THE RATIFICATION, DOMESTICATION AND APPLICATION OF THE ILO CONVENTION NUMBER 158 OF 1982 REGARDING THE RIGHT TO BE HEARD IN CASES OF DISMISSAL IN ZAMBIA.

By

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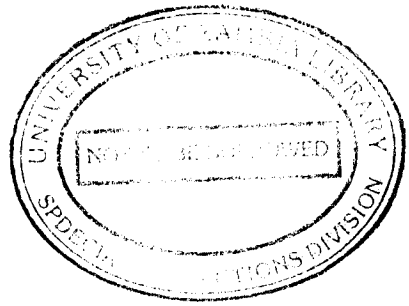

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ABSTRACT

Zambia has ratified various Conventions of the ILO but of relevance is No. 158 of the ILO Conventions relating to the termination of employment. Article 7 of this Convention emphasizes the need for an employee to be given an opportunity to exculpate himself before his contract of employment is terminated on the basis of his conduct or performance. The salient provisions of this Convention have been enacted as part of the local employment law but there is still a gap in the direct application of the said provision. It has been observed that even after the ratification of the Convention and the purported subsequent domestication of Article 7 of the ILO Convention No. 158 as Section 26A of the Employment Act, the courts have rejected the reliance on the said international provision with regard to the right to be heard. In addition, the courts have come in to interpret the application of the rules of natural justice in cases of dismissal and termination of employment bearing in mind the stated provisions and this paper will analyze the approaches taken by the courts in doing so. It will be observed that the right to be heard is not applicable to all cases in which there has been a termination of employment or dismissal.

Chapter one of this paper gives a brief background of the concept of the right to be heard at common law, international law as well as in cases of dismissal in Zambia. The paper then examines the common law position on dismissal and termination of employment as well as the ILO Convention No. 158 in Chapter two. Chapter three discusses the types of dismissal. The views of the courts in Zambia concerning the right to be heard and its applicability in matters of dismissal will be highlighted in this chapter as well.

Finally, Chapter four will provide a conclusion and recommendations. The main source of material used will be case law as espoused by the Supreme Court of Zambia as well as the House of Lords. Books and article will also be referred to in this paper.

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TABLE OF STATUTES

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

2. The Employment Act, Chapter 268 of the Laws of Zambia

3. The Constitution of Zambia, Chapter 1 of the Laws of Zambia

4. The English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

INTERNATIONAL INSTRUMENTS

1. The ILO Convention No. 158 of 1982
2. The ILO Recommendations No. 166 of 1982
3. The ILO Recommendations No. 119 of 1963

LIST OF AUTHORITIES

Zambia Sugar PLC v Nanzaluka (2001) Supreme Court Appeal No. 82

Zulu and Another v Barclays Bank Zambia Limited (2003) ZR 127

LIST OF ACRONYMS

1. ILO- International Labour Organisation

TABLE OF CONTENTS

CHAPTER ONE

CHAPTER TWO

CHAPTER THREE

CHAPTER FOUR

1.0 INTRODUCTION

BACKGROUND TO THE COMMON LAW POSITION ON DISMISSAL

The parties to a contract of employment are the employer, who owns the means of production and the employee who provides the labour. The beginning of any employment relations is the embodiment of the terms and conditions of the relationship in a form communicable between the parties. An employment contract then comes into existence and is defined as; "an individual contract between the employer and employee that regulates their symbiotic relationship. Legally, it is the most important document from which the rights and duties of the employer and employee are derived."[1]

Like every other contract, a contract of employment must come to an end at some point. "Every well drafted contract of employment must have a clause stipulating how or when such a contract may be terminated by either party. This is in recognition that contracts of employment should never be converted into contracts of slavery."[2]

There are several ways by which a contract of Employment comes to an end. It could be by way of agreement, completion of a specific task, by expiry of a fixed term, by automatic termination, for instance, frustration of the contract, dismissal, redundancy, resignation, retirement and retrenchment."[3]

The main concern in this paper with regard to methods of termination is dismissal which is three-fold; constructive dismissal, summary dismissal and wrongful dismissal. Dismissal is where the employer chooses to require the employee to leave, generally for a reason which is the fault of

[1] Winfridah Mwenda, *Employment Law in Zambia, Cases and Materials* (Lusaka: UNZA Press, 2004), 1.
[2] Darlington Banda, *A Guide to Employment Law in Zambia* (Lusaka: Friedrich Ebert Stiftung, 1999), 34.
[3] James Holland .and Stuart Burnett, *Employment Law* (London: Blackstone Press Limited, 1994), 8.

the employee. A dismissal is fair or unfair depending on the employer's reason for dismissal and whether he acts reasonably during the dismissal process.

Wrongful dismissal is one effected at the instance of the employer and it is contrary to the terms of employment. The indicator for wrongful dismissal is whether the dismissal was done in the prescribed manner or not. It is the form that the dismissal was effected that is important. The most common is where the employer fails to give the requisite notice before dismissal. There is usually a notice clause in the contract of employment which provides for the length of the notice period before termination may occur. If the employer fails to give the required notice, the dismissal is deemed wrongful and should the employee succeed in challenging the employer, the former is entitled to an award of damages.

The other form of wrongful dismissal arises when the procedure for dismissal has not been adhered to. This type of wrongful dismissal allows for reinstatement of the employee but this does not deter the employer from commencing the dismissal again and the right way this time.

An employer has the right to dismiss an employee summarily if the latter has misconducted himself or is guilty of a flagrant breach of his contract of employment and this is called summary dismissal. Summary dismissal is provided for under the Employment Act.[4] The provision provides;

> Where an employer dismisses an employee summarily and without due notice, such employer must, within four days of the dismissal, deliver to the Labour Officer in the district in which the employee was working, a written report of the circumstances leading to and the reasons for such dismissal. The Labour Officer then enters into a register, maintained for the purpose, details of the report delivered to him.

[4]Chapter 268 of the Laws of Zambia, Section 25.

Normally an employee will be entitled to the notice period provided by his/her contract or to the relevant minimum statutory notice period in cases where a contract is silent on the issue of notice. Only in exceptional circumstances, notably, where an employee has conducted himself in a way which is so bad that it could be categorised as "gross misconduct", will dismissal without notice be justified.

As has already been alluded to, a contract of employment usually contains a notice clause defining the notice period for termination of the employment. "At common law, no reasons need to be given by the employer for terminating the services of the employee provided he pays him the salary commensurate with the period of notice, in lieu of notice."[5] In June Clarke v American Life Insurance Company, it was held that such instances, the rules of natural justice need not be followed. A master is, therefore, not bound to hear his servant before he dismisses him. He may act capriciously but the dismissal is still valid. There is no remedy for the servant unless the dismissal is in breach of contract and even then, the only available remedy is that of damages for the breach.[6] The assessment of damages is governed by ordinary contractual principles. In employment contracts this generally means that an employee will be able to sue for the amount that he or she should have received as a notice of termination payment.

In Malloch v Aberdeen Corporation,[7]Lord Wilberforce stated that once it has been established that the relevant relationship is that of master and servant, this is sufficient to exclude the requirement of natural justice. The first reason for this is that the master and servant relationship is normally in the field of common law of contract so that principles of administrative law, including those of natural justice, have no part to play. The second reason is found in the

[5]Mwenda, *Employment Law*, 35
[6] [1998] Civil Appeal No. 33
[7] [1971] 2 ALL ER 1278, 1282.

remedies. In an ordinary master and servant relationship, the most that can be obtained is damages if the dismissal is wrongful. No remedies granted under administrative law are granted. In master and servant relationships, there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection.

1.1 THE CONCEPT OF THE RIGHT TO BE HEARD IN CASES OF DISMISSAL

The principles of natural justice were derived from the Romans who believed that some legal principles were 'natural' or self evident and did not require a statutory basis. These basic legal safeguards govern all decisions by judges and or government officials when they take quasi judicial or judicial decisions. The rules of natural justice demand that one must be heard before he is judged. The 'rules of natural justice' is a phrase used to refer to situations where **audi alteram partem** (the right to be heard) and **nemo judex in parte sua** (no person may judge their own case) apply. There are basically three rules that govern the principle of natural justice.

Regarding the first rule, which is the hearing rule, it is contended that the principles of natural justice require that no man be judge in his own case and that each side be heard and no man be condemned unheard – **audi alteram partem.**[8]

The second rule is the bias rule**:** It states that no one ought to be judge in his/her own case. This is the requirement that the deciding authority must be unbiased when according the hearing or making the decision. Additionally, investigators and decision makers must act without bias in all procedures connected with the making of a decision. A decision maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favouring one party over another.

[8] Walker David, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), 867.

Lastly, the evidence rule: Requires that an administrative decision must be based upon logical proof or evidence material. Investigators must not base their decision on mere speculation or suspicion.

In Ridge v Baldwin,[9] a chief constable's terms of dismissal were governed by the Municipal Corporation Act, 1882, which gave power to a watch committee to dismiss a chief constable. Among the questions asked by the court was whether or not the watch committee had exercised its discretion properly having regard to the fact that the rules of natural justice required that the chief constable concerned should be given an opportunity of being heard before his dismissal. Lord Reid, in considering the application of the principles of natural justice to cases of dismissal distinguished three classes of cases, namely;

1. Dismissal of a servant by master.
2. Dismissal from an office held at pleasure.
3. Dismissal from an office where there must be something against a man to warrant his dismissal.

1.1.0 Master- Servant relationships

In ordinary master and servant relationship, Lord Reid pointed out that the question here does not at all depend on whether the master has heard the servant in his own defence. Rather, it is dependent on whether the facts emerging at the trial prove breach of contract. Clearly in this case, the procedure for dismissal is irrelevant as long as it is proved that there was a breach of contract on the part of the employee.

[9] [1963] 2 ALL E.R. 66.

However, there has been a shift in the application of the rules of natural justice in matters of dismissal of a servant by his master. It is widely accepted that before an employee's contract of employment can be terminated based upon his conduct or performance, he must be afforded an opportunity to defend himself.

1.1.1 Office held at pleasure

As regards such cases, Lord Reid acknowledged that such a servant has no right to be heard before his dismissal. This is because as the person having the power of dismissal need not have anything against the officer, he need not give any reasons.[10] Where an office is simply held at pleasure, the person having the authority to dismiss cannot be bound to disclose the reasons for such dismissal and that no doubt he would in many cases tell the servant and hear his explanation before deciding to dismiss him. In this type of employment, there is no consideration of the cause for dismissal as the office is held at pleasure and the right to be heard is not required.

1.1.2 Where there has to be something against a man.

This is the category where employment relations are governed by a specific Act of parliament. Regarding this category, in Ridge v Baldwin,[11] Lord Reid observed that there was an unbroken line of authority to the effect that a servant or officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation. In this case, it was held by the House of Lords that, because the chief constable fell into the class where there must be something against a man to warrant his dismissal, the purported dismissal was null and void.

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[10] [1963] 2 ALL E.R. 66.
[11] Ibid

It follows, therefore, that the contract of employment itself is of vital importance in assessing whether the employee's conduct justifies dismissal without notice and thereby eliminating the application of the rules of natural justice. The contract may define terms such as 'gross misconduct', or it may lay down specific procedures for dealing with any dismissal point, for example, that no dismissal may occur until the employee has been given the opportunity to state a case. The more technical the contractual terms become, the more likely that the employer will be in breach by not following them. Thus, as was the case in Dietmann v Brent London Borough Council,[12] the employee had conducted himself in a manner considered to be in breach of contract. It was held that it might be that even in the face of obvious misconduct, an employer will have to adhere to the procedures laid out in the contract if the terms specifically set out what must happen before a dismissal can occur.

This does not establish a rule that a breach of disciplinary procedures will render a dismissal wrongful though, because if the dismissal is with proper notice or payment in lieu, no further damages will be payable. There is a possibility, however, that the employee might obtain an injunction to prevent dismissal until the procedures have been complied with but even this is not common.

1.2 INTERNATIONAL POSITION FROM THE ILO CONVENTION NO. 158 ON DISMISSAL AND THE RIGHT TO BE HEARD.

"The ILO is an international body which was founded in 1919 and it actively looks into the laws of employment worldwide to provide universal standards for such laws."[13] It operates on recommendations made by various committees which are then drafted into conventions having

[12] [1988] ICR 842
[13] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158');accessed 08.11.11

force in the countries that ratify such conventions. Any state which ratifies the ILO conventions is bound to include the provisions of such conventions in its domestic laws. The constitution of the ILO[14]provides that each member undertakes that it will, within the period of one year at the most, from the closing of the session of the conference or at the earliest practical moment, enact the provisions of the conventions. Member nations are thus obligated to ratify or otherwise domesticate provisions of conventions into domestic law for effective enforcement.

The ILO Convention No. 158 of 1982 is one that was adopted by the governing body of the ILO to address developments that had occurred in many countries, particularly having regard to the problems in the field of termination of employment resulting from economic difficulties and technological changes over the recent years.

Article 7 of the ILO Convention No. 158, emphasizes that before an employee may be dismissed for reasons resting on his/her conduct or performance, he/she must be given an opportunity to be heard on the cases alleged against him. This provision rectifies the common law position which did not take into consideration the rules of natural justice in terminating an employee's contract of employment. The position regarding the right to be heard under international law is that there must be granted, to an employee, an opportunity to exculpate himself concerning allegations against him. Zambia, ratified the ILO Convention No. 158 in 1990 and therefore, steps must be taken to implement the provisions of the Covenant.

[14] The ILO Constitution, Article 19(5),(6) and (7).

1.3 THE POSITION OF THE RIGHT TO BE HEARD IN CASES OF DISMISSAL IN ZAMBIA

"It is note-worthy that quite a number of common law countries have moved away from the concept of termination at will to one prohibiting unfair dismissal or insisting on termination with justification."[15] This can be positively attributed to the work of the ILO as has been observed above.

Zambia is a member of the ILO and has ratified Convention No. 158. Article 7, particularly, has been envisaged in our Employment Act as Section 26A. This section provides;

"An employer shall not terminate the service of an employee on grounds related to conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."

Section 26A brings the relationship of master-servant into the realm of cases requiring the application of rules of natural justice. However, where there has been a flagrant breach of the contract of employment by the employee, there is no application of the rules of natural justice.

Further, the courts have also used section 26A in addressing matters of normal termination as provided by the Employment Act[16] which relates to parties terminating the contract of employment by notice or payment in lieu of notice. In the case of Gerald Musonda Lumpa v Maamba Collieries,[17] the appellant was employed in the accounts department of the respondent company. He had a difference of opinion with his superior as to who should be sent to collect money in Choma, a task which was his. There was evidence that he had used abusive language

[15] Joseph Abugu, *ILO Standards and The Nigerian Law of Unfair Dismissal* (April 2009), 181-211.
[16] Chapter 268 of the Laws of Zambia, Section 21.
[17] (1988-89) ZR 217 (SC).

towards his superior. The appellant's employment was terminated and he was paid terminal benefits. The appellant instituted proceedings against the respondent claiming a declaration that the dismissal was null and void or damages for wrongful dismissal. It was settled law that it is the giving of notice or payment in lieu of notice that terminates a contract of employment. The party terminating such contract has no obligation to give reasons for such termination.

The fact that there is no obligation on the part of the employer to give reasons when terminating an employee's contract of service, employers can easily evade being challenged in the courts of law by simply effecting lawful termination. In such instances, the Courts have applied the rules of natural justice to establish the actual reason behind the lawful termination as was the case in in Atlas Copco (Zambia) Limited v Mambwe.[18] The appellant terminated the services of the respondent, who was employed as Financial and Administrative Manager, in accordance with clause 2 of the employment contract. The court observed that at common law, a contract of employment may be terminated by notice but the incorporation of the right to be heard in section 26A had to be considered as well. It was clear to the court that the reason for the termination was incompetence and thus, the appellant was by law obligated to afford the respondent an opportunity to be heard on the charges of incompetence. The court held that failure by the appellant to afford the respondent an opportunity to be heard breached, not only section 26A of the Employment Act, but also the rules of natural justice. The result was that the termination was wrongful and that the court below was entitled to delve behind the notice to find the real reason for the termination of the complainant's services.

The right to be heard in cases of dismissal is applied by the courts in Zambia but it is not applicable in all cases where there has been a termination of a contract of employment. The

[18] Supreme Court Appeal No. 137 of 2001

principles of natural justice need not be applied in cases where the employee has committed a flagrant breach of his contract or gross misconduct. In addition, the rules of natural justice are not applicable where the rightful punishment for an employee's behavior is dismissal. The rules of natural justice need not be applied if a contract of employment is terminated according to the terms of the contract unless there were previous allegations based on the conduct or performance of the employee which led to such termination.

1.4 STATEMENT OF THE PROBLEM

There have been various approaches by the courts when applying the rules of natural justice in cases of termination of employment and dismissal. The ILO Convention no. 158 was ratified by Zambia and there has been a purported domestication of the same by the insertion of Section 26A in the Employment Act.[19] The amendment was effected in 1997 and by now there should be a direct application of the relevant provisions of the Convention locally. However, it has been observed in case law that even though there has been a purported domestication, the Convention is not relied upon in court cases concerning the right to be heard. This creates a gap in the law as the domestic law is not moving at the same rate and in consonance with international law.

Arising out of the main problem, the following issues can be considered;

1. What is the general background regarding the right to be heard?
2. What was the purpose and provisions of the ILO Convention no. 158 and

   What is the effect, as interpreted by the courts, of Zambia's ratification of the said Convention?

[19]Chapter 268 of the Laws of Zambia.

3. How have the courts interpreted the right to be heard in accordance with Section 26A of the Employment Act?

1.5 OBJECTIVES

1. To provide a general background and development of the right to be heard.
2. To lay the foundation of the relevant provisions of the ILO Convention No. 158, which Zambia ratified and purported to have domesticated as Section 26A of the Employment Act, as well as the implications of the ratification.
3. To examine how the courts in Zambia have interpreted Section 26A, which was drafted in line with Article 7 of the ILO Convention No. 158, in cases of dismissal and termination of employment.
4. To draw conclusions and recommendations on the findings of this paper.

1.6 SIGNIFICANCE OF THE STUDY

This study is important in evaluating the effects of Zambia's ratification of the ILO Convention No. 158 as well as the interpretation by the Courts of the ratification and subsequent purported domestication of the Convention as Section 26A of the Employment Act. It is widely understood that an employee must be heard before he is dismissed for reasons including misconduct but in some cases, the courts have considered this irrelevant. It is important to analyze the reasoning of the courts in settlement of matters to do with dismissal and the right to be heard.

1.7 METHODOLOGY

The research will consist of secondary information which will address the issues in this paper. The research will be conducted by analyzing cases, articles, reports by relevant bodies and text books will be cited.

1.8 CHAPTER CONTENTS

Chapter two outlines the foundation of the relevant provisions of the ILO Convention No. 158, which was ratified and purportedly domesticated by Zambia as Section 26A of the Employment Act, as well as the implications of such ratification as enunciated by the courts. In this chapter, it will be observed that Zambia has ratified the relevant Convention and has also enacted laws to conform to the international standard. However, case law referred to in this chapter reveals that the courts acknowledge ratification and not domestication.

Chapter three will look at how the provisions of the right to be heard have been applied by the courts in matters relating to termination of employment. It will explain the types of dismissal with regard to the application of the rules of natural justice. It will be observed that it is not in all cases where there has been termination of an employee's employment that the rules of natural justice will be applied. In cases where there has been a flagrant breach on the part of an employee and also where the contract has been terminated in accordance with the terms of the contract, it is not seen as injustice when the rules of natural justice are not observed by an employer when effecting dismissal. In order to achieve this aim, case law and other relevant materials will be referred to.

Chapter four will provide a conclusion and recommendations.

CHAPTER 2

2.0 INTRODUCTION

"Contemporary labour law draws on different sources, which can be divided into five categories; constitutions, statutory regulations, collective agreements, international law, common law and equity as well as case law."[1]

Legislative provisions regulating employment in Zambia are found in a host of statutes including, firstly; the Constitution which is a special legislation as it lays the foundation for the existence of all other laws. The second source of labour law, which is that of statutory regulations, takes up the form of laws.[2] Among the statutory regulations in Zambia are the Employment Act,[3] the Industrial and Labour Relations Act,[4] (as amended in 2008), the English Law (Extent of Application) Act[5] which provides in Section 2 for the application of English common law doctrines of equity and certain English statutes. International law is one other source of labour law. It consists of ILO Conventions and more recently, the European Community Law in respect to the 27 members of the European Union. Lastly, case law is a source of labour law.

There have been various developments in the law concerning dismissal and termination of employment in the sphere of common law, international law and domestic law over the recent years as it will be observed hereunder. With regards to common law, Zambia subscribes to the

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[1] Arturo Bronstein, *International and Comparative Labour Law: Current Challenges* (London: Palgrave Macmillan, 2009), 4.
[2] Bronstein, *International Comparative Labour Law*, 4.
[3] Chapter 268 of the Laws of Zambia
[4] Chapter 269 of the Laws of Zambia
[5] Chapter 11 of the Laws of Zambia

common law of England and with regards to international law, Zambia is a member of the ILO and has ratified various Conventions thereof.

2.1 THE COMMON LAW POSITION ON DISMISSAL AND TERMINATION OF EMPLOYMENT

A contract of employment contains terms according to which the parties to it may discharge their obligations. With regard to termination of the contract, parties may state the manner in which the contract may be ended. Common law acknowledges the termination of a contract by notice or payment in lieu of notice.

At common law, a dismissal is justifiable when it is not in breach of the contract of employment. It is irrelevant for these purposes whether it was fair in all the circumstances. Thus, if the employee is dismissed with proper notice, the common law will not be bothered that the employee had been loyal to the employer for 20 years and has been treated badly or that the dismissal was really motivated by discrimination.[6] These factors are irrelevancies as far as the common law is concerned.

2.1.1 Justifiable dismissals- notice given

At common law, an employer can dismiss an employee for any reason provided proper notice is given. The common law is concerned only with the question of breach of contract. Since any contract of employment can be lawfully terminated by the giving of proper notice, it is irrelevant why the employer decides to dismiss the employee.

[6] James Holland and S. Burnett, *Employment Law*, 67.

In Contract Haulage Limited v Mumbuwa Kamayoyo,[7] the respondent was a clerk in the employ of the appellant, a road haulage contractor. The respondent was granted leave and he failed to return from his leave on time as he was detained for a charge of murder. His employment was terminated on the day he was to resume work. He instituted an action against the appellant claiming a declaration that his dismissal was null and void. There was an argument as to the procedure for dismissal and it was held that the contract was nothing more than that of master-servant. Thus, any breach of the terms of the contract between the appellant and respondent as to the mode of termination can give rise only to damages. In that case, the contract provided that the respondent should have been given one month's notice. He was not given such notice, therefore, his contract was improperly terminated. He was entitled to the usual damages. Proper notice is determined according to the terms of the contract and thus, payment in lieu of notice is an acceptable way of meeting the requirements.

However, if the contract makes certain procedures mandatory before a dismissal can occur, then the procedures must be followed. Where there is a statute prescribing the manner of dismissal, that procedure must be adhered to to avoid annulment of the dismissal. In the same case, Contract Haulage v Kamayoyo,[8] the court held, among others, that where there is statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is ultra vires; and where there is some statutory authority for a certain procedure relating to dismissal, a failure to 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.

[7] (1982) ZR 13 (SC)
[8] (1982) ZR 12

It must be emphasized that in a master-servant relationship, once it is established that there was lawful termination, it is irrelevant that the rules of natural justice have been applied. This was clearly stated in Malloch v Aberdeen Corporation.[9]Lord Wilberforce stated that once it has been established that the relevant relationship is that of master and servant, this is sufficient to exclude the requirement of natural justice. The first reason for this is that the master and servant relationship is normally in the field of common law of contract so that principles of administrative law, including those of natural justice, have no part to play. The second reason is found in the remedies. In an ordinary master and servant relationship, the most that can be obtained is damages if the dismissal is wrongful. No remedies granted under administrative law are granted. In master and servant relationships, there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection.

In Davison v The National Agricultural Marketing board,[10]the plaintiff was a chartered accountant employed by the board. He was entitled to three months notice before his contract was terminated. There was an argument as to the rules of natural justice and the court held that there was no element of public employment, nor was there anything in the nature of an office or status which was capable of protection and that he was not protected by statute. The court found that there was nothing more than a master and servant relationship and failure to observe the rules of natural justice did not render the dismissal void.

[9] [1971] 2 ALL ER 1278 at p 1282
[10] [1975] ALL ER 89

2.1.2 Justifiable dismissal- no notice given

When an employee is in serious breach of contract, an employer may do nothing, discipline the employee, sue the employee for damages and dismiss the employee with or without notice. This is in line with the contract principle that an innocent party may, in the face of repudiation by the other party, affirm the contract as it stands or accept repudiation.

Thus, dismissal without notice will be justified where the employee's action shows that further continuance of the relationship is impossible. This was the case in Sinclair v Neighbour,[11] where a betting shop manager borrowed 15 pounds which he replaced later, knowing that had he asked for a loan, it would have been refused. It was held that this was incompatible with his duty as a manager and he was properly dismissed. The manager's conduct, even if it was not dishonest, was inconsistent with his duty towards his employer and with the continuance of the confidential relationship of master and servant between them; accordingly, the master was entitled to dismiss the manager summarily on account of it. In this instance, the rules of natural justice cannot be invoked because the rightful punishment is dismissal.

Unfair dismissal cannot arise at common law because common law cares, not about the merits of the dismissal, but rather about the manner in which the dismissal was effected. The fact that common law does not require that the rules of natural justice be applied to cases of pure master and servant, there was a need to make changes to this position in order to protect employees from unjustified terminations due to the developments that have taken place over the years in the labour industry. The ILO was responsible for rectifying or supplementing the common law through the adoption of various conventions.

[11] [1967] 2QB 279

2.2 THE INTERNATIONAL POSITION ON THE RIGHT TO BE HEARD

2.2.1 The ILO and Conventions

The ILO's principle aim is the improvement and supervision of labour conditions worldwide. The ILO does this through the adoption of protective and promotional instruments. The organization engages the technique of quasi-legislation in its preparation and supervision of the implementation of international labour standards.[12] Zambia has ratified a good number of conventions.

However, ratification is only the first step to implementation. The extent to which the Conventions can be applied in individual cases depends on the legal system of each country. "Ratified ILO Conventions can be directly applicable in individual litigation in a monist system for example France, Spain and most Latin American countries."[13] In dualist systems, however, they need to be further implemented by national law as is the case for Zambia. Internalizing or domestication is necessary to bring about the actual application of the conventions. According to Carlson Anyangwe,[14]the purpose of internalizing an international norm is to make it binding in the municipal sphere, on all individuals, bodies or organs of the state. The technique of transformation of an international norm into municipal legislation is a matter of domestic and not, international law.

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[12] Carlson Anyangwe , *Application of International Labour Organisation Standards in Zambia Presentation* (Lusaka, 1997), 3.
[13] Bronstein, *International Comparative Labour Law*, 7.
[14] *Application of International Labour Organisation Standards*, 3.

2.2.2 The ILO Termination of Employment Convention No. 158 of 1982

Unlike the common law position where an employee may be dismissed or have his contract of employment terminated for whatever reason or for none, in international law, it has been established that the employment of an employee cannot be terminated unless there is a valid reason. This principle was recognised in 1963 by the ILO Termination of Employment Recommendation No. 119. This was strengthened in 1982 by both the Termination of Employment Convention No. 158 and its accompanying Recommendation No. 166. The ILO Convention No. 158 applies to both individual and collective terminations.

The Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), recognizing the employer's right to dismiss a worker for a valid reason, aim to ensure the worker's right not to be deprived of work unfairly. The purpose therefore of the instruments is to provide a balance between the interests of the employer and those of the worker, and to promote the use of social dialogue as a means of achieving that balance. Convention No. 158 provides a basis on which workers are to be afforded protection in the event of termination at the initiative of the employer and is able to be implemented by member States through a range of mechanisms including collective agreements, arbitration awards or court decisions, or in such other manner as may be consistent with national practice, as well as laws and regulations

Despite more or less flexibilization, the labour laws of a large majority of countries remain firmly committed to the principle that a worker may not be dismissed from employment unless there are valid grounds. Yet, there is wide diversity of approaches and solutions when it actually comes to implementing this principle. Thus in a number of countries, the law provides for

various procedural safeguards that should be observed before an employer can dismiss an employee- in other countries such safeguards do not exist at all.[15]

The relevant Articles for this paper are Article 1 of the Convention[16]which provides for the manner in which the provisions therein, may be implemented. It states;

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

Article 4 of the Convention lays the foundation for termination of an employee's contract of employment. It states;

"The employment of a worker shall not be terminated 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."

Article 7 of the Convention lays the procedure for effecting termination and it states;

"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

The provisions in Article 4 and 7 of the Convention are similar to those in Section 26A of the Employment Act which states;

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[15] Bronstein, *International and Comparative Labour Law*, 79.
[16] No. 158 of the ILO

"An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."

Article 11 of the Convention relates to the termination with notice or payment in lieu and dismissal. It states;

"A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."

This provision is similar to the provisions in Sections 20 and 21 of the Employment Act which provides for the termination of a contract of employment by way of notice or payment in lieu thereof.

Giving notice is a quasi-universal procedural requirement, as most countries that employers shall give advance notice of their intention to terminate the contract of employment and there is often a parallel obligation imposed on the employee. This does not constitute a justification for termination per se and does not release the employer from any applicable obligation to base a dismissal on a justifiable cause. However, it is a very important practice as it minimizes the element of surprise of an otherwise sudden dismissal and enables the employee to start searching for new employment.[17] The ILO Convention No. 158 requires that the employee whose termination is about terminated shall be entitled to a reasonable period of notice or compensation

[17] Bronstein, *Internatonal and Comparative Labour Law*, 80.

in lieu thereof but it does not prescribe a minimum entitlement or a minimum period of notice which should be respected to allow the employee to look for a new job.

In comparative law and practice, the actual length of notice widely varies depending on certain factors such as the employee's length of service, age, occupational category and the basis on which the worker is paid. This can range from weeks to several months.

Dismissed employees have the right to challenge their dismissal in the courts and in this case, the burden of proof for the validity of the termination rests upon the employer.

Observing from above, it is very clear that the Zambian Employment Act[18]has incorporated most of the relevant provisions of the convention No. 158 of the ILO. This indicates domestication of the Convention. However, it will be noticed that case law does not make such revelation.

2.2.3 Ratification must precede domestication.

Zambia ratified the convention in question but before its provisions can be invoked locally, they must be domesticated. It is not sufficient to ratify without domestication. This principle was laid down by the Supreme Court in a number of cases.

In Standard Chartered Bank (Z) Limited v Zulu and Others,[19] the respondents invoked the provisions of Convention 158 of the ILO after the appellant transferred its branches to Finance Bank. The Supreme Court held that the conventions relied on by the parties were not relevant to the matter in issue as they had not been domesticated. The Supreme Court observed that the Conventions referred to cannot have force in Zambia unless they had been made into law. In this

[18] Chapter 268 of the Laws of Zambia
[19]Supreme Court Appeal No. 59 of 1996

particular case, there had been ratification of the Convention but there had not yet been an amendment to insert Section 26A which was effected a year following this case.

However, it will be observed in the subsequent cases cited hereunder that even when there was an amendment to the Employment Act in 1997, the courts still maintained their position that though there had been ratification of the Convention No. 158 of the ILO, the provisions therein could not be relied upon due to lack of domestication of the same.

In Zambia Sugar Plc v Nanzaluka,[20] the respondent brought an action in the Industrial Relations Court challenging his termination of employment with the appellant on the ground that his employment was terminated without reasons, thereby making it void as being contrary to International Labour Conventions. The Industrial Relations Court accepted that the conditions of service under which the respondent served provided for termination of employment without giving reasons and notice, but held that that was contrary to the ILO Convention No. 158 of 1982, which forbids termination of workers' employment without valid reasons and held that the termination of the respondent's employment was unfair and awarded the respondent three months salary as damages.

One ground of appeal in the Supreme Court of Zambia was on the lower Court's reliance on the ILO Convention No. 158 when the Zambian law on termination of employment was or is as laid down by the Supreme Court's decisions. The Court held that it was trite law that international instruments on any law, although assented to or ratified by the state, cannot be applied in the country unless they are domesticated. The court observed that the Convention in issue could not be applied without domestication.

[20]Supreme Court Appeal No. 82 of 2001.

Another related case is Zambia Revenue Authority v Mbao and Others.[21]The respondents had their employment with the appellant terminated as per Staff Administration Manual relating to either party giving notice to the other before termination. The respondednt complained that they had been discharged from employment without being given any reasons and without being given an opportunity to be heard contrary to the Staff Administration Manual and the rules of natural justice. The lower court, in entering judgment in favour of the respondents, took into account the provisions of Article 4 and 7 of the ILO Convention No. 158 and there was clear acknowledgement that the same had not been domesticated even though it had been ratified.

Looking at Section 26A of the Employment Act,[22] it can be said that the amendment of this section was an attempt by the legislature to bring the Employment Act to conformity with the standards embodied in Article 7 of the ILO Convention No. 158 of 1982. Section 26A provides;

"An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."

In Zulu and Another v Barclays Bank of Zambia Limited,[23]the Supreme Court had an opportunity to construe the effect of Section 26A of the Employment Act as well as Article 7 of Convention 158. According to the Supreme Court, the gist of these two provisions is that is the conduct or performance of the employee which is questioned must arise or relate to his work and he must be given an opportunity to be heard and this has nothing to do with the notice clause that may be in the contract. Neither do these provisions call for reasons terminating employment. In other words, the employee is notified of his questionable conduct related to his work and is given

[21] Supreme Court Appeal No. 89 of 2000
[22]Chapter 268 of the Laws of Zambia
[23](2003) Z. R 127

an opportunity to explain and it is then up to the employer to decide. The provisions do not set any standard of proof, they merely emphasize on the employee being given an opportunity to defend himself.

From the case just cited, it is clear that the provisions of Article 7 of the ILO Convention 158 have been domesticated by the amendment of Section 26A of the employment Act. However, it is evident that where Article 7 of the ILO Convention 158 has been invoked in the courts of law, it has been said that the Convention in question was not domesticated and hence, the relevant Article cannot be relied upon. With this observation, it is of much consolation that we have a local law that suffices to fill the void of domestication of Article 7 of the ILO Convention 158.

2.3 CONCLUSION

The termination of an employment relationship is likely to be a traumatic experience for a worker and the loss of income has a direct impact on her or his family's well-being. As more countries seek employment flexibility and globalization destabilizes traditional employment patterns, more workers face involuntary termination at some point in their professional lifetime. At the same time, the flexibility to reduce staff and to dismiss unsatisfactory workers is a necessary measure for employers to keep enterprises productive. ILO standards on termination of employment seek to find a balance between maintaining the employer's right to dismiss workers for valid reasons and ensuring that these dismissals are fair and are used as a last resort and that they do not have a disproportionate negative impact on the worker.

The role of the ILO in the formulation of domestic laws cannot be relegated and it is thus, very important for countries like Zambia to live up to what they profess when they ratify international conventions.

It has been advanced in this chapter that before an international convention may be applicable within the country, it must be domesticated. This means that it is not enough that a convention has been ratified before it can be invoked. Convention No. 158 of the ILO was ratified by Zambia but from the cases referred to in this chapter, it has been held not to have been domesticated, even though it has been said that the drafting of Section 26A was an effort to bring the Employment Act into conformity with the ILO Convention 158. The provisions of Article 7 of the ILO Convention have the same effect as the provisions of Section 26A of the Employment Act of Zambia and thus domestication can be inferred. With this said, it is then, imperative that the rules of natural justice be applied in employment relationships, particularly on termination of an employee's contract of employment by the employer, in accordance with both ratified international instruments and local statutes that ensure the implementation of the said instruments.

CHAPTER 3

3.0 INTRODUCTION

Having highlighted the provisions of Article 7 of the ILO Convention No. 158 and Section 26A of the Employment Act as well as the implications of these provisions, the current chapter will discuss the types of dismissal with particular regard to the right to be heard. The approaches by the courts in interpreting Section 26A of the Employment Act will be discussed in the context of the application of the right to be heard. The efficacy of the said provision will be analysed thereafter.

3.1 DISMISSAL

According to Winfridah Mwenda,[1]the word dismissal conjures a picture of wrong-doing on the part of the dismissed employee because of its punitive connotations. Being punitive, the law has provided that a reason or disciplinary cause must support a dismissal and the employee be given an opportunity to exculpate himself. Dismissal may be wrongful or unfair as it will soon be illustrated.

3.1.1 Summary dismissal

An employer has the right to dismiss an employee summarily if the latter has misconducted himself or is guilty of a flagrant breach of his contract of employment. Summary dismissal is provided for under Section 25 of the Employment Act.[2] The provision provides;

"Where an employer dismisses an employee summarily and without due notice, such employer must, within four days of the dismissal, deliver to the Labour Officer in the district in which the

[1]*Employment Law in Zambia,* 41.
[2]Chapter 268 of the Laws of Zambia

employee was working, a written report of the circumstances leading to and the reasons for such dismissal. The Labour Officer then enters into a register, maintained for the purpose, details of the report delivered to him."

An employee owes various duties to his employer and the failure to perform such duties may allow the employer to dismiss him. In the case of summary dismissal, the rules of natural justice need not be considered when the employer is dismissing an employee.

In Agholor v Cheesebrough Ponds (Zambia) Limited,[3]the plaintiff was a chartered secretary and cost accountant and was appointed as company secretary. The plaintiff failed to exhibit a level of skill in the execution of his duties. It was stated that it is well settled that the employee who holds himself out as being skilled to do a certain type of work impliedly undertakes that he will exercise reasonable skill or competence in that work. He can be dismissed summarily if he fails to display such skill or competence. It was also held that a master may terminate an employee's contract of employment with or without sufficient notice. In the latter case, he is liable for breach of contract. Where, however, the master dismisses a servant, he terminates the contract summarily without notice, on the grounds of misconduct, negligence or incompetence. If such grounds are justified, the servant forfeits the right to any notice whatsoever and to a number of other benefits.

A similar case was that of Stockdale v The Woodpecker Inn Limited and Spooner,[4]the plaintiff was a manager of the inn in question. He abused his authority when he began to commit acts that were contradictory to his duties and thus, detrimental to the employer. He was dismissed because of his conduct. It was stated that if a servant is guilty of misconduct, he may be dismissed without notice before the expiration of the period for which he was hired. There is no fixed rule of law

[3](1976) Z. R 1 (HC)
[4](1967) ZR 128

defining the degree of misconduct which will justify dismissal. The general rule is that if the servant does anything which is incompatible with the due or faithful discharge of his duty to his master, the latter has the right to dismiss him, even though the incompatible thing is done outside the service. It is a known principle that the employer need not prove that he has in fact suffered by reason of a servant's conduct and that it would be sufficient if the employer might suffer seriously if he kept the servant in his employ. It was emphasized in the present case that a servant may be dismissed summarily for failing to exercise the skill which, expressly or by implication, he holds himself out to possess.

Similarly, in Jupiter General Insurance Co. Limited v Ardeshir Bomanji Shroff,[5] the manager of the life insurance department of an insurance company recommended the issue of an endowment policy upon a life which the managing governor had a few days earlier refused to re-insure. He was thereupon dismissed, being given his current month's salary and a month's salary in lieu of notice. It was held that the one act of misconduct of the manager justified a summary dismissal. The immediate dismissal of an employee is a strong measure and it can only be in exceptional circumstances that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence.

Further, any conduct which indicates that the employee is unfit for a position of trust and confidence may justify the employer in dismissing him. This was the case in Sinclair v Neighbour,[6] where a betting shop manager borrowed 15 pounds which he replaced later, knowing that had he asked for a loan, it would have been refused. It was held that this was incompatible with his duty as a manager and he was properly dismissed. The manager's conduct, even if it was

[5][1937] 3 ALL ER 67
[6][1967] 2QB 279

not dishonest, was inconsistent with his duty towards his employer and with the continuance of the confidential relationship of master and servant between them; accordingly, the master was entitled to dismiss the manager summarily on account of it.

There is good ground for the dismissal of a servant if he habitually neglects his duties, but an isolated act of negligence or misconduct will not justify summary dismissal unless attended by serious consequences as was the case in the foregoing.

A clear observation of these cases shows that the duties that an employee has towards his master are to be upheld at all times in order to avoid dismissal. Normally an employee will be entitled to the notice period provided by his/her contract or to the relevant minimum statutory notice period in cases where a contract is silent on the issue of notice. Only in exceptional circumstances, notably, where an employee has conducted himself in a way which is so bad that it could be categorised as "gross misconduct", will dismissal without notice be justified. The cases cited above help define summary dismissal.

3.1.2 Wrongful dismissal

Wrongful dismissal is one effected at the instance of the employer and it is contrary to the terms of employment. The indicator for wrongful dismissal is whether the dismissal was done in the prescribed manner or not. It is the form that the dismissal was effected that is important. The most common is where the employer fails to give the requisite notice before dismissal. There is usually a notice clause in the contract of employment which provides for the length of the notice period before termination may occur. If the employer fails to give the required notice, the dismissal is

deemed wrongful and should the employee succeed in challenging the employer, the former is entitled to an award of damages.

The other form of wrongful dismissal arises when the procedure for dismissal has not be adhered to. This type of wrongful dismissal allows for reinstatement of the employee but this does not deter the employer from commencing the dismissal again and the right way this time.

In Contract Haulage Limited v MumbuwaKamayoyo,[7]it was held that where there is a statute which specifically provides that an employee may only be dismissed if certain procedures are carried out then an improper dismissal is **ultra vires**. In the same way, 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 indeed any other unfairness, may be said to be contrary to natural justice to the extent that a dismissal under such circumstances would be null and void. Section 26A of the Employment Act[8]provides for the right to be heard being afforded to an employee whose contract has been terminated on grounds of his conduct or performance

3.1.3 Unfair dismissal

Unfair dismissal focuses on the merits of a dismissal. Thus, the courts look at the reasons for the dismissal to see whether the dismissal is justified. An unfair dismissal will usually be based on discrimination on grounds of race, sex, marital status, political affiliation and so on. Should unfair dismissal be established, damages, reinstatement or any other remedy may be awarded.

[7](1982) Z. R 13 (SC)
[8] Chapter 268 of the Laws of Zambia

In Henry Million Mulenga v Refined Oils Products Limited,[9]the complainant had attended his nephew's funeral and stayed for a period longer than authorised. One of the issues was that he had a bad record at his place of work and that was used by his employer to justify his dismissal. It was held that the dismissal of the complainant was without merit and re-employment was ordered.

It has been shown that there are various duties incumbent on the employee under his contract of service. The failure to perform the duties outlined is what brings about the different types of dismissal of employees and also determines whether or not the rules of natural justice will be applied or not.

3.2 THE COURTS ON THE RIGHT TO BE HEARD IN CASES OF DISMISSAL

According to A. Bronstein,[10] the power of the judiciary to interpret the law can have a potentially significant impact on the effectiveness of labour law. That is why the role of the courts in implementing the application of the laws is of great importance.

The original employment Act enacted in 1995 did not contain a provision requiring an employer to give an employee the opportunity to be heard in order to defend himself against allegations before he is dismissed. However, it has been illustrated in the first chapter of this paper that the courts have been applying the rules of natural justice regardless of the then absent provision on the right to be heard.

[9]Complaint Number 40 of 1983 (unreported)
[10] *International and Comparative Labour Law*, 7.

3.3 THE RIGHT TO BE HEARD AND ITS APPLICABILITY.

As it was stated in Chapter two, at common law, a master is not bound to hear his servant before he dismisses him. He may act capriciously but the dismissal is still valid. There is no remedy for the servant unless the dismissal is in breach of contract and even then, the only available remedy is that of damages for the breach.[11]The assessment of damages is governed by ordinary contractual principles. In employment contracts this generally means that an employee will be able to sue for the amount that he or she should have received as a notice of termination payment.

It follows, therefore, that the contract of employment itself is of vital importance in assessing whether the employee's conduct justifies dismissal without notice. The contract may define terms such as 'gross misconduct', or it may lay down specific procedures for dealing with any dismissal point, for example, that no dismissal may occur until the employee has been given the opportunity to state a case. The application of the right to be heard has been handled by the courts in a number of cases as will be shown.

3.3.1 Termination according to the contract of employment.

The courts, in dealing with cases invoking section 26A of the employment Act, have laid down the application of the said section. In Atlas Copco (Zambia) Limited v Mambwe,[12] the appellant terminated the contract of the respondent, who was employed as Financial Administrative Manager, in accordance with clause 2 of the contract of employment. The respondent was entitled to six months pay in lieu of notice and other benefits upon the termination of his employment. Although the appellant's action was stimulated by some alleged incompetence by the respondent

[11]June Clarke v American Life Insurance Company [1998] Civil Appeal No. 33
[12]Supreme Court Appeal No. 137 of 2001

relating to failure to follow up what his subordinates were doing resulting in late reporting of the respondent's business activities, no charges of incompetence were leveled against him. The respondent believed the termination of his contract of employment was a mere camouflage to conceal the real reason which was the alleged incompetence. According to the appellant, the respondent's contract was properly terminated in reference to his contract of employment. The Industrial Relations Court held that the respondent should have been given an opportunity to exculpate himself before his services were terminated; that failure to afford the respondent the opportunity to be heard amounted to a breach of the rules of natural justice.

On appeal, the Supreme Court observed whether it was procedurally wrong and against the rules of natural justice as well as section 26A of the Employment Act to invoke a notice clause to terminate the services of the respondent who was considered incompetent and whose job was advertised while he was still serving his employer. The court observed that at common law, a contract of employment may be terminated by notice but the incorporation of the right to be heard in section 26A had to be considered as well. It was clear to the court that the reason for the termination was incompetence and thus, the appellant was by law obligated to afford the respondent an opportunity to be heard on the charges of incompetence. The court held that failure by the appellant to afford the respondent an opportunity to be heard breached, not only section 26A of the Employment Act, but also the rules of natural justice. The result was that the termination was wrongful and that the court below was entitled to delve behind the notice to find the real reason for the termination of the complainant's services.

In Yamba v. Food Reserve Agency,[13]the Supreme Court of Zambia pointed out that issues of rules of natural justice do not arise where termination was in accordance with the conditions of service which provide for notice or salary in lieu of notice. In this case, the contract was terminated by payment in lieu of notice. The Supreme Court observed that this case did not present a situation of dismissal from employment but termination of employment pursuant to the conditions of service. In this case, the issue of using the notice clause as a camouflage did not arise.

In the same vein, in Sitwala v Zambia National Provident Fund Board,[14] the Industrial Relations Court had made a finding that the termination of the appellant's employment was in breach of the rules of natural justice as he was not given an opportunity to exculpate himself. The respondent had terminated the appellant's employment by paying the appellant three months pay in lieu of notice. The Supreme Court of Zambia observed and noted that the appellant was not summarily dismissed but had his employment terminated in accordance with the conditions of service.

It is trite law that it is the giving of notice or payment in lieu of notice that terminates a contract. Therefore, if the contract of employment is terminated in accordance with the conditions of service, there is no injustice done to an employee whose contract of employment has been terminated if the rules of natural justice are not observed and there is nothing to show that such termination was due to misconduct on the part of the employee.

However, there are cases where an employer terminates the employee's contract of employment by giving notice or payment in lieu of such notice but there are facts that make the termination appear as though it was effected due to the conduct or performance of the employee. This was the

[13] Supreme Court Appeal No. 33 of 2003.
[14] Supreme Court Appeal No. 20 of 1996

case in Atlas Copco v Mambwe[15]. In such cases, as has been observed, the courts have the power to delve into the matters that led to the termination of the employee's contract of employment. This is a necessary measure to protect employees.

3.3.2 Employee's flagrant breach of the contract of employment.

It must be noted that in certain cases, the courts consider it unnecessary to grant an employee the opportunity to be heard. These are cases where the employee is guilty of committing a flagrant breach of his contract of employment.

In National Breweries Limited v Mwenya,[16]the respondent was dismissed for negligence after he failed to properly invoice customers. It was held that where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure laid down in the contract of service and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity.

In addition to this area of application of the rules of natural justice, it has been settled by the courts in Zambia that there is no breach of the rules of natural justice where the employee is dismissed for an action for which the appropriate punishment is dismissal.

According to the courts in Zambia Provident Fund v Chirwa,[17]where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is subsequently dismissed, no injustice arises from a failure to comply with the laid down procedure

[15] Supreme Court Appeal No. 137 of 2001.
[16](2002) Z.R 118.
[17] (1986) Z. R 70.

in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity.

In Africa Supermarkets Limited (T/A Shoprite Checkers) v Mhone,[18]the Supreme Court of Zambia held that it is trite law that the rules of natural justice do not have to be observed in an employer/employee relationship where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal. In such a case, the Supreme Court of Zambia stated, even if the employer dismisses such an employee without following the procedure laid down in the contract of service prior to the dismissal, no injustice is done to that employee by such failure to follow the stipulated procedure and that employee has no claim on the ground that there was no observance of the rules of natural justice or the rules laid down in his contract.

Similarly, in Pamodzi Hotel v Godwin Mbewe,[19]the appellant employed the respondent as a Waiter and Coffee Shop Supervisor. The terms and conditions of employment were contained in a collective agreement. The respondent was caught drunk on duty at an event held by the appellant. He was dismissed immediately. Upon appeal, it was held that where the penalty for a certain conduct is dismissal, no injustice arises if the rules of natural justice are not applied when effecting dismissal.

3.4 SECTION 26A OF THE EMPLOYMENT ACT

Section 26A of the Employment Act[20]was drafted in conformity with Article 7 of the ILO Convention No. 158. The said provisions require that an employee whose contract of employment based on his conduct or performance must be afforded an opportunity to defend himself against

[18] Supreme Court Appeal No. 162 of 2001
[19](1987) Z. R 56 (SC)
[20] Chapter 268 of the Laws of Zambia

the allegations. This being the case, it can be concluded that the insertion of Section 26A was an act of internalization of Article 7 of the ILO Convention No. 158. It then becomes necessary that the courts acknowledge domestication of the Convention because how else can an international instrument be domesticated apart from the manner prescribed under Article 1 of the relevant Convention which states;

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

Clearly, Zambia has given effect to the provisions of the Convention by enacting laws that conform to the international standard. It is surprising that regardless of the enactment, the courts insist that there has been no domestication.

3.5 CONCLUSION

In this chapter, the types of dismissal have been discussed to show the application of the right to be heard in such cases. Before dismissal is effected, there is need for the employer to observe procedures applicable to each particular case. The rules of natural justice might be invoked as they are embedded in section 26A of the Employment Act which was drafted in line with Article 7 of the ILO Convention No. 158. As has been observed, there is no injustice done to the employee if he is guilty of misconduct and he is not afforded a hearing. The same is true when the contract of employment is terminated according to the contract of employment. Where misconduct has been concealed by termination in accordance with the contract of employment, the court may delve into the case to address the real reason for such termination. Section 26A is

intended to safeguard employees from unfair dismissal or termination and to a certain extent it fulfills its purpose.

CHAPTER 4

4.0 CONCLUSION

A contract of employment is a reflection of the rights and obligations of both the employer and the employee. The contract contains terms that the parties to the contract are to refer to during the subsistence of the contract as well as terms regarding the end of the contract. This paper has given a substantial background of the right to be heard and it was shown that at common law, where it is established that there is a pure master and servant relationship, the rules of natural justice need not be applied when ending a contract of employment. What matters is that the requisite notice to terminate was given or payment in lieu thereof. The common law is concerned with the procedure being followed and not whether the dismissal or termination was justified. The rules of natural justice can only be applied under common law where there is a procedure prescribed by statute on how the termination is to be effected. Therefore, if there is a requirement of a hearing before dismissal and the employer neglects to follow that requirement, he will be liable for wrongful dismissal.

The ILO is responsible for developing labour standards worldwide and its contribution in the sphere of both international and domestic law cannot be denied. The ILO works by way of Conventions and Recommendations. Conventions are to be ratified by the members of the ILO and thereafter, they may have to be domesticated for countries like Zambia that have a dualist system of law.

In international law, there is generally a need for lawful termination with notice or payment in lieu thereof. However, there is a requirement that where an employee's contract of employment

is about to be terminated for reasons based on his conduct or performance, he must be afforded an opportunity to be heard concerning the allegations. These terms all play an important role in governing the contract between the employer and employee.

Zambia has ratified the ILO Convention No. 158 of 1982, however, without domestication, there cannot be implementation. Case law reveals that the courts acknowledge the ratification the Convention but they insist that it has not been domesticated and thus, the provisions therein, have no direct application in Zambia.

Case law and statutory provisions have shown that when it comes to terminating an employment contract, there are certain requirements which are to be met by both the employer and employee. There is a requirement on the part of the party electing to end the contract to give notice to the other party. A contract of employment will most often contain a notice clause stating the notice period for termination. Should the party terminating the contract do so without giving the other party adequate notice, the other party may sue for breach of contract and if it the employer instituting termination, he will be liable in damages for wrongful dismissal. The party terminating a contract of employment has the option to give notice to terminate to the other party or pay him in lieu of notice. The amount payable in this case is usually the salary sum commensurate to the notice period. This is because it is settled law that it is the giving of notice or a salary in lieu of notice that terminates a contract of employment.

Regarding termination, there is a tendency, as was seen in case law, by employers to terminate an employee's contract in a lawful manner when in actual fact there was incompetence or negligence alleged against the employee prior to such lawful termination. In such instances, the Courts have looked into the cases to establish whether the termination was lawful or it arose out

of the conduct or performance of the employee in question. In such instances, the Courts have demanded that the rules of natural justice be observed. This is because Section 26A of the Employment Act, which was drafted in the same spirit as Article 7 of the ILO Convention No. 158 of 1982, demands that before an employee's contract of employment can be terminated on grounds of his conduct or performance, he must be afforded an opportunity by his employer to defend himself against the allegations leveled against him.

However, it has been observed in the case law cited in this paper that the rules of natural justice are not applicable to all cases where there has been an end to a contract of employment. The right to be heard cannot be relied upon when there has been a flagrant breach of the employment contract by the employee. In such a case the Courts have ruled that no injustice arises due to non observance of the rules of natural justice by the employer.

In the same vein, the Courts have ruled that there is no injustice done to the employee if the employer does not afford him an opportunity to defend himself against conduct for which the rightful punishment is dismissal.

4.1 RECOMMENDATIONS

4.1.1 A body to ensure domestication

Zambia has ratified various conventions but steps to domesticate have not been taken. Application of international conventions cannot occur without domestication. It is necessary that there is a domestic body in place to ensure that the conventions ratified by Zambia are implemented by domestication. The body will sit at periodic times to consider the ratified

conventions, list them and ensure that they are brought before parliament in order that our commitment as a nation can be portrayed.

Further, it is necessary that there is a provision in our local laws to set a time frame for domestication of ratified conventions. This will ensure that the legislature act promptly in keeping up with the international principles and standards.

4.1.2 The need for a legislative instrument outlining domestication

There is also a need for clarification by the courts or the legislature as to what exactly amounts to domestication in the context of Zambia considering the fact that there has been an enactment of laws in conformity with No. 158 of international Convention of the ILO but yet the courts have held that there has not been domestication. This may entail the drafting of a soft law outlining and defining what amounts to domestication in the Zambian context so as to bring clarity and certainty.

4.1.3 The need for an effective supervisory labour body to ensure implementation of labour laws

We have various provisions in various statutes that are not implemented due to administrative incompetence of the labour office. It is essential that the supervisory labour body be mandated and funded adequately in order that it performs its role. This body will see to it that employers administer the labour laws appropriately.

This body must also educate employers as well as employees about labour relations so that companies come up with adequate labour policies. In this education, matters such as the right to

be heard in ending contracts of employment may be explained so that employer and employees are aware of their duties and rights.

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