THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 1190 OF 2024

In the dispute between:

HOLMES BANDA………………..…………………………..…..………..APPLICANT

-AND-

COUNCIL OF THE MALAWI UNIVERSITY OF BUSINESS AND APPLIED SCIENCES (MUBAS)………..……………..RESPONDENT

CORAM:	**TAMANDA C. NYIMBA**	: Acting Chairperson
	A. Ndhlovu & P. Dzikawanda	: Counsel for the Applicant
	F. Chikabvumbwa	: Counsel for the Respondent
	Rosemary Msimuko	: Court Clerk

RULING

1 PRELIMINARIES

1.1 By notice of motion, the applicant moved this Court to have this matter determined on points of law pursuant to section 67 of the Labour Relations Act as read with Rule 16 of the Industrial Relations Court (Procedure) Rules.

1.2 The applicant seeks the Court’s determination on three key questions, namely, whether he is entitled to a contractual or service gratuity pursuant to his terms of employment; whether the respondent’s conduct amounts to an unfair labour practice and whether he is consequently entitled to damages for unfair labour practices.

1.3 Filed in support of the motion is an affidavit sworn by the applicant, Mr. Holmes Banda. The motion is strongly opposed by the respondent and filed in said opposition is an affidavit sworn by Mr. Gregory Banda, the respondent’s Senior Assistant Registrar (Human Resources). Further in support of and in opposition to the motion are extensive skeleton arguments filed by Counsel for the applicant and Counsel for the respondent, respectively.

1.4 All the parties' papers were duly adopted at the hearing of the motion and the same were bolstered by elaborate oral arguments.

1.5 I am profoundly grateful to learned Counsel for both parties for their detailed submissions. I have rigorously evaluated all arguments and authorities provided. Therefore, the absence of an explicit reference to a particular point in this judgment does not imply it escaped this Court's attention.

2 THE FACTUAL MATRIX

2.1 It is a fundamental principle that this Court proceeds based on the parties' uncontested facts. These are facts proven, admitted or mutually agreed upon and which are relevant to the disposal of the motion. Gleaned primarily from the respective affidavits in support and opposition, the facts of this matter are as follows:

2.2 The applicant was initially employed as a lecturer by the University of Malawi (The Polytechnic) in January 2003. He subsequently resigned from this position in September 2012. Upon his resignation, the applicant withdrew his accrued benefits in full, effectively closing the initial chapter of his active service with the University of Malawi (The Polytechnic). In that regard, the applicant's initial period of employment from 2003 to 2012 does not have any bearing on the accumulation of active service years for his present action against the respondent herein.

2.3 Following a vacancy in the Mathematics and Statistics Department at the University of Malawi (The Polytechnic), the applicant applied for and was offered a new lecturing position which he accepted. At that point in time, the applicant was 49 years old, having been born in September 1966. The applicant's new employment was governed by the University of Malawi Terms and Conditions of Service for Academic and Administrative Staff of 2007 hereinafter referred to as "COS 2007". Section B of the COS 2007 provides for staff appointments and stipulates as follows:

"Staff Appointments in terms of this section shall be of the following types:

1. PERMANENT APPOINTMENT

There shall be probationary appointment leading to permanent appointment. ***No domiciled Member of Staff over the age of forty-five (45) years will be offered permanent appointment****. Such a member of staff may however be offered an appointment on contract terms.*

2. CONTRACT APPOINTMENT

A contract appointment is for a fixed period of not less than two (2) years and not more than four years. Contract appointments shall be renewable subject to mutual agreement by the University Council and the employee, provided this shall not exceed a total of ten (10) years of service." [Emphasis mine].

2.4 Despite his age of 49 years, the applicant was offered and accepted employment on a permanent (tenured) basis rather than being hired on a fixed-term contract.

2.5 Subsequently, following the de-linking of the University of Malawi through the enactment of various pieces of legislation by Parliament in 2019, the University of Malawi (The Polytechnic) ceased to exist on 4 May 2021 and became the Malawi University of Business and Applied Sciences (MUBAS), the respondent in this matter. Consequently, the applicant's employment and all associated liabilities were duly transferred to MUBAS.

2.6 As earlier set out, the applicant's employment was governed by COS 2007. Under section C (9) of the COS 2007, tenured members of staff contributed to a pension scheme and were also entitled to a *gratis* service gratuity upon completing a continuous period of at least 20 years of active service. Staff employed on fixed-term contracts were entitled to a periodic contract gratuity ranging from 15% to 25% at the end of each two- to four-year contract term and did not qualify for the long-service benefit. As a tenured member of staff, the applicant contributed to a pension scheme and was not entitled to the standard contract gratuity paid out at the end of fixed-term contracts.

2.7 Now, MUBAS did not have its own service gratuity scheme and upon unbundling, the legacy University of Malawi scheme was deemed unsustainable, leading to its official abolishment on 30 September 2024. Thus, to avoid disadvantaging eligible staff, the respondent made payouts to two categories of tenured employees: first, those who had already served 20 years; and second, those who would have reached 20 years of service by their mandatory retirement age of 60 had the scheme not been discontinued.

2.8 The applicant in this matter did not receive a gratuity payout when the scheme was discontinued. When the applicant inquired as to why he was excluded, the respondent informed him that he did not qualify based on his age at the time of his re-employment.

2.9 This concludes the simple and straightforward undisputed facts in this matter.

3 SUMMARY OF THE APPLICANT'S ARGUMENTS

3.1 Very briefly, learned Counsel Ndhlovu, appearing for the applicant, argued that the applicant is legally entitled to what is effectively a prorated gratuity payout based on, *inter alia*, the fact that the respondent paid other tenured staff members who had not yet reached the 20-year milestone. He contended that the terms of service contain no age disqualification for tenured staff and that only fixed-term contract employees are explicitly excluded from this benefit. He further argued that because the respondent used its discretion to hire the applicant permanently at the age of 49, when they could have simply offered him a fixed-term contract, the applicant had a legitimate expectation to receive the service gratuity associated with tenured appointments.

4 SUMMARY OF THE RESPONDENT'S ARGUMENTS

4.1 In response, learned Counsel Chikavumbwa, appearing for the respondent, argued that the applicant's exclusion is a matter of mathematical impossibility rather than age discrimination. He pointed out that the applicant was born in September 1966 and will reach the mandatory retirement age of 60 in September 2026. Therefore, from his re-employment in November 2015 to his mandatory retirement, he would only be able to serve a total of 10 years and 11 months. He continued to argue that because the applicant could never have achieved the requisite 20 years of active service by the time he retired, he does not qualify for the gratuity or the prorated payouts designed for those who were on track to meet the 20-year threshold.

5 ISSUES FOR DETERMINATION

5.1 Having carefully reviewed the motion and appreciated the papers in support as well as in opposition, the issues this Court is called upon to determine are as follows:

(1) Whether this matter is suitable to be disposed of on a point or question of law;

(2) Whether the applicant is entitled to the payment of contractual gratuity/service gratuity pursuant to the terms and conditions of his employment; and

(3) Whether the conduct of the respondent amounts to an unfair labour practice and whether the applicant is entitled to damages thereof.

6 THE APPLICABLE LAW

6.1 This being a civil action, the burden of proof is on the party who asserts the affirmative,[1] namely the applicant. As regards the standard of proof in civil cases, the same is on a balance of probabilities.

6.2 Rule 16 of the Industrial Relations Court (Procedure) Rules makes provision for the procedure to be followed respecting applications or motions not fully covered by the said rules. Section 67(2) of the Labour Relations (Amendment) Act, 2021 grants power to this Court to determine matters of law and fact. Rule 5A (1) (c) of the Industrial Relations Court (Procedure) Rules also provides for disposal of a matter on a point of law.

6.3 In ***Charles Nsaliwa v. Malawi Communications Regulatory Authority***[2], the Court emphasized that the decisive consideration is whether there are material factual disputes requiring resolution through evidence. In ***Council of the University of Malawi v. Benjamin Chirwa and Others***[3], the Court similarly affirmed that the jurisdiction to dispose of a matter on a point of law should only be exercised where no factual disputes exist and a legal determination will fully dispose of the matter.

[1] ***Chipiliro Banda v Southern Bottlers Ltd*** [2012] MLR 53 (HC).
[2] Civil Appeal No. 30 of 2015 [Unreported] at pp. 5-6.
[3] Civil Appeal Number 12 of 2016 (Being IRC Matter No. 195 of 2014) [Unreported].

6.4 In the interests of brevity, I undertake to cite – where relevant – the rest of the applicable statutory or case law in appropriate places in the *"Analysis and Disposal"* segment of this ruling.

7 ANALYSIS AND DISPOSAL

7.1 This Court avoids placing parties in what it terms "gratuitous suspense" regarding its decision. Consequently, for the reasons to be set out below, the applicant's motion must succeed.

(1) Whether this matter is suitable to be disposed of on a point or question of law;

7.2 As earlier alluded to, it is a fundamental principle that this Court works with uncontested facts. For starters, it is beyond contestation that the motion under consideration is amenable to the machinery of disposal on a point or question of law as there is no dispute regarding the relevant facts. The parties are in total agreement concerning the applicant's dates of employment, his age at commencement, his contract type and the wording of the applicable terms and conditions of service. Thus, the construction of the terms of employment, in light of the relevant law and agreed facts, shall culminate in the disposal of the applicant's entire matter without the need for a trial.

(2) Whether the applicant is entitled to the payment of contractual gratuity/service gratuity pursuant to the terms and conditions of his employment;

7.3 On this issue, it is manifest that the respondent flagrantly disregarded its own COS 2007 regulating staff appointments. To that end, it is instructive to set out the governing provision, Section B, which reads as follows:

> *"No domiciled Member of Staff over the age of forty-five (45) years will be offered permanent appointment. Such a member of staff may however be offered an appointment on contract terms"*.

7.4 What happened in practice is that, despite the applicant being 49 years old, the respondent elected to misapply or circumvent the express stricture of Section B by engaging him on a tenured (permanent) basis. In doing so, the respondent deprived the applicant of the contractual gratuity to which he would have otherwise been strictly entitled at the conclusion of every two to four-year contract had the respondent dutifully complied with the express dictates of Section B of the COS 2007.

7.5 Having placed the applicant in tenured employment, the respondent then deployed Section C (9) of the COS 2007 to deny him a service gratuity, reasoning that he could not reach 20 years of service prior to the mandatory retirement age of 60. Obviously, by offering the applicant tenured employment only to later deny him entitlement to a service gratuity, precisely because he could not reach the 20-year threshold, the respondent subjected the applicant to the loss of both the service gratuity offered to tenured staff and the contractual gratuity given to staff on contract terms.

7.6 Clearly, this administrative breach precipitated the impossibility of the applicant receiving any benefit as articulated earlier. In fact, the deliberate violation of its own terms which resulted in the applicant losing both his service gratuity as tenured staff and the contractual gratuity owed to contract staff, is what unravels the respondent's defence. The respondent willingly made its bed and must now lie in it. It is that simple.

7.7 The respondent has placed heavy reliance on the case of ***Febbie Chiwambo v The University of Malawi***[4] to argue that enforcing the 20-year service criteria to deny the applicant a service gratuity is standard practice and non-discriminatory. However, I must hasten to point out that *Febbie Chiwambo*[5] is a decision of the Industrial Relations Court. As a decision of a court of coordinate jurisdiction, that is to say, a court of the exact same rank as me, its holding is only of persuasive value and does not strictly bind me.

7.8 While I take full cognizance of the reasoning in *Febbie Chiwambo*, I respectfully decline to follow it as the instant matter is, in my view, rather distinguishable. Here,

[4] IRC Matter No. PR 772 of 2011 [unreported].
[5] As above.

the respondent unilaterally breached its own 45-year age limit for permanent appointments and it was this very administrative irregularity that rendered it impossible for the applicant to qualify for the benefit articulated earlier. As stated previously, the respondent's defence is rendered entirely untenable by its deliberate departure from its own governing terms. This intentional deviation effectively stripped the applicant of both the service gratuity afforded to tenured staff and the contractual gratuity owed to contract employees. It is a bedrock principle of law and equity that a party cannot be permitted to benefit from its own wrong. Having authored this irregularity, the respondent cannot now use it as a shield and must, consequently, bear the full brunt or weight of its consequences.

7.9 At this juncture, it repays to add that one of the indisputable facts in this matter is that after the unbundling, which resulted in the liabilities of the Council of the University of Malawi being taken over by the Council of the Malawi University of Business and Applied Sciences (the respondent herein), the respondent, on 1 October 2022, wrote a placement letter[6] to the applicant transferring his employment to the respondent. Indisputably, the respondent's communication to the applicant in the said letter was that, although MUBAS (the respondent) did not have a service gratuity scheme, the applicant's service gratuity as tenured staff under the defunct University of Malawi would remain intact pending further information from the respondent's Council.

7.10 However, despite these irrefutable circumstances, the respondent contends that the applicant could not have harboured any legitimate expectation of receiving a service gratuity, arguing that his entry age of 49 made it a mathematical impossibility for him to complete the requisite 20 years of active service before the mandatory retirement age of 60. Relying on the principle espoused in ***R vs Secretary of State for Foreign and Commonwealth Affairs (No. 2)***[7], that a legitimate expectation requires a clear and unambiguous promise, the respondent argues that its letter to the applicant on 1 October 2022 merely stated his gratuity status remained "intact" which in their view meant he remained ineligible.

[6] See exhibit **HB4**.
[7] **[2008] UKHL 61**.

7.11 In my firm and considered view, this argument fails to appreciate the true genesis of the applicant's expectation. The applicant's expectation of a terminal benefit in the form of a service gratuity was squarely rooted in the respondent's own deliberate action of offering him a permanent, tenured appointment at the age of 49, in direct contravention of its 2007 COS, which prohibits offering permanent appointments to individuals over the age of 45. By intentionally waiving this age ceiling rather than placing the applicant on a fixed-term contract (which would have guaranteed him a contractual gratuity), the respondent generated a legitimate expectation that the applicant would enjoy a terminal benefit arising from his tenured status. The respondent cannot create this expectation through its own deliberate administrative waiver, only to later weaponize the strict 20-year rule to defeat the very expectation it created.

7.12 In the result, this Court rules that the applicant is entitled to be paid a contractual/service gratuity pursuant to the terms and conditions of his employment. Obviously, the same must be paid on a prorated basis, just as the respondent paid its other employees who received contractual/service gratuities on the ground that they would have reached 20 years of service by their mandatory retirement age of 60 had the scheme not been discontinued.

(3) Whether the conduct of the respondent amounts to an unfair labour practice and whether the applicant is entitled to damages thereof.

7.13 This question is responded to positively. Simply put, what the respondent did, that is, offering a permanent contract to the applicant in direct violation of the age limit set in Section B of its COS 2007 thereby excluding the applicant from periodic contract gratuity and later weaponizing the inevitable reality of the applicant's age to deny him tenured service gratuity, cannot, in all fairness, be described as conduct that is even handed, reasonable, acceptable and expected from the standpoint of employer, employee and all fair-minded persons looking at the unique relationship between employee and employer and good industrial and labour relations[8]. In short, the respondent's conduct constitutes an unfair labour practice in contravention of section 31(1) of the Constitution of the Republic of Malawi. It follows that the applicant is entitled to damages for unfair labour practices[9].

[8] ***Kalinda v Limbe Leaf tobacco Ltd*** Civil Cause No. 542 of 1995 [Unreported].
[9] See section 31(1) as read with sections 46(2)(a) and 46(4) of the Constitution of the Republic of Malawi.

8 CONCLUSION

8.1 In light of the relevant agreed facts, the applicable law and the discussion conscientiously had, the applicant's motion carries the day. Judgment in favour of the applicant is hereby entered. The respondent is ordered to pay the applicant his gratuity and damages for unfair labour practices.

8.2 Regarding reckoning of the remedies, I note that neither party specifically addressed the Court in the course of arguing the motion on quantum of the reliefs. In point of fact, while it is efficient to deal with liability and assessment in an omnibus fashion, the parties were not heard on the precise topic of reckoning of the reliefs. Given that the right to be heard is a fundamental tenet of our justice system, the parties would be unfairly prejudiced were I to proceed to assess quantum without allowing them to adduce evidence or make submissions regarding the same. Accordingly, I shall defer the assessment of the reliefs. In the interim, I direct as follows:

(a) The parties are at liberty to agree on quantum of the reliefs within 14 days from the date hereof;

(b) Failing such agreement, this Court shall preside over a remedy hearing to assess the reliefs on a date and at a time to be fixed following the filing of assessment papers by both parties and a notice of hearing by the applicant.

8.3 Determination of the liability question concludes the first part of the applicant's suit. Pursuant to the authority of ***JTI Leaf (Malawi) Limited v. Kad Kapachika***[10], this decision is inchoate for purposes of appeal. It may only be escalated to the High Court once this Court renders its order on assessment of reliefs or if the parties settle the same as directed. To avoid confusion, while the right of appeal subsists under Section 65(2) of the Labour Relations Act, it is currently stayed pending conclusion of the relief proceedings or the parties reaching agreement on the same.

8.4 It is so ordered.

[10] MSCA Civil Appeal No. 52 of 2016 [unreported].

Pronounced this 3rd day of August 2026 at IRC, **PRINCIPAL REGISTRY**

Tamanda Chris Nyimba
ACTING CHAIRPERSON