

**IN THE HIGH COURT FOR ZAMBIA  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**COMP/IRCLK/222/2021**

**BETWEEN:**

**ALBERT MUPILA**

**COMPLAINANT**

**AND**

**YU-WEI**

**RESPONDENT**

**Before: Hon. Lady Justice Dr. W. S. Mwenda at Lusaka this 2<sup>nd</sup>  
day of March, 2022.**

*For the Complainant: In Person*

*For the Respondent: No Appearance*

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**JUDGMENT**

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**Cases referred to:**

1. *Khalid Mohamed v. The Attorney-General* (1982) Z.R.49 (SC).
2. *B.J. Poultry Farm Limited v. Nutri Feeds Zambia Limited*, SCZ Appeal No.166 of 2015.
3. *Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others*, SCZ Appeal No.06/2020.
4. *Care International Zambia Limited v. Misheck Tembo*, SCZ Selected Judgment No. 56 of 2018.
5. *Redrilza Limited v. Abuid Nkazi and Others*, SCZ Judgment No. 7 of 2011.
6. *Zambia Consolidated Copper Mines v. James Matale* (1995-1997) Z.R.157 (S.C.).
7. *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited*, CAZ/Appeal No. 129/2017.
8. *Swarp Spinning Millis Plc. V. Sebastian Chileshe and Others* (2002) Z.R. 23 (S.C.).
9. *Charles Ng'onga v. Alfred H. Knight (Z) Limited*, SCZ Selected Judgment No. 26 of 2019.

**Legislation referred to:**

1. Rules 11 (2) and 44 (1) of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia.

2. Section 4 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.
3. The Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011, Statutory Instrument No. 11 of 2011.
4. The Minimum Wages and Conditions of Employment (Shop Workers) (Amendment) Order, 2012, Statutory Instrument No.47 of 2012.
5. The Minimum Wages and Conditions of Employment (Shop Workers) (Amendment) Order, 2018, Statutory Instrument No.70 of 2018.
6. Section 85A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.
7. Sections 2 (2), 3, 22 (1), (2) and (3), 50 (1), 52 (2) and (5), 53 (1), 54 (1) and (3), 55 (1) and 72 of the Employment Code Act No. 3 of 2019.
8. The National Pension Scheme Act, Chapter 256 of the Laws of Zambia.
9. The Employment Code (Exemption) Regulations, 2020, Statutory Instrument No.48 of 2020.

**Authoritative text referred to:**

1. Mwenda W.S. and Chungu C., A Comprehensive Guide to Employment Law in Zambia, (University of Zambia Press, 2021).

**1. INTRODUCTION**

1.1 The Complainant herein filed a Notice of Complaint on 28<sup>th</sup> April, 2021, on the ground that he was employed by the Respondent on 10<sup>th</sup> October, 2016, as a manager on a permanent basis and his employment was terminated verbally by the Respondent on 27<sup>th</sup> February, 2021. The Complainant thus, seeks the following remedies:

- (a) Benefits for the years worked;
- (b) Leave days;
- (c) Unfair and unlawful dismissal; and
- (d) Costs and any other benefits the Court may deem fit.

## **2. THE COMPLAINANT'S CASE**

- 2.1 The Complainant asserts in the Affidavit in Support of Complaint, that he was employed by the Respondent as a manager, on a permanent basis, on 10<sup>th</sup> October, 2016 but he was not given a copy of his contract of employment or any document containing his conditions of service. He worked well with the Respondent until 27<sup>th</sup> February, 2021 when the Respondent verbally terminated the Complainant's employment for asking about his National Pension Scheme Authority (NAPSA) contributions which the Respondent was not remitting to NAPSA.
- 2.2 The Complainant asked the Respondent about his terminal dues and was told that they needed to calculate the dues together but after that, the Respondent remained quiet and stopped answering the Complainant's calls.
- 2.3 On 18<sup>th</sup> March, 2021 the Complainant went to the Labour Office for assistance but the Respondent failed to show up when summoned. Consequently, the Complainant

filed the suit before this Court seeking the reliefs in paragraph 1.1 above.

### **3. THE RESPONDENT'S CASE**

3.1 The Respondent did not file an answer to the complaint or appear for trial despite being served with the Notice of Complaint and Notice of Hearing, as evidenced by the Affidavit of Service filed into Court by the Complainant. The matter came up for hearing on 18<sup>th</sup> January, 2022. After satisfying myself that the Respondent was served with court process but opted to stay away from court, I decided to proceed with trial irrespective of the Respondent's absence.

### **4. EVIDENCE**

4.1 The Complainant (CW), testified on his own behalf and did not call any other witness. CW testified that he was employed by the Respondent as a manager/shop keeper on 10<sup>th</sup> October, 2016. According to CW, the Respondent was running a gambling business and the Complainant's job was to look after the gambling machines and to ensure that the other shops where the Respondent had

machines were open. He was employed on a permanent basis although he was not given any document containing his conditions of service. He was only told that he was entitled to 2 leave days per month, but his salary would be increased depending on the turnover. CW tendered into evidence a document exhibited as "AM6" in an affidavit dated 25<sup>th</sup> January, 2022, to prove that his salary was K800 per month.

- 4.2 It was CW's testimony that on 10<sup>th</sup> February, 2021, he went to see the Respondent and expressed his concerns that his NAPSA contributions were not being remitted to NAPSA. The Respondent told CW to wait for one week so that he could calculate the remittances nicely.
- 4.3 According to CW, when he mentioned the issue of NAPSA contributions, the Respondent started looking for ways to terminate his contract of employment and on 27<sup>th</sup> February, 2021 he terminated it.
- 4.4 Following the termination, CW asked the Respondent for his terminal benefits and was told to wait while the Respondent calculated what was due to him. In March, 2021, CW went to the Labour Office so that they could

intervene in the issue, but the Respondent did not show up at the meeting, prompting the Labour Officer to advise CW to file a complaint in this Court. CW asked that judgment be entered in his favour as prayed in the Notice of Complaint.

## **5. DETERMINATION OF THE MATTER**

5.1 The Complainant seeks this Court to order the Respondent to pay him benefits for the period 10<sup>th</sup> October, 2016 to 27<sup>th</sup> February, 2021, which adds up to four (4) years and 4 months, plus leave days. He has also asked this Court for damages for unfair and unlawful dismissal, costs and other benefits the Court may deem fit. As mentioned earlier, the Respondent did not file an answer or appear at the hearing. Regulation 11(2) of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia stipulates as follows with regard to filing of an answer by a respondent:

*"A respondent who desires to answer a complaint shall, within the time appointed under sub-rule (1), deliver to the Court the answer in, or substantially in accordance with, Form IRC 10 contained in part B of the Schedule, setting out his answer to the complaint."*

5.2 Regulation 11 (2) is very clear as to what a respondent who desires to answer the complaint should do, that is, file an answer within the specified time. Therefore, by not filing an answer to the complaint, the Respondent herein signified to this Court that he had no desire to defend himself against the complaint which, thus, remained uncontested. Nevertheless, it is trite law that a plaintiff or complainant cannot automatically succeed whenever there is no defence or when a defence has failed as he has to prove his case because the mere failure of the defence does not entitle him to judgment; see *Khalid Mohamed v. The Attorney-General*<sup>1</sup> and *B.J. Poultry Farm Limited v. Nutri Feeds Zambia Limited*<sup>2</sup>.

5.3 Therefore, the question for determination in this matter, in my view, is whether or not the Complainant has proved his claims against the Respondent on a balance of probabilities. While the Complainant states in his ground of complaint that he was employed by the Respondent as a manager, on a permanent basis, on 10<sup>th</sup> October, 2016, in his testimony he clarified that he was a shopkeeper who used to run the Respondent's gambling business



and ensured that the other shops belonging to the Respondent which had gambling machines were open. He further testified that he worked for the Respondent for four years and four months before he was verbally dismissed by the Respondent.

- 5.4 Thus, the Complainant indicated in the Notice of Complaint that he was employed as a manager, but clarified in his testimony that he was a shopkeeper employed to run the Respondent's gambling business. I am of the view that the designation of the Complainant notwithstanding, he was not in management of the Respondent as envisaged by Section 4 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia as his job description and circumstances of his job do not indicate that he was in a management position. In the absence of any evidence to the contrary, I am inclined to believe the Complainant's testimony that he was a shopkeeper and did not belong to any union. Further, in the absence of a contract of employment from which this Court could have determined what the Complainant's terms and conditions of employment were,



and due to the nature of his job, I can safely conclude that he was a protected employee covered by the Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011 as amended in 2012 and 2018. It is significant that even though the Minimum Wages and Conditions of Employment Act, 1982 was repealed by Section 138 (1) of the Employment Code Act, the Ministerial Orders enacted pursuant to the same were not repealed and are still applicable until expressly repealed. Thus, the Shop Workers Order, 2011 as amended by the 2012 and 2018 Orders, applied to the Complainant.

5.5 CW testified that he was employed by the Respondent on a permanent basis. As stated earlier, there is no evidence before this Court contrary to the testimony by CW that he was employed on a permanent basis. Thus, in the absence of evidence to the contrary, I will go by CW's unchallenged testimony that he was employed on a permanent basis.

5.6 In *Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and others*<sup>3</sup>, the Supreme Court settled that it is

possible for an employee to be recategorised into one of the identified categories in the Ministerial Orders, but this must be done with caution and only for good cause and after a careful examination of the circumstances of the case. Delivering the judgment of the Court, Malila JS (as he then was), said the following on pages J33 – J34 of the judgment:

*“It is beyond debate that hatchery men, poultry men and vaccinators are not mentioned in any of the four categories of the Schedule to the General Order. This much is factual and it is uncontroverted. For the Act to apply to them, there ought to be a basis for bringing them into one or another of the job categories mentioned in the Act. In other words, notwithstanding their work designation which do not answer to any of the categorised positions, it is possible for good cause, as happened in *Kenny Sililo v. Mend-A-Bath* and in *Kasembo v. Kinnear*, for non-categorised employees to be recategorised into one or another of the identified categories.”*

5.7 The learned authors of A Comprehensive Guide to Employment Law in Zambia, 2021 at page 87 state the following in relation to the Tiger Chicks judgment:

*“Therefore, the court will critically examine whether or not an employee is covered by the Ministerial Orders or redesignate them based on their job description and the facts and circumstances of the case. Only where the court is*

*satisfied that the employee falls within the categories of workers envisaged under the Ministerial Orders will they be entitled to the benefits under them."*

- 5.8 As protected employees, shop workers are covered by the Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011 (as amended by the 2012 and 2018 Orders). It is not in dispute that the Complainant was working in a shop as a shopkeeper. Having established above that the Complainant was a protected employee and that the Shop Workers Orders applied to him, he was entitled to the benefits provided in the Ministerial Orders. However, a perusal of the Shop Workers Orders shows that "shop keeper" is not mentioned in any of the four categories of the Schedule. Therefore, as a protected employee under the Shop Workers Orders, I am recategorising the Complainant as a general worker not elsewhere specified, falling in Grade 1 of the Fourth Schedule, whose minimum wages from the date of his employment, namely, 16<sup>th</sup> October, 2016 up to 7<sup>th</sup> September, 2018 was K700 per month and K1050.00 per month from 8<sup>th</sup> September, 2018 to the date of his dismissal.

5.9 The Complainant testified that he had asked his employer for a copy of the contract of employment at the time of signing the same but was not availed one. This undesirable behaviour by some employers of denying their employees copies of their contracts of employment is, regrettably, becoming common. Employers are well advised to take note that Section 22 (1) of the Employment Code Act, 2019, requires that every contract for a period of six months or over must be in writing. Further, in subsection (2) of the section, an employer is required to read and explain the terms of the contract of employment to the employee who is required to enter the contract voluntarily and full of understanding of the terms of that contract. An employee who consents to entering into a contract of employment may indicate consent by signing the contract or affixing on the contract, a thumb or finger print in the presence of a person other than the employer (subsection (3)).

5.10 Further, section 72 of the Employment Code Act requires an employer to explain to the employee the rate of wages and conditions relating to the payment of wages before

commencement of the employment or when changes in the nature of the employment take place. It can be surmised from the provisions of Section 22 and 72 of the Employment Code above, that an employer is under obligation to provide his employee with a copy of the employment contract after reading and explaining the terms of the contract and the conditions relating to the payment of his wages. Significantly, even under an oral contract of employment, an employer is required to keep a record of the contract in the manner prescribed in the First Schedule to the Employment Code Act; the presumption being that the employee will be given a copy, as otherwise it would not make any sense for an employee to sign copies of the employment contract or record of oral contract and end up not being availed any.

5.11 The above being the position of the law, one can only speculate as to the motives behind the action by some employers to withhold from their employees copies of their employment contracts. In my view, the motives are suspiciously sinister. It is time that courts started to consider subjecting such employers to administrative

penalties as provided in Section 22 (7) of the Employment Code to deter other employers or would-be employers from doing the same to their employees.

**Analysis and findings on Complainant's claims**

Benefits for the years worked

5.12 It is my considered view that as a protected worker, the Complainant's employment was governed by the Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011, Statutory Instrument No. 1 of 2011 as amended by the Minimum Wages and Conditions of Employment (Shop Workers) (Amendment) Order, 2012 from 10<sup>th</sup> October, 2016 up to 6<sup>th</sup> September, 2018. On 7<sup>th</sup> September, 2018, the Minimum Wages and Conditions of Employment (Shop Workers) (Amendment) Order, 2018 was promulgated. This means that from the date of employment, that is, 10<sup>th</sup> October, 2016, to 6<sup>th</sup> September, 2018, the Complainant was entitled to a minimum monthly wage of K700.00 as an employee in Grade 1, as per the Schedule to the Principal Order. Since the Complainant testified that his salary was K800.00 per month during that period, it was above the

minimum wage and therefore, in compliance with the law. Further, even though the Complainant was paid K100 more than the minimum wage of K700.00 per month from 10<sup>th</sup> October, 2016 to August, 2018, the additional K100 per month cannot be deducted from the Complainant's salary because the Schedule to the Ministerial Order, 2011 provides in 2 (1) that the wages or any benefit enjoyed by an employee shall not be reduced or altered adversely as a result of the application of the Order.

5.13 From 7<sup>th</sup> September, 2018 to the date of dismissal, the Complainant's minimum wage as per the Schedule to the Minimum Wages and Conditions of Employment (Shop Workers) (Amendment) Order, 2018 was K1,050 per month. Since the Complainant's wage was K800.00 per month, it was below the minimum wage by K250.00. He is thus, entitled to recover the underpayments of K250.00 per month from 7<sup>th</sup> September, 2018 to the date of dismissal.

#### Annual leave pay and allowances

5.14 Having completed six months' continuous service with the Respondent, the Complainant was entitled to annual



leave with full pay at the rate of two days per month under the Shop Workers Orders. He was further, entitled to transport allowance, lunch allowance and housing allowance, which he was not being paid. It will be noted that apart from annual leave pay which the Complainant has claimed in the Notice of Complaint, he has not made an express claim for transport, lunch and housing allowances, but has asked this Court to order the Respondent to pay him any other benefit the Court may deem fit.

5.15 Section 85A of the Industrial and Labour Relations Act has endowed this Court with the discretion, where it finds that the complaint or application presented to it is justified and reasonable, to grant such remedy as it considers just and equitable, including an award of damages for loss of employment and making any other order or award as the Court may consider fit in the circumstances of the case. Therein lies the root of this Court's power to award housing, transport and lunch allowances which the Complainant has not explicitly asked for. I therefore, find that the Complainant is

entitled to payment of unpaid housing, transport and lunch allowances which the Respondent was under obligation to pay to the Complainant.

Damages for unfair and unlawful dismissal

5.16 The Complainant has claimed for damages for unfair and unlawful dismissal. Under the grounds of complaint in the Notice of Complaint, the Complainant states that the Respondent verbally terminated his employment on 27<sup>th</sup> February, 2021, while in the Affidavit in Support of the Complaint, he asserts that he was verbally dismissed from work by the Respondent after he asked him about his NAPSA contributions which the Respondent was not remitting to NAPSA. Clearly, the Complainant is using the words "termination" and "dismissal" interchangeably. However, even though both terms relate to the cessation of the employer/employee relationship, the two terms are different; see the case of *Care International Zambia Limited v. Misheck Tembo*<sup>4</sup>, per Musonda JS (as he was then). In *Redrilza Limited v. Abuid Nkazi and Others*<sup>5</sup>, the Supreme Court pointed out that there is a difference between "dismissal" and "termination" as "dismissal"

involves loss of employment arising from disciplinary action, while “termination” allows the employer to terminate the contract of employment without invoking disciplinary action.

5.17 By way of *obiter dictum* and for the guidance of employers, employees and indeed, the general public, Section 52 (1) of the Employment Code Act, No. 3 of 2019 has now made it a requirement for an employer who terminates the contract of employment of an employee to give reasons to the employee for the termination. This is notwithstanding the fact that notice of termination of employment may have been given. Previously, the position was that termination with proper notice was a lawful way of bringing a contract of employment to an end as exemplified by the Supreme Court’s holding in the case of *Zambia Consolidated Copper Mines v. James Matale*<sup>6</sup>. The position in the James Matale case has been altered by Section 52 (1) and (2) of the Employment Code Act which now stipulates that a reason for termination of a contract of employment must precede the termination and the only valid reasons for termination are those

connected to the capacity, conduct of the employee or operational requirements of the employer's undertaking as well as redundancy in terms of Section 55 of the Employment Code Act. The distinction between termination for operational requirements and redundancy is that termination for operational requirements is based on a bonafide commercial reason such as inability to financially sustain an employee or due to a restructuring exercise while redundancy is only triggered when one of the redundancy situations in Section 55 (1) of the Employment Code arises. Section 55 (1) provides as follows:

*"55. (1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to –*

*(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employees were engaged;*

*(b) the business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged; or*

*(c) an adverse alteration of the employee's conditions of service which the employee has not consented to."*

5.18 I am fortified in making the above distinction based on the definition of redundancy in Section 3 of the Employment Code Act which limits redundancy to the situations in Section 55 and makes no reference to termination for operational requirements which is found in Section 52 (2).

5.19 In the case of *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited*<sup>7</sup>, the Court of Appeal, per Majula J.A., held that Section 36 of the Employment Act, Chapter 268 of the Laws of Zambia (since repealed by the Employment Code Act), now Section 52(2) of the Employment Code, has placed a requirement on an employer to give reasons for terminating an employee's employment. Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination.

5.20 Section 53 (1) of the Employment Code Act entitles an employee whose contract of employment is intended to be terminated, to a period of notice or compensation in lieu of notice except in cases of gross misconduct by the employee. Where the contract is silent on the period of

notice or there is no agreement between the parties, the period of notice provided in Section 53 (2) is twenty-four hours for a contract of employment not exceeding one month; fourteen days for a contract of employment of more than one month but not exceeding three months and thirty days for a contract of employment of more than three months.

5.21 In *casu*, the Respondent did not file an Answer to the Notice of Complaint and further, did not appear at the trial. In the absence of evidence from the Respondent on how the termination of the contract of employment was effected, and the burden of proving that the termination of the contract of employment was fair and for a valid reason having been on the Respondent as employer as required by Section 52 (5) of the Employment Code Act, by not filing an Answer to the Complaint and not appearing at trial, the Respondent has failed to discharge his burden. The only evidence which is before this Court is the Complainant's and that is to the effect that the Respondent verbally terminated his employment after he enquired from him about the non-remission of his NAPSA

contributions to NAPSA. It is evident that neither notice of termination of the contract of employment nor a valid reason recognised by law for termination was availed to the Complainant.

5.22 In view of the fact that the Complainant is claiming for damages for unfair and unlawful dismissal, clarity as to what amounts to an unfair dismissal is crucial. According to the authors Mwenda and Chungu in their book entitled, A Guide to Employment Law in Zambia, unfair dismissal is dismissal that is contrary to the statute or based on an unsubstantiated ground. It is a creation of statute. In the case of *Care International Zambia Limited v. Misheck Tembo* (supra), the Supreme Court was of the view that unfair dismissal is dismissal which is contrary to statute and that it is usually a much more substantial right for the employee and the consequences for the employer of dismissing unfairly are usually much more serious than those which attend to a wrongful dismissal, which is a dismissal which is contrary to the contract of employment



5.23 Section 50 (1) of the Employment Code provides the only instances where summary dismissal is permitted. It provides as follows:

*"An employer shall not dismiss an employee summarily except in the following circumstances:*

- (a) where an employee is guilty of gross misconduct inconsistent with the express or implied conditions of the contract of employment;*
- (b) for willful disobedience to a lawful order given by the employer;*
- (c) for lack of skill which the employee, expressly or impliedly warranted to possess;*
- (d) for habitual or substantial neglect of the employee's duties;*
- (e) for continual absence from work without permission of the employer or a reasonable excuse; or*
- (f) for misconduct under the employer's disciplinary rules where the punishment is summary dismissal."*

The evidence before this Court shows that the Complainant was dismissed summarily. However, there is no evidence before this Court to show that the circumstances outlined in Section 50 (1) of the Employment Code applied to the Complainant. Therefore, the summary dismissal of the Complainant was unjustified and in contravention of the Employment Code, and thereby, unfair. Being in breach of

the provisions of the law, the dismissal of the Complainant was also unlawful.

5.24 Having found that the dismissal of the Complainant by the Respondent was unfair and unlawful, the next issue to be determined is quantum of damages.

5.25 It is trite that the normal measure of damages for unfair, unlawful or wrongful dismissal is the applicable contractual length of notice or the notional reasonable notice where the contract is silent ( see the case of *Swarp Spinning Millis Plc. V. Sebastian Chileshe and Others*<sup>8</sup>). In that case the Supreme Court went further to state that the normal measure is departed from where the termination may have been inflicted in a traumatic fashion which caused undue stress or mental suffering. In *Charles Ng'onga v. Alfred H. Knight (Z) Limited*<sup>9</sup>, the Supreme Court confirmed that the normal measure of damages is an employee's notice period or as it is provided for in the law and can only be departed from when the employee proves that he is deserving of more and the conduct of the employer was so serious that it warrants a higher award of damages. In *casu*, the

Complainant has not provided any evidence to show that his dismissal was inflicted in a traumatic fashion which caused undue stress or mental suffering, therefore, he is only entitled to the normal measure of damages, being one month's salary.

5.26 In addition to the prayer for benefits for the years worked, leave days, unfair and unlawful dismissal and costs, the Complainant has asked this Court to award him any other benefit the Court may deem fit. As indicated earlier in this judgment, Section 85A of the Industrial and Labour Relations Act, allows this Court to grant any remedy it considers just and equitable in addition to the remedies provided therein. In the premises, I am of the view that the Complainant is entitled to severance pay as provided for under Section 54 (1) (c) of the Employment Code Act. The section states as follows:

*"Where a contract of employment for a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than 25% of the employee's basic pay earned during the contract period as at the effective date of termination."*

5.27 A permanent contract of employment has been defined in Section 3 of the Employment Code Act as a contract

which, if not terminated in accordance with the Employment Act, expires on the Employee's attainment of the retirement age specified under a written law. From the definition of a permanent contract of employment in Section 3, I form the opinion that a permanent contract of employment is also a contract of fixed duration in the sense that it is certain to expire on the retirement date if not terminated in the various ways specified in the Employment Code. Further, Section 54 (3) proscribes the payment of severance pay to casual employees, temporary employees, employees engaged on long-term contract or employees serving on probation. The prohibition has not been extended to employees engaged on a permanent basis. In relation to Section 54 (3) of the Employment Code Act, Mwenda and Chungu state at page 288 of their book thus:

*"The foregoing provision proscribes the payment of a severance package to employees engaged on, among others, long term contracts. As such it would seem that Section 54 (1) (b) and (c) of the Employment Code Act was designed for employees on permanent, short-term and seasonal contracts to receive gratuity when their employment terminates for a reason other than redundancy, medical discharge or death.*

*A contract for a fixed duration includes permanent contracts and thus, although the definition of gratuity provides the entitlement for long-term employees, permanent employees get this benefit in the form of severance pay when their employment terminates for a reason other than redundancy, medical discharge or death.*

5.28 Hence, it is not farfetched to conclude that employees engaged on a permanent basis are entitled to payment of severance pay when their contracts of employment are terminated for a reason other than redundancy, medical discharge or death.

5.29 In view of the above, it is my understanding that as an employee under a permanent contract of employment who was unfairly and unlawfully dismissed, the Complainant herein is entitled to severance pay. As mentioned earlier, the Complainant was not availed a copy of his contract of employment. That notwithstanding, where a contract does not fix a date for expiry, it is presumed to be a permanent contract that expires at retirement age unless terminated in terms of the law. The general retirement age in Zambia is 60 years as prescribed by the National Pension Scheme Act, Chapter 256 of the Laws of Zambia. Therefore, as an

employee under a permanent contract of employment who was unfairly and unlawfully dismissed, the Complainant is entitled to severance pay of not less than 25% of his basic pay earned during the contract period.

5.30 It should be noted that the Minister of Labour and Social Security issued the Employment Code (Exemption) Regulations, 2020, Statutory Instrument No. 48 of 2020, on 8<sup>th</sup> May, 2020 pursuant to Section 2(2) of the Employment Code Act. The statutory instrument allows the Minister, following consultation with the Tripartite Consultative Labour Council and by statutory instrument, to exempt any person or class of persons or any trade, industry or undertaking from any of the provisions of the Act. Thus, until Statutory Instrument No. 48 of 2020 is revoked, the following categories of employees are exempted from payment of severance pay in terms of Section 54 (1) (c) when their contracts come to an end, namely; expatriate employees and management employees. The Complainant herein does not fall within the categories of employees mentioned above; therefore, he is eligible for the payment of

severance pay. However, since the entitlement to severance pay does not apply retrospectively, the severance pay is payable from 9<sup>th</sup> May, 2020 when the transition period in which to comply with the Employment Code Act expired. Thus, the Complainant is not entitled to this benefit from the date of his engagement, but only from 9<sup>th</sup> May, 2020 until the date of his dismissal, that is, 27<sup>th</sup> February, 2021.

## **6. CONCLUSION AND ORDERS**

6.1 From the evidence on the record, I am satisfied that the Complainant worked for the Respondent as a manager/shop keeper on a permanent basis from 10<sup>th</sup> October, 2016 until 27<sup>th</sup> February, 2021 when he was unfairly and unlawfully dismissed. I find that the Complainant has proved his claims against the Respondent on a preponderance of probabilities. Therefore, judgment is entered for the Complainant for the following:

- (1) Underpayment of salary at K250.00 per month from 7<sup>th</sup> September, 2018 to the date of dismissal, being,



27<sup>th</sup> February, 2021 (30 months) giving a total of K7,500.

(2) Housing, transport and lunch allowances, from the date of employment, being 10<sup>th</sup> October, 2016 to 27<sup>th</sup> February, 2021, to be computed by the Deputy Registrar.

(3) Leave days at the rate of 2 days per month from 10<sup>th</sup> October, 2016 to 27<sup>th</sup> February, 2021, to be computed by the Deputy Registrar.

(4) One month's salary as damages for unfair and unlawful dismissal.

(5) Severance Pay, being 25% of the Complainant's basic salary of K1050 per month from 9<sup>th</sup> May, 2020 to 27<sup>th</sup> February, 2021;

(6) The Judgment sums shall attract interest at short term bank deposit rate from the date of the Notice of Complaint to the date of Judgment and thereafter, at current lending rate as determined by the Bank of Zambia from the date of Judgment until full payment.

(7) Ordinarily this Court does not award costs in favour of one party. However, Rule 44 of the Industrial

Relations Court Rules gives an exception where one party has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. I am of the view that the failure by the Respondent to file an Answer and appear before this Court falls within the ambit of unreasonable behaviour envisaged in Rule 44 of the rules of this Court. For these reasons, I am awarding costs to the Complainant, to be taxed in default of agreement.

6.2 Leave to appeal is granted.

**Dated at Lusaka this 2<sup>nd</sup> day of March, 2022.**

