



REPUBLIC OF MALAWI
IN THE INDUSTRIAL RELATIONS COURT
ZOMBA REGISTRY
IRC MATTER NUMBER ZA 554 OF 2022
BETWEEN

ANDREW SUNGITSA.....APPLICANT

AND

MALAWI NATIONOONAL EXAMINATION BOARD RESPONDENT

CORAM:

HON. PETER M.E. KANDULU, DEPUTY CHAIRPERSON

Wesley, Counsel for the Applicant

Temwa Banda, Counsel for the Resopondent

Mr Patrick Banda: Court Clerk

JUDGMENT

FOR THE AVOIDANCE OF DOUBT; It Is Hereby Ordered And Decreed That:

DISMISSAL OF CLAIM FOR UNFAIR DISMISSAL

The Applicant's claim that he was unfairly dismissed by the Respondent pursuant to Sections 57, 58, and 61 of the Employment Act (Cap. 55:02) is hereby **DISMISSED** in its entirety.

DISMISSAL OF CLAIM FOR UNFAIR LABOUR PRACTICES

The Applicant's claim for damages for Unfair Labour Practices pursuant to Section 31 of the Constitution of the Republic of Malawi is hereby **DISMISSED**.

DISMISSAL OF ANCILLARY CLAIMS

The Applicant's claims for Severance Pay under Section 35 of the Employment Act and Damages for Loss of Pension Benefits are hereby **DISMISSED**.

FACILITATION OF ACCRUED PENSION BENEFITS

The Respondent shall forthwith execute all necessary administrative clearances and documentation to facilitate the release of the Applicant's accrued pension benefits directly from his designated Pension Fund Administrator pursuant to the provisions of the Pension Act 2011 and applicable fund rules.

Brief Background and Introduction

The Applicant, Andrew Sungitsa, instituted these proceedings against the Respondent, the Malawi National Examinations Board (MANEB), by filing an IRC Form 1 on 8th June 2022. The Applicant claims:

- (a) Compensation for Unfair Dismissal pursuant to Sections 57, 58, and 63 of the Employment Act (Cap. 55:02);
- (b) Compensation for Unfair Labour Practices pursuant to Section 31 of the Constitution of the Republic of Malawi;
- (c) Damages for loss of pension benefits; and
- (d) Severance pay pursuant to Section 35 of the Employment Act.

The Respondent filed its IRC Form 2 on 24th June 2022, denying all material allegations and asserting that the Applicant's employment was lawfully terminated for serious misconduct in accordance with its Conditions of Service and statutory provisions.

A Certificate of Non-Compliance was subsequently filed with the Court noting that the Respondent failed to attend the ordered Pre-Hearing Conference. However, the matter ultimately proceeded to full trial where both parties adduced sworn oral evidence, produced documentary exhibits, and cross-examined opposing witnesses.

Burden of Proof

In civil and labour proceedings, the initial legal burden of proof rests upon the party who substantially asserts the affirmative of an issue (*Joseph Constantine Steamship Line v. Imperial Smelting Corporation Ltd* [1942] AC 154). The burden is fixed at the commencement of trial by the state of the pleadings (*B. Sacranie v. ESCOM*, HC/PR Civil Cause No. 717 of 1991).

Standard of Proof

The standard of proof required is on a balance of probabilities (*Miller v. Minister of Pensions* [1947] 2 All ER 372).

Under common law, as posited in *Winter v Cardiff RDC* [1950] 1 All ER 819, an employer's duty is not absolute, and an employee claiming a breach must affirmatively establish that breach to succeed.

However, in employment law, specifically regarding claims of unfair dismissal, once the employee establishes the basic fact of dismissal, Section 61(1) of the Employment Act (Cap. 55:02) statutory shifts the legal burden to the employer to establish the valid reason for the dismissal. If the employer fails to provide a valid reason under Section 57(1), there arises a statutory, conclusive presumption that the dismissal was unfair. Furthermore, under Section 61(2), the employer bears the additional duty to prove that in all the circumstances of the case, it acted with justice and equity.

The Applicant's Case

The Applicant, Andrew Sungitsa, adopted his sworn Witness Statement and tendered Exhibits marked "AS1" through "AS6". He testified that he was employed by the Respondent on 2nd August 2009 as a Principal Procurement Officer. He worked for eleven years under five different Executive Directors without any performance complaints, save for the period under Mr. Gerald Chiunda.

The Applicant asserted that his last monthly basic salary was MK880,000.00.

On 4th February 2020, he received a letter of suspension ("AS2") alleging acts of misconduct, specifically that he had breached terms and conditions of service by providing false information to an external body, the Malawi Institute of Procurement and Supply (MIPS), alleging he was demoted from Principal Procurement Officer to Administration Officer on political grounds.

The Applicant contended that MIPS, as the statutory professional regulator of procurement practitioners, approached the Respondent to establish the grounds of his demotion. He stated that MIPS met with the Respondent in his absence, that he was never accorded a right to be present, nor was he furnished with the minutes or recommendations of that meeting despite being directly affected.

On 19th February 2020, he was summoned to a disciplinary hearing for allegedly breaching Sections 13.4.3 ("breaching board procedure") and 13.5.1.1 ("supplying data or information") of the Conditions of Service.

On 21st February 2020, he received a letter of summary dismissal ("AS5"). The Applicant contended that his dismissal was motivated by alleged underperformance and political grounds (specifically, false accusations that he awarded procurement contracts to opposition political figures). He further testified that the Procurement Department was deliberately crippled by Management, which reduced the operational fuel allocation for solicitation trips to Blantyre from 20 litres to 5 litres, and replaced qualified procurement officers (such as Cynthia Kalipinde) with an intern and transfers from unrelated departments.

Regarding absenteeism, the Applicant testified that he suffers from diabetes and had notified the Director of Administration, presenting a sick leave report from MASM Clinic ("AS6"). He stated that his medical condition was disregarded and he was informed that the Executive Director had already finalized the decision to dismiss him prior to the hearing concluding.

Under cross-examination, the Applicant admitted that he knew the established procedure for dealing with external entities was through the Public Relations Officer (PRO), and claimed he had informed the PRO. He conceded that he went to MIPS head office and provided them with scanned copies of MANEB's internal memos and letters regarding his demotion. When confronted with discrepancies across his witness statement, appeal letters, and trial testimony regarding how MIPS got involved, he maintained that it was a casual discussion. When confronted with Exhibit "AS1", he conceded that following his demotion in August 2019, his salary had been adjusted to MK722,321.00 per month.

The Respondent's Case

The Respondent called Willy Mzama, its Chief Human Resources Officer, who tendered Exhibits marked "WM1" through "WM19". Mr. Mzama testified that he had custody of personnel records and sat on the disciplinary panels concerning the Applicant.

Mr. Mzama testified that the Applicant was employed on 3rd August 2009 ("WM1"). In July 2019, performance concerns were raised by the Acting Director of Corporate Services ("WM2") regarding procurement delays and unexcused absences. The Applicant was invited to a hearing on 6th August 2019 ("WM4", "WM5"), submitted a written response ("WM6"), and was subsequently demoted to Senior Administrative Officer at a salary of MK722,321.00 per month by letter dated 19th August 2019 ("WM7" / "AS1"). The Applicant lodged a grievance ("WM8"), which was responded to on 5th September 2019 ("WM9").

The witness highlighted the Applicant's prior disciplinary record, which included formal written cautions for absenteeism and leaving his workstation without permission dated 7th February 2018 ("WM10"), 28th January 2019 ("WM11"), and a further written warning on 27th December 2019 ("WM12").

In January 2020, MIPS contacted MANEB regarding a complaint from the Applicant alleging political victimisation in his demotion. The Applicant was suspended on 4th February 2020 ("WM14" / "AS2") for disclosing internal personnel records to a third party without Executive Director approval and failing to exhaust internal grievance machinery.

A disciplinary hearing was conducted on 19th February 2020 ("WM16"), where the Applicant was heard. The committee recommended a severe reprimand. However, after evaluating the Applicant's active warning status, recent demotion, and the gravity of unauthorized disclosure of confidential operational documents, the Executive Director exercised his statutory and administrative authority under the Conditions of Service to dismiss the Applicant on 21st February 2020 ("WM17" / "AS5"). The Applicant's subsequent appeal on 20th May 2020 ("WM18") was rejected for being lodged 75 days out of time ("WM19").

Under cross-examination, Mr. Mzama conceded that the Respondent did not attach a formal performance appraisal report "per se", nor written performance gap agreements signed by the Applicant for the year 2019/2020. He acknowledged that no specific formal training or coaching logs were produced following the August 2019 demotion. He maintained, however, that while underperformance formed the basis of the 2019 demotion, the operative reason for the 2020

summary dismissal was gross misconduct specifically, disclosing internal confidential records to an external body without prior authorization.

Issues for Determination

The central issues falling for determination by this Court are:

1. Whether the Applicant was unfairly dismissed by the Respondent under Sections 57, 58, and 61 of the Employment Act;
2. Whether the Respondent subjected the Applicant to Unfair Labour Practices under Section 31 of the Constitution; and
3. Whether the Applicant is entitled to the Reliefs sought, including statutory compensation, pension damages, and severance pay.

Substantive Legal Analysis based on Facts, Evidence and Law

Unfair Dismissal (Sections 57, 58, and 61 of the Employment Act)

Under Section 57(1) of the Employment Act, an employer must establish a valid reason for termination connected with the capacity or conduct of the employee or operational requirements. Under Section 57(2), the employee must be afforded a fair opportunity to defend himself against allegations before termination is effected. Under Section 61(1), the burden of proving a valid reason rests squarely on the employer, failing which an irrebuttable statutory presumption of unfairness arises. Section 61(2) imposes a cumulative requirement that the employer acted with justice and equity.

The Operative Reason for Dismissal: Capacity vs. Conduct

The Court must first resolve a fundamental factual dispute: What was the real and operative reason for the Applicant's dismissal on 21st February 2020?

Counsel for the Applicant argued forcefully that the Applicant was dismissed for "underperformance," and that because the Respondent failed to produce formal written performance appraisal reports, objective targets, or proof of corrective coaching, the dismissal lacks a valid reason.

The Court has meticulously examined the contemporaneous documentation. The dismissal letter dated 21st February 2020 ("AS5" / "WM17") recites the historical background of the Applicant's employment, but explicitly states that the immediate trigger for summary dismissal was his conduct in January 2020, specifically, taking MANEB's internal personnel disputes and confidential letters / memos to an external professional body (MIPS) without authorization and before exhausting internal grievance procedures under Section 12 of the Conditions of Service.

Underperformance is a matter of capacity (governed by Sections 13.6 and 13.16 of the Conditions of Service, requiring written warnings and a 3-month improvement plan). Unauthorised disclosure of internal documents to third parties is a matter of conduct (governed by Sections 13.4, 13.5, and 14.4).

The Court finds that while the Respondent failed to prove underperformance by objective appraisal standards during cross-examination (which would have rendered a performance-based dismissal void), underperformance was not the operative reason for the February 2020 dismissal. The true, underlying reason was serious misconduct concerning the unauthorized disclosure of internal board records to MIPS.

Section 13.5.1.15 of MANEB's Conditions of Service explicitly defines serious misconduct as: "Divulging any information relating to MANEB to third parties without prior authorisation by Executive Director." Section 14.4.3.12 renders unauthorized disclosure of confidential information to third parties a ground for summary dismissal.

The Applicant's own exhibit ("AS3") and his admissions during cross-examination confirm that he provided MIPS with scanned copies of MANEB's internal communications, disciplinary letters, and demotion memos. The Applicant's contention that he merely had an "unofficial friendly chat" is flatly contradicted by his written appeal ("WM18") and Exhibit "AS3", which state that he was summoned and provided a complete bundle of incident files.

The Applicant claimed under cross-examination that he verbally informed an unnamed MANEB official before speaking to MIPS. The Court notes that the Applicant failed to name or call this official as a witness. Applying the principle in *Gadama and Another v Opportunity Bank of Malawi* [2018] MWIRC 9, where a party fails to call a material witness who would naturally support his account without reasonable explanation, the Court is entitled to draw an adverse inference that no such authorization was given. Moreover, Section 13.5.1.15 explicitly requires prior authorization from the Executive Director, not merely "an official."

Consequently, the Respondent has successfully discharged its legal burden under Section 61(1) of the Employment Act by establishing a valid reason for dismissal connected with the Applicant's conduct. Under this heading the Court finds that the Respondent had a valid reason to dismiss the Applicant as per the reasons extensively discussed above.

Procedural Fairness (Section 57(2) of the Employment Act)

Procedural fairness requires that an employee be informed of the specific allegations against him and given a reasonable opportunity to defend himself before a decision is taken (*Ernest Mtingwi*

v. Malawi Revenue Authority, Civil Cause No. 3389 of 2004; *Terrastone Construction Ltd. v Solomon Chatuntha*, MSCA Civil Appeal No. 60 of 2011).

The Applicant argued that he was denied procedural fairness because he was not invited to the meeting between MIPS and MANEB management, and was not provided with the minutes of that meeting.

The Court holds that MIPS is an independent external body. MANEB was under no legal or contractual obligation under its Conditions of Service to allow an employee to attend executive-level meetings with external third parties. Procedural fairness applies to the internal disciplinary process instituted against the employee.

Regarding the internal disciplinary process of February 2020, the record reveals strict adherence to Section 13.7.6 of the Conditions of Service:

(a) Notice of Charge

The Applicant was suspended on 4th February 2020 ("AS2") with full written particulars of the charges citing Sections 13.4.3 and 13.5.1.1.

(b) Adequate Notice

He was issued a notice of hearing on 13th February 2020 for a hearing on 19th February 2020, providing 6 days' notice, well above the mandatory 3 day minimum (Section 13.7.6.3.1).

(c) Right to be Heard

The hearing took place on 19th February 2020 before a properly constituted panel comprising four members, including a trade union representative ("WM16"). The Applicant attended, made oral submissions, and defended his actions.

(d) Prompt Decision

The dismissal letter ("AS5") was issued on 21st February 2020, within two working days of the hearing, complying with Section 13.7.6.3.2.

(e) Right of Appeal

The Applicant was notified of his right to appeal within 14 days under Section 13.7.6.4. He inexplicably waited 89 days before lodging an appeal on 20th May 2020, leading to its lawful rejection for being out of time.

The Applicant's assertion that the Executive Director had "already made up his mind" prior to the hearing was unsupported by independent evidence and relies on uncorroborated hearsay. The Court finds that the Respondent complied fully with Section 57(2) of the Employment Act under this heading and the court finds no wrong doing with the Respondent.

Substantive Fairness, Justice, and Equity (Section 61(2))

In determining whether the employer acted with justice and equity, the Court does not substitute its own administrative discretion for that of the employer. The standard is whether the employer's decision to dismiss fell within the range of reasonable responses open to a reasonable employer in those circumstances (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17; *British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

While the Disciplinary Panel of 19th February 2020 recommended a "severe reprimand," the Executive Director retained ultimate statutory and administrative discretion regarding final sanctions under Sections 13.8.1.7 and 13.8.2 of the Conditions of Service.

In electing to terminate the Applicant's employment, the Executive Director was entitled to take into account the Applicant's active disciplinary record (*Kachingwe v Shire Bus Lines*, IRC Matter No. 18 of 2000; *Kalambo v Paladin (Africa) Ltd*, IRC Matter No. 1 of 2014). At the time of the MIPS incident in January 2020, the Applicant had:

1. A formal caution for absenteeism on 7th February 2018 ("WM10");
2. A formal caution on 28th January 2019 ("WM11");
3. A demotion for unsatisfactory performance on 19th August 2019 ("WM7"); and
4. An active, written warning issued on 27th December 2019 ("WM12"), which was fully live under Section 13.12.1 (valid for 12 months).

Section 14.4.3.3 of the Conditions of Service permits summary dismissal where an employee accumulates repeated written warnings within 12 months. Disclosing confidential operational files to an external entity while under an active written warning severely undermined the duty of trust and confidence inherent in the employment relationship.

Credibility of the Applicant

The Court must note that the Applicant's credibility was severely undermined during cross-examination:

1. He explicitly swore under oath that he was "never called to a disciplinary hearing on underperformance," yet his own exhibits ("AS4", "AS3"), pleadings, and written letters of August 2019 ("WM6", "WM8") directly confirm he attended a full disciplinary hearing on poor performance on 6th August 2019.
2. He swore in his Witness Statement that his last monthly salary was MK880,000.00, yet Exhibit "AS1" indisputably proves that following his demotion in August 2019, his salary was reduced to MK722,321.00.

3. He gave four irreconcilable versions of how MIPS became involved (varying from a WhatsApp leak, a formal summons, an official membership query, to a "casual chat with a family member").

In light of these material contradictions, the Court prefers the documentary evidence and the testimony of Mr. Willy Mzama. The Court finds that dismissal was well within the range of reasonable responses available to MANEB. The claim for Unfair Dismissal is accordingly dismissed as the Applicant had failed to discharge the burden placed upon him that he was dismissed without a valid reason.

Unfair Labour Practices (Section 31 of the Constitution)

Section 31(1) of the Constitution guarantees the right to fair labour practices. Case law defines fair labour practices as conduct that is even-handed, reasonable, transparent, and consistent with good industrial relations (*Kalinda v Limbe Leaf Tobacco Ltd*, Civil Cause No. 542 of 1995; *Magola v Press Corporation Ltd*, Civil Cause No. 3719 of 1998; *Chilala and Others v Petroleum Services (Mw) Ltd* [2008] MLLR 152).

The Applicant alleged four acts of unfair labour practices:

Reduction of fuel allocation and department understaffing

The Applicant claimed fuel was cut from 20L to 5L and staff were replaced by interns. The Court finds these were administrative operational decisions regarding resource distribution. The Applicant presented no evidence that he ever lodged a formal grievance under Section 12.3 of the Conditions of Service regarding fuel, nor did he prove personal victimization.

Victimization due to Diabetes

The Applicant claimed his absence was due to diabetes and produced MASM Note "AS6". However, "AS6" relates to an earlier medical leave in June 2019. The discipline in December 2019 and February 2020 related to unexcused absences without prior leave approval or medical documentation covering those specific dates. Sick leave must comply with administrative reporting procedures; chronic illness does not grant an unfettered exemption from notifying the employer.

Political Motivation (Section 57(3)(a))

The Applicant alleged he was dismissed for awarding procurement contracts to opposition party members. Under Section 57(3)(a), political opinion is an impermissible ground for dismissal. However, the burden of proving a pre-textual political dismissal rests on the Applicant (*Makileni v Attorney General*, IRC 55 of 2015). The Applicant produced zero corroborative evidence, named no contractors, called no witnesses, and relied solely on an uncorroborated oral remark allegedly

made in 2019. The panel records show that his personal file contained no political entries whatsoever. This allegation fails for lack of proof.

MIPS Meeting in absentia

As resolved above, MANEB was entitled to meet its professional regulator without the employee present.

The Court finds that the Respondent handled the Applicant through documented, contractually established disciplinary procedures. The Applicant has failed to establish any act constituting an Unfair Labour Practice. This claim is accordingly dismissed without the mercy of the Court as it has failed to establish by half of what it alleged.

Assessment of Remedies & Compensation Claims

Having found that the Applicant was neither unfairly dismissed nor subjected to unfair labour practices, the primary claims for statutory compensation under Section 63 of the Employment Act and constitutional damages fail. However, for completeness and in the event of an appeal, the Court addresses the ancillary pecuniary claims:

Severance Pay (Section 35 of the Employment Act)

Severance pay under Section 35 of the Employment Act (and Section 14.7.2 of MANEB Conditions of Service) is payable upon termination on grounds of redundancy, retrenchment, or medical incapacity. Section 35(1) explicitly excludes employees who are fairly dismissed for misconduct. Furthermore, severance pay was not pleaded in the Applicant's IRC Form 1, and a party is bound by its pleadings (*Malawi Railways Limited v Nyasulu*, MSCA Civil Appeal No. 13 of 1992). The claim for severance pay is refused.

Loss of Pension Benefits

Section 8.1.7 of the Respondent's Conditions of Service dictates that an employee leaving service shall be paid accrued pension benefits in accordance with the Pension Act 2011.

A claim for "damages for loss of pension" against an employer requires proof that the employer committed a breach, such as failing to remit statutory monthly pension contributions to the Pension Fund Administrator. The Applicant led no evidence, produced no pension statement, and established no unremitted arrears.

The Applicant remains fully entitled to claim his accrued pension benefits directly from his designated Pension Fund Administrator as governed by the Pension Act 2011 and fund rules. The Respondent has not disputed his entitlement to his accrued fund exit benefits. The claim for damages for loss of pension is dismissed.

Hypothetical Assessment of Compensation (Section 63(4) & (5))

Had the Court found the dismissal procedurally defective, any compensation award would have been drastically adjusted under Section 63(4) of the Employment Act due to:

Contributory Conduct

The Applicant directly contributed to his dismissal by taking internal confidential documents to MIPS while under an active written warning. Contributory fault would have attracted a reduction of at least 75%.

Failure to Mitigate Loss

The Applicant presented no evidence of attempts to seek alternative employment post-dismissal (*Phiri v Dignitas Limited*, Civil Appeal No. 37 of 2017).

Applicable Baseline Salary

Any assessment would strictly utilize the Applicant's actual basic salary at the date of dismissal (MK722,321.00 per month as established in Exhibit "AS1"), and not the overstated figure of MK880,000.00.

Final Determination & Orders

Upon a total assessment of the facts, statutory provisions, and judicial precedents, this Court orders as follows:

1. The Applicant's claim that he was unfairly dismissed by the Respondent is hereby **DISMISSED**.
2. The Applicant's claim for damages for Unfair Labour Practices is hereby **DISMISSED**.
3. The Applicant's claims for Severance Pay and Pension Damages are hereby **DISMISSED**.
4. The Respondent shall ensure that all administrative clearances are facilitated to enable the Applicant to access his accrued pension benefits directly from his Pension Fund Administrator pursuant to the Pension Act 2011.

Right of Appeal

Any party dissatisfied with the determination of this matter are free to appeal to the High Court of Malawi within the period stipulated in the IRC Rules.

Cost of the Proceedings

Each party shall bear their own costs of these proceedings.

Pronounced in Chamber this 2nd day of October 2026 at Zomba, Malawi.



A handwritten signature in purple ink, appearing to read "Peter M.E. Kandulu".

HON. PETER M.E KANDULU

DEPUTY CHAIRPERSON