.
- (v) Further, that the employee did not enjoy equal treatment under the company's ruling regulations.
- (vi) The court went on to state that as the plaintiff had been dismissed for dishonesty, the plaintiff would not easily get employment in Zambia due to the stigma attached to such a charge.

Thus the Supreme Court observed that reinstatement was the only equitable and reasonable remedy so that the defendant may atone for the stigma that had been pinned on the plaintiff.

Implicit in the judgement in *Bank of Zambia v Kasonde*,⁵⁰ is the acceptance by the Supreme Court that a dismissal based on the following: non-adherence to principles of fair play, the lack of substantiation of claims of misconduct against the employee, the lack of equal treatment of employees by the employer under the company's regulations and the stigma attached to dishonesty if not proved amounts to special circumstances justifying the remedy of reinstatement. What is apparent from the Supreme Court's approach is that the court could order reinstatement of an employee, in these situations even though the employer had good reason to dismiss the employee.

⁵⁰ (1995-1997)ZR 28 (SC)

3.5 Inconsistencies and lack of adherence to earlier adopted principles in interpretation of special circumstances

Having evaluated case law, the following discusses inconsistencies and the failure by the courts of Law to adhere to principles that were espoused in earlier cases when instituting the remedy of reinstatement. This is to show that there is a general lack of adherence to the principles such as those espoused in the case of *Zambia Airways Corporation Limited v Gershom Mubanga*,⁵¹ and *Bank of Zambia v Kasonde*.⁵² Since our jurisprudence is based on the doctrine of judicial precedent the need for consistency which ultimately leads to certainty in the law when sticking to precedents cannot be overemphasised.

In the case of *Mukupa Mwilwa v Zambia Electricity Supply Company (Zesco)*,⁵³ the Industrial Relations Court seemed to follow the legal principles espoused in the case of *Zambia Airways Corporation Limited v Gershom Mubanga*,⁵⁴ and *Bank of Zambia v Kasonde*.⁵⁵ In this regard the court had the occasion to award the remedy of reinstatement where it was found that the respondent dismissed the applicant for allegedly dishonest conduct emanating from forged sheets and dishonest conduct which were both not proved. The trial Judge found that there was no evidence to the alleged forgery because a testimony to the fact that signed documents in respondent's bundle were not forgeries was provided. Further, there was no evidence adduced by the respondent to show that obtaining more than one salary advance was dishonest conduct. As a result of the aforementioned, the trial judge found that the applicant was dismissed for a non-existing disciplinary offence and the dismissal was consequently unfair. Reinstatement was thus ordered.

⁵¹ (1990-1992) ZR 149 (SC)

⁵² (1995-1997) ZR 28 (SC)

⁵³ Application No. 111 of 1998 (IRC)

⁵⁴ (1990-1992) ZR 149 (SC)

⁵⁵ (1995-1997) ZR 28 (SC)

Evidence of inconsistency and lack of adherence to earlier espoused principles is to be found in the case of *ANZ Grindlays Bank Zambia Limited v Chrispin Kaona*.⁵⁶ The case was an appeal from the Industrial Relations Court holding that the respondent was improperly dismissed and ordering that he be reinstated and paid arrears of salary and allowances plus interest. The respondent and other employees had obtained permission from the appellant to attend a union meeting and when they had returned to their workplace they found that they had been locked out of their offices and treated though they had been on strike. They later found out that they had actually been dismissed on reporting to work after the weekend.

The union brought proceedings in the Industrial Relations Court where it was found that the employees had been unfairly dismissed but no order of reinstatement was made. Consequently, the respondent Crispin Kaona brought an action in his personal capacity in the Industrial Relations Court claiming that he had been discriminated against and should be reinstated. The order was granted and hence the appeal to the Supreme Court by the appellants. Even though the Industrial Relations Court found that the case fell within the ambit of section 108 (2) of the Industrial and Labour Relations Act and consequently ordered reinstatement,⁵⁷ the Supreme Court reversed the order. The Supreme Court found that despite the dismissal being declared null and void by the trial Judge, the case was not one that necessitated an order of reinstatement. The Supreme Court in giving the judgement reiterated the exceptionality of the remedy. It stated thus: “In the present case the evidence having indicated that the respondent

⁵⁶ SCZ Judgement No. 12 of 1995 (Unreported)

⁵⁷ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

was wrongly dismissed, there is nothing to suggest that this is one of those rare cases where reinstatement should be ordered.”⁵⁸

The ruling by the Supreme Court indicates that the circumstances of the case did not warrant the remedy of reinstatement rather an award of damages. According to the Supreme Court, the proceedings in the first case did not give the respondent an opportunity to obtain an order of reinstatement as claimed in the second case. Secondly the question of reinstatement was irrelevant as the discrimination in the case did not come within the ambit of section 108 (2) of the Industrial and Labour Relations Act⁵⁹ but came within section 5(2) which provides that no employer should dismiss any person for exercising his right to attend a union meeting.

Clearly from the foregoing case, the award of the remedy of reinstatement in the circumstances is an outright departure from the principles espoused in the earlier cases and is proof of the inconsistencies and a lack of understanding to what amounts special circumstances.

Inconsistencies and lack of adherence to earlier adopted principles is also found in the case of *Zambia Bata Shoe Company Limited v Damiano Mtambalika*.⁶⁰ The Supreme Court was called upon to decide a dispute in which the Industrial Relations Court reinstated the respondent to his position as Branch Manager and deemed him retired at the age of fifty five with full benefits. The nature of the evidence before the trial court was that the respondent had been charged with dishonest conduct and falsifying company documents. The Appellant handed the employee over to the police for prosecution and also dismissed him from employment. On evidence, the trial judge observed that the failure of the employers to comply with its established rules and

⁵⁸ SCZ Judgement No. 12 of 1995 (Unreported)

⁵⁹ The Industrial and Labour Relations Act Chapter 268 of the Laws of Zambia

⁶⁰ SCZ Judgement No. 18 of 2010 (Unreported)

procedures resulted in a straight forward wrongful dismissal. Added to this was the failure of the employer to produce documents as to the guilt of the employee. The trial court found that the respondent had proved his case on a balance of probability and ordered his reinstatement and that he be deemed to have retired at the age of fifty five with full benefits.

However, after a thorough consideration of the merits of the whole appeal, the Supreme Court made the following observations; on the facts and circumstances before them, reinstatement was not the appropriate remedy and therefore allowed the appeal and the decision of the lower court to reinstate the employee was set aside. The judge made some cautionary remarks as follows:

We caution that the order of reinstatement is something that cannot be easily decreed in a pure master and servant relationship as was the case in this case (see *Contract Haulage v Kamayoyo*).⁶¹ There must be special circumstances, clearly made out in the evidence (per *Zambia Airways v Gershom Mubanga*).⁶²

In this case, the Supreme Court was emphasizing the need and importance of making sure that special circumstances exist before making orders of reinstatement.

Implicit in the judgement above is that the trial judge using his discretion concluded that the failure of the employers to comply with its established rules and procedures coupled with the failure to substantiate claims as to the guilt of the employee amounted to exceptional circumstances justifying the remedy of reinstatement. The court below had relied on the case of *Bank of Zambia v Kasonde*.⁶³ The Supreme Court considered this a misdirection and the case of

⁶¹ (1982) Z.R. 13 (SC)

⁶² (1990-1992) ZR 149 (SC)

⁶³ (1995-1997) ZR, 28 (SC)

*Bank of Zambia v Kasonde*⁶⁴ was consequently distinguished. Whereas, in the *Bank of Zambia v Kasonde*,⁶⁵ case the charge was vague and without sufficient details and further the disciplinary code had not been adhered to, in the case of *Zambia Bata Shoe Company Limited v Damiano Mtambalika*,⁶⁶ even though the employer did not follow the Disciplinary Code, there were circumstances to show that it was not prudent to go by the Disciplinary Code. Further the respondent employee had been awarded an opportunity to exculpate himself.

What is apparent from the Industrial Relations Court's approach from is that the court can order reinstatement of an employee, where the employer did not follow a disciplinary procedure even though the employer had good reason to dismiss the employee and depart from the Disciplinary Code. This clearly is confirmation that determining what really amounts to special circumstances in an unfair dismissal case is indeed a challenge for the courts.

Following the decision by the Supreme Court it is argued that the order was not only unwarranted but also unjustifiable as the evidence adduced did not present exceptional circumstances demanded by the law to justify an order of reinstatement. The Supreme Court's interpretation of what amounts to special circumstances is in line with what was espoused in the case of *Zambia Airways Corporation Limited v Gershom Mubanga*⁶⁷ and the later case of *Bank of Zambia v Kasonde*.⁶⁸

Indeed it is reasonable and justified in view of the cases reviewed for one to aver that there exists appalling inconsistencies in the Zambian courts of law as to the interpretation of what

⁶⁴ (1995-1997) ZR, 28 (SC)

⁶⁵ (1995-1997) ZR, 28 (SC)

⁶⁶ SCZ Judgement No. 19 2010 (Unreported)

⁶⁷ (1990-1992) ZR 149 (SC)

⁶⁸ (1995-1997) ZR, 28 (SC)

amounts to special circumstances to warrant the remedy of reinstatement. Additionally, these inconsistencies inherent in the decisions of the court make it difficult to come up with a coherent explanation of what amounts to special circumstances. This is coupled with the lack of adherence to the principles laid down in the earlier cases.

3.6 Conclusion

This chapter has thoroughly considered the various provisions of Zambian statutes that address the issue of reinstatement. It established that even though the Industrial and Labour Relations Act provide for the remedy of reinstatement, it does not give indications as to what amounts to special circumstances. Further, section 108 of the Act limits instances in which an employee can bring a discrimination claim thus disadvantaging employees who are discriminated on other grounds.

The chapter went on to critically examine what kind of exceptional circumstances warrant an award of the remedy of reinstatement. An evaluation of case law pointed to the fact that none of the cases distinctively point to the exact special circumstances that warrant the award of reinstatement. It also established that there exist inconsistencies in how courts interpret what amounts to special circumstances for reinstatement to be awarded. It has further been shown that there is a lack of adherence to earlier principles regarding the award of reinstatement, in particular those espoused in the case of *Zambia Airways Corporation Limited v Gershom Mubanga*⁶⁹ and the later case of *Bank of Zambia v Kasonde*.⁷⁰

⁶⁹ (1990-1992) ZR 149 (SC)

⁷⁰ (1995-1997) ZR 28 (SC)

4. Chapter Four

APPROPRIATENESS OF THE REMEDY OF REINSTATEMENT

4.1 Introduction

This chapter seeks to analyse the appropriateness of the remedy of reinstatement to Zambia's system of litigation. The paper postulates that while reinstatement is a well-founded remedy for reparation in the field of contract, the realms of industrial relations owing to a variety of factors ranging from the personal nature of the employer/ employee relationship, the duration of the relationship, and the vagaries of the nature of litigation in the country, it is essential for legislation to set standards for the application of the remedy. The chapter will conclude with a discussion of findings from interviews with judges and advocates specialised on the subject matter.

4.2 Reinstatement as an assurance of job security

In most countries especially a developing nation like Zambia, people build much of their lives around their jobs. Their income and prospects for the future are unavoidably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster especially because there are no unemployment benefits. Dismissal for some may therefore mean an unavoidable breaking up of a community and the displacement of families. In the case of *Nyoni v Attorney General*,¹ the Supreme Court reaffirmed the difficulty of finding employment when they took judicial notice of the scarcity of jobs. The order of reinstatement by the courts therefore provides a definite solution to the uncertainties of unemployment and

¹ (2000) ZR 65

the ultimate punitive power of the employer to dismiss the employee and deprive him of his livelihood for no good reason.²

In light of the foregoing, the case of *Malcolm Chileshe v Bank of Zambia*,³ testifies to the harshness of unemployment in third world countries such as Zambia. In this case the plaintiff was challenging his dismissal from Bank of Zambia. It took over four years for his case to be heard. During this time he remained unemployed. In as much as the duty to mitigate loss once dismissed is placed on the employee, as was stated in *Zambia Airways Corporation Limited v Gershom Mubanga*,⁴ mitigation in an economic environment such as Zambia is challenging.

4.3 Reinstatement as an assurance of natural justice

The rules of natural justice are not expressly defined in the Employment Act.⁵ Section 26A of the Employment Act⁶ however requires an employer to give an employee the opportunity of being heard on his defence before dismissal on grounds of conduct or performance. This is only in relation to oral contracts. In the case of *Hang'andu v Kafue District Council and Another*,⁷ the Supreme Court of Zambia citing *Ridge v Baldwin*,⁸ on rules of natural justice noted thus; "It has been said many times that the exact requirements of natural justice cannot be precisely defined and that they depend in each case, on the circumstances of such case." Even though not explicitly defined the courts have gone ahead and awarded reinstatement in cases such as the case of *Zambia Airways Corporation Limited v Gershom Mubanga*,⁹ The court in this case

² Gwyneth. Pitt, *Employment Law*, 6th ed. (London: Sweet and Maxwell 2007), 215.

³ Complaint No. 81/99 (IRC)

⁴ (1990-1992) ZR 149 (SC)

⁵ The Employment Act Chapter 268 of the Laws of Zambia

⁶ The Employment Act Chapter 268 of the Laws of Zambia

⁷ SCZ Judgement No. 90 of 2003 (Unreported)

⁸ [1963] 1 QB 539

⁹ (1990-1992) ZR 149 (SC)

awarded the remedy of reinstatement due to inter alia reasons of natural justice. It was stated that one of the reasons for the advancement of the remedy of reinstatement among others was that two of the members of the appellant's management who sat on the disciplinary committee were interested parties. Their participation in the disciplinary procedure showed that the principles of natural justice had not been adhered to.

Clearly reinstatement in such instances provides an assurance to an employee that failure by the employer to adhere to rules of natural justice may ultimately entitle him to the remedy of reinstatement. It also serves as a warning to employers to act fairly even where an employee is deserving of discipline.

4.4 Reinstatement and the Employer/ Employee relationship

As much as there exists several benefits to the employee when reinstatement has been ordered as seen in the preceding paragraphs, an employer who dismisses an employee will often be reluctant to take that employee back, even after a determination that the employee had been dismissed in circumstances that were harsh, unjust or unreasonable. The mere fact that an employee commenced proceedings against the employer is enough for the relationship between the two parties to take a down turn. To quote a typical judgement of Lord Justice *Fry De Francesco v Barnum*:

It would be invidious to keep persons tied to each other in business relations when the tie has become odious; or to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations.¹⁰

¹⁰ (1890) 45 Ch.D.430, 438

Further in the celebrated case of *Chagger v Abbey National Plc. & Hopkins of 2006*,¹¹ the Employment Tribunal concluded that Mr Chagger had been dismissed unfairly, owing to discrimination on grounds of race. When the Tribunal ordered the respondents Abbey National to reinstate Mr Chagger in order to remedy its wrongdoing, Abbey National, refused to comply with the order. Following Abbey National's failure to comply, the Tribunal subsequently ordered them to pay Mr Chagger a record amount of £2.8 million compensation for his loss on the basis that he had not been reinstated.

Similarly in the case of *Faidecy Mithi Zulu v Lonrho Zambia Limited*,¹² the appellant successfully challenged her dismissal in the High Court whereupon the Court ordered reinstatement. However by the time the order was made her position had been abolished. In an effort to implement reinstatement, the company gave her a lower position but without loss of salary. She was later transferred to a subsidiary company where she ended up doing a typist's work. She in no time resigned and launched proceedings for constructive dismissal, contending that she felt frustrated and humiliated and was forced to resign because the company made it impossible for her to continue working for them. The respondents however claimed that she had a bad attitude resulting in her insubordination to her superiors. The lower court however found that there was no constructive dismissal. On appeal to the Supreme Court the Judge in delivering judgement echoed the difficulties of the order of reinstatement when he stated thus: "the case illustrates the difficulties of ordering reinstatement in a private conglomerate where personal relationships are important."¹³

¹¹ [2009] IRLR 86

¹² Appeal No. 182 of 2000 (Unreported)

¹³ *Faidecy Mithi Lungu v Lonrho Zambia Limited*, Appeal No. 182 of 2000 (Unreported)

The abovementioned cases bare testament to the fact that where the relationship has been severed the employer in most cases is unwilling to take back the employee. Even where the employer shows willingness it is unlikely that a good working relationship could be re-established. In discrimination matters the law operates to entitle the guilty party to reinstatement thereby encouraging an organisation to carry a bad egg. The employee may continue with the bad behaviour or entice others. The heroic status that the employee may come in with could equally make him unmanageable as a victor.

4.5 Reinstatement and the lapse of time

Even where the employer is willing to take the employee back the nature of litigation in a Zambia, in particular the lapse of time between termination and finality of a case may make it disadvantageous for an employee to return to the same workplace. The case of *Malcolm Chileshe v Bank of Zambia*,¹⁴ bears testimony to this. From the time of termination until the case was due to be heard, a period of over four years had passed. During this time the structures at Bank of Zambia had considerably changed and even though the employers may have been willing to reinstate the employee, he would have had to go in at a position lower than those employees that were earlier reporting to him. Moreover in his absence a number of training initiatives had taken place. Taking these factors and many others into account the parties agreed on a consent judgement before the case could be allocated to a judge.

The case of *Zambia Airways Corporation Limited v Gershom Mubanga*¹⁵ is another case that clearly illustrates the time it takes for a case to be disposed of. In this case over six years had lapsed from the time of termination to the time when the order of reinstatement was made. In

¹⁴ Complaint No. 81/99 (IRC)

¹⁵ (1990-1992) ZR 149 (SC)

the case of *Bank of Zambia v Kasonde*,¹⁶ the lapse of time between dismissal and final judgement was over five years. The case of *Faidecy Mithi Zulu v Lonrho Zambia Limited*,¹⁷ discussed above also bears testament to how quickly structures within an organisation can change. In the case the appellant successfully challenged her dismissal in the High Court and whereupon reinstatement was ordered. However by the time the order was made her position had been abolished.

In the above circumstances, the appropriateness of the remedy can reasonably be debated in light of technological advancements and changes in the organisational structure. The organic growth of the organisation and the interval between dismissal and successful judgement is likely to make the employee incongruent to the organisation.

4.6 Reinstatement in Post Privatisation Era

In the post privatisation era, the nature of the employment relationship has evolved owing to the shift in the social economic structures in Zambia.¹⁸ Most corporations are now privately owned and are more profit oriented such that reinstating a dismissed employee may prove unworkable and unproductive and neither party may be comfortable because of the personal nature of the corporation. The case of *Faidecy Mithi Zulu v Lonrho Zambia Limited*,¹⁹ illustrates the difficulties of ordering reinstatement in private companies where personal relationships are important. However in public companies or big conglomerates, a different trend is reflected. In the case of *Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami*,²⁰ the Supreme Court stated thus “the general principle that a contract of service cannot be

¹⁶ (1995 -1997) ZR 28 (SC)

¹⁷ Appeal No. 182 of 2000 (Unreported)

¹⁸ Interview Honourable Justice Betty Majula Industrial Relations Court ,18/04/12

¹⁹ Appeal No. 182 of 2000 (Unreported)

²⁰ SCZ Judgement No. 27 of 2004

specifically enforced is not without exceptions. The Employment Act and a number of authorities reflect a changing trend especially when it comes to public companies.” The same views were echoed in the earlier case of *Zambia Consolidated Copper Mines Limited v James Matale*.²¹

From the foregoing the appropriateness of reinstatement in private companies is questionable, however the trend reflected is different when it comes to public companies and big conglomerates.

4.7 Discussion of Findings

It is recognised that the remedy of reinstatement is rarely granted. Courts are therefore more inclined to order damages as opposed to reinstatement.²² Further, there has been a shift in the relationship between the employer and employee from that of a long term pensionable type of relationship to short term contracts that give both parties the option of non-renewal at the end of each contractual term. Most employers will opt to wait for the contract period to end rather than dismiss the employee. The change in the employment relationship is owing to the overall shift in the social economic structure from that of a socialist economy under the one party state to that of a liberalised economy under the multi-party system of politics. This has ultimately led to a reduction in claims for reinstatement, and secondly it has made it difficult for the courts to actually prove that an employee was unfairly dismissed owing to the nature of the agreements under the contracts.²³ However, in public companies and big conglomerates

²¹ (1995-1997) ZR 144

²² Interview Honourable Justice Betty Majula Industrial Relations Court ,18/04/12

²³ Interview Honourable Justice Betty Majula Industrial Relations Court ,18/04/12

reinstatement is still an appropriate remedy because the relationship of employer/employee not wholly reliant on the personal nature of the relationship as in private companies.²⁴

There is also acknowledgement to the fact that there exist some inconsistencies in the judgements passed when awarding reinstatement mainly attributable to the lack of adherence to earlier set principles.²⁵ This lack of adherence to earlier set principles is attributable to a poor administrative system in the Judiciary. The problem is evident from the fact that up-to-date judgements are not easily availed to advocates and interested parties by the judiciary. This emanates from the fact that the judiciary has a poor reporting system. This problem is worsened by the fact that judgements are not reported promptly.²⁶ There is however an acknowledgement to the fact that despite the vigorous debate as to the appropriateness and contours of reinstatement, the need for protection against arbitrary dismissals would be meaningless without the possibility of redress in the event of violation.²⁷

4.8 Conclusion

This chapter has examined the appropriateness of the remedy of reinstatement to Zambia's legal system. There is no doubt that the remedy of reinstatement in particular under the Industrial and Labour Relations Act section 108,²⁸ represents a significant improvement over the common law remedies. The remedy extends legislative protection to many employees who would otherwise have to rely on the limited remedies for breach of contract.

²⁴ Interview Mr Fredrick Mudenda, Lecturer in Law University of Zambia, 09/05/12

²⁵ Interview Mr Gregory Cornhill of Wilson and Cornhill, 16/04/12

²⁶ Interview Mr Yangailo of Yangailo and Company 17/04/12

²⁷ Interview Honourable Justice Betty Majula Industrial Relations Court 18/04/12

²⁸ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

There is however the issue of how appropriate the remedy of reinstatement is to a country like Zambia considering the shift in the relationship between the employer and the employee emanating from changes in the social economic structure of a socialist era under the one party system of politics to a liberalised economy under the multi-party system of politics. The overall shift in the relationship has ultimately made reinstatement claims rare and unfair dismissal difficult to prove. Further, with the prolonged process of litigation the adversarial relationship and the personal animosity heightened by the costs of trial the appropriateness of the remedy is reasonably questionable.

5. Chapter Five

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

The study set out to critically analyse the award of the remedy of reinstatement by the courts for loss of employment. In chapter one the study considered the fundamental aspects of the research. These included the background, objectives of the study, statement of the problem, research questions, definition of concepts, methodology, significance of the study and the research limitations.

In chapter two the study considered the general overview of the employment contract and how it terminates; it also provided a brief historical background to the remedy of reinstatement. It went on to further highlight the regulatory framework that governs employment contracts in Zambia. It concluded by indicating the various efforts made to regulate and protect the right of an employee not to be arbitrary dismissed at the international level.

In chapter three the study thoroughly considered the various provisions of Zambian statutes that address the issue of reinstatement. It evaluated the differences between a wrongful dismissal and an unfair dismissal. In addition the differences in the remedies that are awarded under each remedy were highlighted. It established that significant to the solution against arbitrary dismissals is section 108 of the Industrial and Labour Relations Act which provides for the remedy of reinstatement as the primary remedy,¹ in comparison to wrongful dismissal whose primary remedy is an award of damages. Although the section 108 of the Industrial and Labour Relations Act² may not guarantee the reinstatement of the employee as special

¹ The Employment Act Chapter 268 of The Laws of Zambia

² The Industrial Relations Act Chapter 269 of the Laws of Zambia

circumstances have to exist for its award, it usually leads to a right to compensation and other forms of relief which can restrict the practice of arbitrary dismissals. It was also noted that section 108 of the Industrial and Labour Relations Act³ only provides for limited instances of discrimination under which an employee can claim thereby disadvantaging employees who are discriminated on other grounds.

The chapter went on to critically examine what exceptional circumstances warrant an award of the remedy of reinstatement by evaluating case law. An evaluation of case law pointed to the fact that none of the cases distinctively point to the exact special circumstances that warrant the award of reinstatement. The chapter further brought to light, the inconsistencies in the interpretation of what exactly amounts to special circumstances by the courts. It also exposed the lack of adherence to earlier principles regarding the award of reinstatement, in particular those espoused in the cases of *Zambia Airways Corporation Limited v Gershom Mubanga*⁴ and the later case of *Bank of Zambia v Kasonde*.⁵

Chapter four examined the appropriateness of the remedy of reinstatement to Zambia's legal system. It was established in the chapter that the remedy of reinstatement in particular under the Industrial Relations Act section 108,⁶ represents a significant improvement over the common law remedies as it extends legislative protection to many employees who would otherwise have to rely on the limited remedies for breach of contract.

The underlying findings suggest that there that there had been a shift in the relationship between the employer and the employee emanating from changes in the social economic structure from the socialists era under the one party system of politics to a liberalised economy under the multi-party system of politics. The overall shift in the employer/employee

³ The Employment Act Chapter 268 of the Laws of Zambia

⁴ (1990-1992) ZR 149 (SC)

⁵ (1995-1997) ZR, 238

⁶ The Employment Act Chapter 268 of the Laws of Zambia

relationship has ultimately made reinstatement claims rare and unfair dismissal difficult to prove. The shift has also resulted in employers sticking to short term contracts making it difficult for employees to prove that they were unfairly dismissed. Further with the known vagaries of litigation, the adversarial relationship, the personal animosity, heightened by the costs of trial the appropriateness of the remedy is reasonably questionable.

However, it has been equally established that despite the vigorous debate as to the appropriateness and contours of reinstatement, the need for protection against arbitrary dismissals is indispensable. It was further established that reinstatement is still appropriate in public companies and big conglomerates.

In summation, the paper has shown that even though the Industrial and Labour Relations Act,⁷ provides for reinstatement it does not give indications as to what special circumstances warrant the remedy. Further on, none of the cases distinctively point to the exact special circumstances that warrant the award of reinstatement. The Act under section 108 provides for a limited number of grounds under which an employee can claim for discrimination.

The study also established that there exists inconsistencies in the interpretation of what amounts to special circumstances by the courts owing to lack of adherence to earlier set principles in particular those espoused in the case of *Zambia Airways Corporation Limited v Gershom Mubanga*⁸ and the later case of *Bank of Zambia v Kasonde*.⁹ Part of the challenges faced by advocates in adhering to espoused principles is attributed to difficulties in obtaining case law from the Judiciary.

Through underlying findings the study has shown that the overall shift in the employer/employee relationship owing to changes in the political and economic

⁷ The Employment Act Chapter 268 of the Laws of Zambia

⁸ (1990-1992) ZR 149 (SC)

⁹ (1995-1997) ZR, 238

environment, has ultimately made reinstatement claims rare and unfair dismissal difficult to prove and therefore questioning its appropriateness. However the indispensable nature of the remedy cannot be doubted this is especially for public companies and large conglomerates.

Recommendations shall be made to this effect.

5.2 Recommendations

Having critically analysed the award of the remedy of reinstatement by the courts for loss of employment and based on the conclusions reached above, the study proposes the following recommendations:-

Firstly, parliament in Zambia should be tasked to effect an amendment through regulations to the current section 108 of the Industrial and Labour Relations Act¹⁰ so as to include non-limiting reasonable indicators as to when to administer the remedy of reinstatement without taking away the discretionary power of the judges. For example where there is proof of vindictiveness, failure to adhere to principles of natural justice, and an appropriate employment environment, taking into consideration all other circumstances of the case the judge may award reinstatement.

Secondly, the Law Development Commission should carry out legal research on ways of broadening the instances of discrimination in section 108 of the Industrial and Labour Relations Act.¹¹

Thirdly, since our system of jurisprudence is based on the doctrine of judicial precedent, the Judiciary should reaffirm the importance of providing consistency in the law through adherence to set principles.

¹⁰The Industrial and Labour Relations Act Cap 269 of the Laws of Zambia

¹¹ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

Fourthly, there is a fundamental and urgent need to upgrade the technological system within the Judiciary so that information pertaining to case law is readily available to all interested parties.

Finally, despite the debate as to the appropriateness of reinstatement its significance and indispensability is undoubted. Therefore the Industrial Relations Court and the High Court should continue with administering of the remedy where special circumstances are warranted. However, the Judiciary needs to draw a clear dichotomy between cases that go to the Industrial Relations Court and those that go to the High Court.

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