



THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 1215 OF 2023

In the dispute between:

RACHAEL NG'AMBI (MRS PEHELIWA).....APPLICANT

-AND-

THE CATHOLIC UNIVERSITY OF MALAWI.....RESPONDENT

CORAM: **TAMANDA C. NYIMBA** : Acting Chairperson
 Rachael Ng'ambi : Litigant in Person
 Rev. Fr. Dr Wilfred Sumani : Respondent's Representative
 M. Chipembere : Court Clerk

RULING

1 INTRODUCTION

- 1.1 Before this Court is the applicant's Notice of Motion seeking the disposal of this matter on points of law pursuant to section 67(2) of the Labour Relations Act (as amended), read with Rules 5A(1)(c), 16(1) and 25(4) of the Industrial Relations Court (Procedure) Rules.
- 1.2 The applicant moves this Court to determine the following points of law: (a) whether an employee on probation is entitled to procedural justice, specifically the right to be heard, prior to the termination of employment under section 57(2) of the Employment Act and section 43 of the Constitution; (b) whether the respondent unlawfully extended or misapplied the probationary period by issuing a one-month notice of termination beyond the stipulated three-month probationary period without the applicant's consent; (c) whether, in the circumstances of this case, the applicant was unfairly dismissed; and (d) whether, contingent upon the Court's findings on liability, judgment should be entered in favour of the applicant with the trial limited solely to the assessment of quantum.

- 1.3 According to the applicant's IRC Form 1, she seeks the following relief: (a) reinstatement, or in the alternative, compensation for unfair dismissal; (b) severance allowance; (c) loss of bonuses and allowances; and (d) loss of future earnings.
- 1.4 In support of the motion, the applicant relies on her affidavit in support, sworn on 1 February 2024, alongside her skeleton arguments. The respondent opposes the motion, relying on a sworn statement in opposition deposed to on 28 February 2024 by Rev. Fr. Dr. Wilfred Sumani, the respondent's Director of Academic Affairs, accompanied by the respondent's skeleton arguments. During the hearing of the motion, the parties formally adopted their sworn papers and submissions before me.
- 1.5 It is pertinent to note that on 19 January 2024, the parties conducted a pre-hearing conference. This culminated in a set of minutes duly signed by both parties and endorsed by the Registrar of this Court.

2 THE FACTUAL MATRIX

- 2.1 Under the summary procedure invoked by the applicant herein, it is a well-established principle that this Court must proceed upon uncontested facts; namely, those proven, admitted or otherwise agreed upon by the parties. Material facts, in this context, are those bearing directly upon the threshold question of liability, as distinguished from collateral controversies or arithmetic details going strictly to issues of quantum or remedies.
- 2.2 Drawn from the pleadings and sworn papers, the core chronological timeline of material facts is as follows:
- 2.3 On 15 August 2023, the respondent engaged the services of the applicant as a full-time Lecturer in Economics within the Department of Economics, Faculty of Social Sciences, under a three-year written contract of employment, subject to a three-month probationary period¹. The applicant reported for duties and executed the contract on 17 August 2023 rendering the effective probationary period to run from 17 August 2023 to 16 November 2023.

¹ Exhibit RPN 1.

- 2.4 From 4 September 2023 to 25 September 2023, the applicant fell ill and was hospitalized at Zomba Central Hospital. Upon her discharge, her attending medical practitioner recommended strict bed rest prior to her resumption of duties. The applicant formally communicated her hospitalization and the medical recommendation to her Head of Department, who subsequently forwarded the same to the respondent's Human Resources Manager².
- 2.5 During her period of indisposition, the Head of Department advised the applicant that internal arrangements would be made within the department to cover her courses. Nevertheless, the applicant transmitted study notes and assignments to her students. Upon her return to campus, the applicant organized make-up classes for her students, administered mid-semester examinations, marked assignments and substantially covered the prescribed syllabus prior to the mid-semester and end-of-semester examinations.
- 2.6 On 15 November 2023, exactly one day prior to the expiration of the probationary period, the applicant was summoned to the office of the respondent's Acting Vice Chancellor. There, she was verbally informed that management had resolved to terminate her contract on the premise that she had accepted employment with prior knowledge of an impending illness that would prevent her from reporting for duty.
- 2.7 On 16 November 2023, the final day of the three-month probationary period, the respondent issued a formal letter of termination to the applicant. The letter cited non-confirmation on the grounds that "she found it difficult to avail herself for duties" and offered a one-month notice period expiring on 15 December 2023 or payment in lieu thereof. The salient excerpts of the letter of termination³ read as follows:

"The Catholic University engaged you as a full-time lecturer in the department of Economics. Consistent with the University's conditions of service, you were placed on a three-month probation. A review of your performance during the probation period shows that you have found it difficult to avail yourself for duties at the University. In fact, members of your department have had to cover up for you on many occasions.

² Exhibit RPN 2.

³ Exhibit RNP 4.

I therefore regret to inform you that Management has decided not to confirm you in your position as a full-time lecturer at the Catholic University of Malawi.

According to the University's conditions of service (Chapter 13.1.2), an employee on probation whose employment engagement is terminated is entitled to either one month notice or payment equal to one-month total emolument.

Management hereby gives you a one-month notice of the termination of your employment agreement with the University. Your contract will expire on 15th December 2023.” [sic]

2.8 On 20 November 2023, the applicant wrote to the respondent requesting written reasons for her termination and questioning why she had been denied an opportunity to defend herself⁴. On 28 November 2023, the Acting Vice Chancellor requested a meeting in his office, during which he presented class attendance registers, alleging that the applicant had taught only 36 hours out of an expected 132 hours. When the applicant requested permission to produce evidence from students and colleagues confirming that make-up classes had been held, the Acting Vice Chancellor expressly barred her from relying on student or colleague testimony. The respondent subsequently issued a formal letter dated 28 November 2023 (delivered on 1 December 2023) affirming its decision⁵.

2.9 I note that in paragraphs 11 and 12 of the signed pre-hearing conference minutes dated 19 January 2024, both parties expressly agreed, as an uncontroverted fact, that the applicant was not called to a hearing, given prior notice of the reasons for her dismissal or afforded an opportunity to defend herself prior to the issuance of the termination letter on 16 November 2023.

2.10 The foregoing constitutes the material factual matrix.

3 THE PARTIES' ARGUMENTS AND SUBMISSIONS

3.1 The applicant submits that her termination was procedurally unlawful. She contends that under section 57(2) of the Employment Act and section 43 of the Constitution, every employee, regardless of probationary status, is entitled to procedural justice, specifically the right to be heard, prior to termination. Citing

⁴ Exhibit RPN 5.

⁵ Exhibit RPN 7.

*Sheha v. Malawi Revenue Authority*⁶ and *Mary Mbwana v. Blantyre Sports Club*⁷, the applicant argues that a probationer retains the legal status of an “employee” and that the respondent could not unilaterally extend the probationary period beyond the agreed three months, under the guise of issuing a post-probationary notice period, without her express consent.

- 3.2 In opposition, the respondent contends that non-confirmation of employment at the conclusion of a probationary period is legally distinct from dismissal. Relying on foreign persuasive authorities, including *Dr H Korthals Altes v. University of Essex*⁸ and *Deman v. Queen's University Belfast*⁹, the respondent argues that probation serves as a trial period during which an employer retains absolute discretion to decline to confirm an employee for unsatisfactory performance or unavailability without the necessity of invoking full formal disciplinary procedures. The respondent submits that under Chapter 13.1.2 of its Conditions of Service and section 26(2) of the Employment Act, it lawfully exercised its prerogative to terminate the employment relationship upon the expiry of the probationary period by offering a one-month notice period and, subsequently, salary in lieu of notice.
- 3.3 I commend both parties for the admirable skill and gravitas with which they presented their respective positions, particularly navigating this complex matter without the assistance of legal counsel. I assure the parties that I have meticulously evaluated all arguments and submissions advanced before me, both orally and in written form. Accordingly, the absence of an express reference to any specific submission, authority or piece of evidence in this ruling should by no means be construed as a failure by this Court to have considered it.

4 ISSUES FOR DETERMINATION

- 4.1 Having carefully evaluated the motion, affidavits, written arguments and oral submissions of the parties, the issues that fall for this Court’s determination are as follows:

(a) *Whether this matter is suitable for disposal on points of law;*

⁶ Matter IRC 113 of 2002.

⁷ Civil Cause 1430 of 2009.

⁸ UKEAT/0059/2019/LA.

⁹ [2022] NICA 23.

- (b) *Whether an employee on probation is entitled to procedural justice, specifically the right to be heard, under section 57(2) of the Employment Act and section 43 of the Constitution prior to non-confirmation or termination of employment;*
- (c) *Whether the respondent unlawfully extended or misapplied the probationary period by issuing a one-month notice of termination beyond the three-month probationary period without the applicant's consent;*
- (d) *Whether, based on the material uncontroverted facts, the applicant was unfairly dismissed within the meaning of sections 57, 58 and 61 of the Employment Act; and*
- (e) *Whether the applicant is entitled to the relief sought.*

5 THE APPLICABLE LAW

- 5.1 Rule 16 of the Industrial Relations Court (Procedure) Rules provides the procedure for applications or motions not expressly covered by the Rules. Furthermore, section 67(2) of the Labour Relations Act (as amended in 2021) vests this Court with the jurisdiction to determine matters of both law and fact while Rule 5A(1)(c) of the Procedure Rules expressly provides for the disposal of a matter on a point of law.
- 5.2 In *Charles Nsaliwa v. Malawi Communications Regulatory Authority*¹⁰, the Court emphasized that the decisive consideration is whether there are material factual disputes requiring resolution through oral evidence. In *Council of the University of Malawi v. Benjamin Chirwa and Others*¹¹, it was 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 where a legal determination will finally dispose of the matter.
- 5.3 For the termination of employment to be deemed fair in law, it must satisfy the dual requirements of substantive and procedural fairness. A failure on either front is invariably fatal rendering the dismissal legally indefensible and unfair. Substantive

¹⁰ Civil Appeal No. 30 of 2015 [Unreported] at pp. 5-6.

¹¹ Civil Appeal Number 12 of 2016 (Being IRC Matter No. 195 of 2014) [Unreported].

justice concerns the validity of the reason for dismissal whereas procedural justice governs the manner in which the dismissal was effected.

- 5.4 Section 57(1) of the Employment Act provides that the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirement of the undertaking. The burden of showing that the reasons for dismissal are valid is on the employer¹².
- 5.5 Section 57(2) of the Employment Act provides that the employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.
- 5.6 Section 58 of the Employment Act provides that a dismissal not in conformity with section 57 is unfair and section 61 creates a conclusive presumption of unfair dismissal where the employer fails to provide the reason for dismissal in compliance with section 57.
- 5.7 Complementing this framework, section 61(2) of the Employment Act stipulates that, in addition to proving a valid reason for dismissal under section 57(1), an employer must demonstrate that in all the circumstances of the case, it acted with justice and equity in dismissing the employee.
- 5.8 Section 26 of the Employment Act regulates probationary periods, stipulating that during such a period, a contract of employment may be terminated at any time by either party without notice.
- 5.9 Section 43 of the Constitution guarantees every person the right to procedurally fair administrative action.
- 5.10 In the interest of brevity, I shall cite, where relevant, the remainder of the applicable statutory provisions and case law at appropriate junctures within the “*Analysis and Disposal*” segment of this ruling.

¹² Section 61(1) of the Employment Act; *Mangulama v. Raiply Malawi Limited* Matter No. IRC 254 of 2003 [Unreported].

6 ANALYSIS AND DISPOSAL

6.1 It is the practice of this Court not to place parties in what it terms “gratuitous suspense” regarding its decisions. Consequently, for the detailed reasons set out below, the applicant’s motion succeeds in its entirety. This conclusion stems from a careful scrutiny of the questions formulated in the “*Issues for Determination*” section of this ruling and, importantly, in light of the relevant agreed facts and applicable law.

(a) *Whether this matter is suitable for disposal on points of law;*

6.2 As alluded to earlier, the summary procedural machinery deployed by the applicant in the determination of this matter requires this Court to work strictly with uncontested facts. In other words, for a case to be barred from summary disposal under the ***Charles Nsaliwa***¹³ test, the unresolved factual disputes must be material to the determination of the threshold liability question. It is observed that, in the present matter, there are disputed factual assertions regarding, *inter alia*, the applicant’s class attendance hours and whether she fulfilled her lecturing workload. However, these disputed facts are immaterial to the determination of the threshold questions of liability. Rather, they pertain to collateral performance details best reserved for inquiry during a remedy hearing, should the applicant succeed on the liability question.

6.3 Given that the primary liability questions in the instant matter revolve around whether the respondent complied with section 57(2) of the Employment Act and section 43 of the Constitution prior to terminating the applicant’s employment, as well as whether the respondent unlawfully extended or misapplied the probationary period without the applicant’s consent, it is beyond contestation that the motion is amenable to disposal on points of law. To reiterate, it is uncontroverted that the applicant was not called to a hearing, given prior notice of the reasons for her dismissal or afforded an opportunity to defend herself before termination. It is equally undisputed that the respondent issued a one-month notice of termination beyond the three-month probationary period without the applicant’s consent. Because all material facts governing procedural liability are firmly established, this matter is eminently ripe for disposal on points of law. I so hold.

¹³ n.10 above.

(b) Whether an employee on probation is entitled to procedural justice, specifically the right to be heard, under section 57(2) of the Employment Act and section 43 of the Constitution prior to non-confirmation or termination of employment;

- 6.4 In simple terms, the respondent fervently argued that non-confirmation at the end of a probationary period is legally distinct from dismissal asserting that probationers have no right to a disciplinary hearing or natural justice, citing the United Kingdom Employment Appeal Tribunal (EAT) case of ***Dr H Korthals Altes v University of Essex***¹⁴.
- 6.5 I have carefully considered this authority. Therein, Dr. Hester Korthals Altes was appointed as a lecturer in 2017 under a contract that specified a three-year probationary period. Like most permanent academic appointments in the UK, her contract incorporated the provisions of the University of Essex Ordinances. These Ordinances heavily restrict how an academic's employment can be terminated, mandating a specialized, multi-stage "good cause" procedure designed to protect academic freedom. In 2019, before her three years concluded, the university issued Dr. Altes a notice of dismissal on the grounds that she was unlikely to achieve the satisfactory progress required to pass her probation. The central argument brought forward by Dr. Altes was whether the university had the right to cut her probationary period short and dismiss her using a standard capability or probation framework. She argued that because her contract incorporated the university Ordinances, she could only be dismissed if the university initiated and completed the formal, complex "good cause" procedure.
- 6.6 In a ruling initially delivered by the Employment Tribunal (ET), Dr. Altes' claim was rejected on the basis that the university's Charter and Ordinances differentiated between confirmed permanent staff and probationary staff. The Tribunal held that the "good cause" protections were intended exclusively for staff who had successfully cleared probation. On appeal, the EAT upheld the ET's first-instance ruling. The EAT looked closely at the construction of the employment contract alongside the University of Essex Charter and Statutes. It concluded that a probationary period inherently implies an ongoing assessment of suitability.

¹⁴ UKEAT/0059/2019/LA.

Crucially, the EAT ruled that forcing a university to trigger a full constitutional “good cause” panel simply to end an unsuccessful probation would render the concept of a probationary contract entirely meaningless.

- 6.7 For reasons I shall immediately elucidate, to the extent argued by the respondent, the *Dr H Korthals Altes*¹⁵ case is unhelpful on two important fronts. First, the case turned on its own peculiar facts, in that the university’s Charter and Ordinances expressly differentiated between confirmed permanent staff and probationary staff. Secondly, and more importantly, it is distinguishable in light of the statutory regime governing employment law in our jurisdiction. In short, I find the respondent’s argument, that non-confirmation at the end of probation is distinct from dismissal such that probationers have no right to a disciplinary hearing or natural justice, to be legally untenable, profoundly misconceived and incompatible with our employment jurisprudence.
- 6.8 Under section 2 of our Employment Act, an employee is defined as any person who offers services under an oral or written contract of employment, whether express or implied. Furthermore, Chapter 1.0 of the respondent’s very own Conditions of Service defines an employee as any person working under the employment of the Catholic University of Malawi, whether on contract, pensionable terms or temporary terms of service. It is highly significant that neither the statute nor the respondent’s own Conditions of Service draws any distinction between confirmed staff and probationary staff regarding basic statutory rights. As for the Employment Act, while section 26(2) permits shorter notice periods during probation, it does not exempt employers from complying with section 57 thereof. Similarly, regarding the termination of employment for employees on probation, the respondent’s Conditions of Service simply state that “either party will give one month notice or pay an amount equal to one-month total remuneration.” Nowhere is it provided that the Catholic University of Malawi is exempted from complying with section 57 of the Employment Act. In fact, employers and employees cannot mutually agree to contract out of the express statutory provisions of section 57 of the Employment Act.

¹⁵ As above.

- 6.9 As remarkably established by this Court in *Sheha v. Malawi Revenue Authority*¹⁶, while section 26(2) of the Employment Act modifies notice entitlements during probation, it does not exclude probationers from the general statutory requirement of procedural justice enshrined in section 57 of the Employment Act.
- 6.10 Some foundational observations on the workings of probation may be apposite at this juncture.
- 6.11 The legal effect of an appointment subject to a probationary or confirmation procedure is that the appointment does not become complete and unqualified unless and until the conditions laid down in the probation or confirmation procedure have been satisfied. The satisfaction of these conditions is part of the process of appointment, not of dismissal.
- 6.12 Undoubtedly, employees are not automatically entitled to work their full probation period before any decision on suitability for the role is reached. The probationer may expect to be terminated in the course of the probation period or at its end, or may be confirmed, or have the probation period extended. It is also implicit in an employment contract with probationary terms that the new employee's performance will be reviewed during or at the end of the probation period. Whether that happens in practice is a different question altogether. Indeed, if in the meantime the probationer proves to be a thoroughly unsatisfactory employee, it remains open to the employer to dismiss him or her at any time, in keeping with section 26(2) of the Employment Act.
- 6.13 Stated differently, a probationary period does not create a fixed-term contract. Regardless of how long the probation period is, an employee does not have the unassailable right to be employed for that full period and an employer will have the right to terminate the contract during the probation period without notice. It is equally important to view the probation period from the employee's perspective, as the other side of the coin. The probation period assists the employee in making a definitive decision about the role, because an employee may discover that the practical reality of the job differs fundamentally from the job description or their initial expectations. Thus, the probation term simultaneously permits the employee

¹⁶ Matter IRC 113 of 2002.

to quit the role without notice. As it were, section 26(2) of the Employment Act is a double-edged sword.

- 6.14 Be that as it may, probationary status does not place an employee beyond the pale of fair labour practices as enshrined in section 31(1) of the Constitution of the Republic of Malawi. The statutory latitude afforded to an employer under section 26(2) of the Employment Act to terminate a probationary contract without notice must not be misconstrued as a license to bypass the dictates of natural justice. The dispensation of notice relates strictly to time. Most certainly, the dispensation of notice does not extinguish or abrogate the substantive and procedural justice safeguards enshrined in section 57 of the Employment Act. A probationary employee is not stripped of the protective cloak of the Employment Act. He or she remains unequivocally entitled to be apprised of the reasons for his or her proposed non-confirmation and must be accorded a fair, meaningful opportunity to be heard before the decision to terminate is crystallized. Any assertion that termination on probation without notice under section 26(2) equates to termination without a hearing is a fundamental misapprehension of the Employment Act.
- 6.15 For the avoidance of doubt, section 31(1) and section 43 of the Constitution apply universally to all employment relationships. Of course, the statutory expression of section 43 of the Constitution is practically situated within section 57 of the Employment Act.
- 6.16 In the matter at hand, to ambush the applicant on the final day of probation without prior written charges or a hearing plainly violates the fundamental constitutional rights and the applicable statutory provisions laid bare. The post-termination meetings on 28 November 2023, where the Acting Vice Chancellor introduced class registers but barred the applicant from presenting student evidence, cannot retrospectively cure an unlawful dismissal based on the facts and the law applicable to this matter.
- 6.17 Pausing here, and to build upon the impeccable reasoning in *Sheha*¹⁷, this Court is wholly persuaded by the reasoning in *White v. London Transport Executive*¹⁸, which must surely apply to the facts of the case under consideration, as well as to all cases concerning the dismissal of employees on probation.

¹⁷ As above.

¹⁸ [1981] IRLR 261.

6.18 I am acutely alive to the fact that *White*¹⁹, being a decision of the English EAT, is a persuasive authority. However, it should be remembered that our Employment Act was promulgated to establish, reinforce and regulate minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice and for matters connected therewith and incidental thereto²⁰. In that regard, I see no harm in employers being required to comply with the progressive *modus operandi* established in *White*²¹, as well as another case to which I will presently make reference. In any event, this Court is of the firm conviction that adopting the *modus operandi* from these two EAT cases would effectively shield employers from litigation as it ensures compliance with procedural justice in the processing of probationers' dismissals.

6.19 In *White*²², the English EAT ruled on the balance between an employer's obligation to guide a probationer and the limits of what contractual terms can be automatically implied into a standard trial period. Mrs. White was an assistant at the London Transport Executive's (LTE) Hornchurch Social Centre and was promoted to Manager. Her promotion was made "subject to the satisfactory completion of the probationary period." Her contract specified that if the arrangement proved unsatisfactory, she could return to her previous job or an equivalent role. It then transpired that her performance during probation was deemed unsatisfactory by LTE. In accordance with the contract, LTE offered her alternative employment. Mrs. White refused the offer, resigned and claimed constructive dismissal on the grounds that she had not been adequately trained or supported.

6.20 In its decision, the EAT accepted that when a contract contains a probationary clause, there is an implied term that the employer will take reasonable steps to maintain an appraisal of the probationer. The employer must offer positive help, guidance, advice or warnings where necessary to help the employee reach the expected standard. Conversely, the EAT rejected the argument that employers are bound to provide highly specific, extensive levels of "support, assistance, guidance and training" unless explicitly written into the contract. The EAT ruled that the law would be "ill-advised to imply detailed contractual rights" of this nature as it would place an unfair and impractical burden on employers.

¹⁹ As above.

²⁰ See the Preamble to the Employment Act.

²¹ n.9 above.

²² As above.

- 6.21 In a related case, *Post Office v. Mughal*²³, the English EAT established essential legal guidelines regarding the fair dismissal of a probationary employee on the grounds of capability. In this case, Mrs. Mughal was hired by the Post Office as a trainee clerical officer for a one-year trial period. Her contract specified that her employment could be terminated with appropriate notice if her performance proved unsatisfactory during this probationary year. When her performance fell short of expectations, the Post Office dismissed her at the end of the trial period. She subsequently brought a claim for unfair dismissal. The core issue was determining what constitutes a procedurally fair dismissal when dealing with an employee on a contractual probationary period.
- 6.22 In determining the matter, the EAT held that while employers have broader latitude to assess suitability during probation, they must still act reasonably under general unfair dismissal principles. The EAT laid down a two-part test for evaluating the fairness of a probationer's dismissal. The first part is characterized as "reasonable appraisal and guidance", wherein the employer must prove they took active, reasonable steps to maintain an ongoing appraisal of the probationer throughout the probationary term. This includes providing proper guidance, advice or warnings regarding performance gaps. The second part is termed "honest effort to assess standard", wherein the employer must make an "honest effort" to determine whether the employee has actually come up to the required standard before making the final decision to dismiss.
- 6.23 The core principle to be distilled from these two well-reasoned decisions is that an employer owes an implied duty to actively appraise, advise and guide a probationer regarding alleged shortcomings during the trial period. Even the case cited by the respondent herein, *Dr H Korthals Altes v. University of Essex*²⁴, concluded that a probationary period inherently implies an ongoing assessment of suitability.
- 6.24 In my considered and firm view, an objective assessment during the probationary period is essential because it places the employee on fair notice. It alerts the probationer to the very real risk of non-confirmation if their performance is unsatisfactory, if their performance fails to align with the competencies they

²³ [1977] IRLR 178.

²⁴ n.4 above.

represented during their interview, or if their performance is otherwise not commensurate with their negotiated salary.

6.25 In my further considered and firm opinion, if there is one period during which an employer is crucially expected to take a particular interest in an employee, it is during probation, as it is during this precise window that the employer must determine whether the probationer is fit to belong to the organization permanently. One crucial way of demonstrating that interest is through the active supervision or review of the probationer's work to assess performance, capability, competency, skills and general conduct against the standards required in the job role for which the probationer was recruited.

6.26 In the present matter, it is an uncontested fact that at no point did the respondent actively appraise, advise or guide the applicant, as a probationer, regarding her alleged shortcomings during the trial period. What is more astounding is the indisputable fact that the respondent remained silent during the applicant's certified medical hospitalization at Zomba Central Hospital – an illness that was incontestably not of her own making, but a mere vicissitude of life. The respondent then inexplicably and unconscionably weaponized the very same indisposition the applicant was contending with as a ground for abrupt non-confirmation on the last day of her probation. In addition to this being a clear infraction of section 57(2) of the Employment Act, I find, in law, that through this conduct, the respondent failed to act with justice and equity in terminating the applicant's contract of employment, acting in direct contravention of section 61(2) of the Employment Act.

(c) Whether the respondent unlawfully extended or misapplied the probationary period by issuing a one-month notice of termination beyond the three-month probationary period without the applicant's consent;

6.27 It is an undisputed fact that the agreed probationary period ran for a strict three months, expiring on 16 November 2023. On that final day, the respondent issued a letter purporting to give one month's notice which practically projected the employment relationship to expire on 15 December 2023.

- 6.28 As held by the High Court in *Mary Mbwana v. Blantyre Sports Club*²⁵, where parties agree to a specific probationary period, an employer cannot unilaterally extend that period without the employee's express consent. Issuing a notice that projects employment beyond the stipulated probationary timeframe, particularly where the Conditions of Service contain no express provision for such an extension, operates as an invalid attempt to extend probation by stealth.
- 6.29 The legal untenability of the respondent's position can be further illustrated by way of a hypothesis. Let us suppose that on 16 November 2023 (the very day the respondent issued the one-month notice), the tables were turned and it was the applicant who wrote to the respondent advising that she did not wish to be considered for confirmation and was thereby giving one month's notice of termination. Would that legally compel her employment to continue until 15 December 2023 under probationary terms? Certainly not, for the very same reasons advanced above.
- 6.30 I find no legal basis to justify the respondent's decision to issue a one-month notice on the final day of a three-month probation, particularly when neither the employment contract nor the Conditions of Service provided for an extension of the probationary period. Plainly, the respondent's issuance of this notice was an impermissible attempt to unilaterally extend the probation, seemingly for the sole purpose of mechanically complying with the termination formalities outlined in its Conditions of Service. The material fact remains: the probationary period was capped at a maximum of three months with no contractual provision for an extension.
- 6.31 Ultimately, in the absence of a lawful extension or timeous notice of termination preceding the expiry of probation, an employee who continues in service post-probation is deemed confirmed by implication or operation of law. The respondent's attempt in the present matter to deploy a one-month notice period projecting beyond the strict three-month window cannot retrospectively sanitize an unprocedural dismissal. I so hold.

²⁵ Civil Cause 1430 of 2009.

(d) Whether, based on the material uncontroverted facts, the applicant was unfairly dismissed within the meaning of sections 57, 58 and 61 of the Employment Act;

6.32 Section 57(2) of the Employment Act contains an absolute prohibition against terminating employment for reasons connected with capacity or conduct before affording the employee an opportunity to defend himself.

6.33 Under section 58 of the Employment Act, any termination effected in breach of section 57 is statutorily classified as an unfair dismissal. Furthermore, section 61 creates a conclusive presumption of unfair dismissal where the employer fails to provide the reason for dismissal in compliance with section 57.

6.34 On the agreed facts, the respondent failed to provide the applicant with prior written reasons or a hearing before issuing the termination letter on 16 November 2023. Inescapably, I hold that the applicant was unfairly dismissed within the meaning of sections 57, 58 and 61 of the Employment Act and that the respondent thereby subjected her to unfair labour practices under section 31 of the Constitution. However, the Court observes that in her pleadings in IRC Form 1, the applicant did not include a claim for unfair labour practices amongst the relief sought. Thus, on the authority of *Banja La Mtsogolo v. Harriet Chiomba*²⁶ and *Mandala Ltd v. Soche Tours and Travel Ltd*²⁷, this Court is precluded from awarding a remedy grounded in unfair labour practices as the same was not pleaded (a principle often colloquially expressed in our jurisprudence as the prohibition against “giving a litigant an orange when they asked for a mango.”). Consequently, judgment on liability is hereby entered for the applicant solely in respect of the finding of unfair dismissal.

(d) Whether the applicant is entitled to the reliefs sought.

6.35 Having established that the termination of the applicant’s employment was unfair, the applicant is entitled to the reliefs particularized in her IRC Form 1.

²⁶ MSCA Civil Appeal No. 33 of 2008.

²⁷ [1991] 14 MLR 210 (HC).

7 CONCLUSION

7.1 On an overall conspectus of the relevant facts and the applicable law, as well as the discussion conscientiously undertaken herein, permitting this matter to proceed to trial to resolve the liability issue would be otiose. The applicant's motion succeeds and judgment on liability is entered against the respondent for unfairly dismissing the applicant. The applicant is entitled to all the reliefs sought.

7.2 Regarding the determination or reckoning of the reliefs, this Court notes that neither party specifically addressed the Court on the same in the course of arguing the motion. While it is generally efficient to determine liability and assessment in a consolidated, omnibus fashion, the parties were not heard on the precise determination of the remedies. Given that the right to be heard is a foundational tenet of our justice system, the parties would be unfairly prejudiced were I to proceed to assess the reliefs without affording them the opportunity to adduce evidence or make specific submissions. Accordingly, I shall defer the assessment of the relief. In the interim, I direct as follows:

(a) *The parties are at liberty to agree on determination of the reliefs within fourteen (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.*

7.3 The determination of the liability question concludes the first phase of the applicant's suit. Under the authority of ***JTI Leaf (Malawi) Limited v. Kad Kapachika***²⁸, this decision remains inchoate for appeal purposes. It may only be appealed to the High Court once this Court has rendered its order on the assessment of remedies or upon the parties registering a consent order settling the same. For the avoidance of doubt, while the right of appeal under section 65(2) of the Labour Relations Act subsists, it is effectively stayed pending the conclusion of the remedies phase or the parties reaching a mutually binding agreement on the quantum of the reliefs.

²⁸ MSCA Civil Appeal No. 52 of 2016 [unreported].

7.4 It is so ordered.

Pronounced this 6th October 2026 at IRC, **PRINCIPAL REGISTRY**



Tamanda Chris Nyimba
ACTING CHAIRPERSON