

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

LILONGWE REGISTRY

MATTER NO. IRC 277 OF 2004

BETWEEN:

BANDA.....APPLICANT

-and-

MAHINDRA LEKHA.....RESPONDENT

CORAM: R. Zibelu Banda (Ms), Chairperson

Applicant- present

Respondent- Absent

Mpakani, Court clerk

JUDGMENT

Dismissal- Justification for dismissal- Reason- HIV Status-Discrimination-Prohibited ground- Unconstitutional-Anti discrimination Conventions-National policy on HIV-AIDS.

Facts

The respondent employed the applicant in June 2003. She was dismissed for reasons relating to her health status. The applicant went for HIV Voluntary Counseling and Testing. She tested positive. When she reported for duties after the test, the respondent immediately and without any formality dismissed the applicant.

The respondent did not attend court despite indications that the notice of hearing was delivered to them. There was no excuse for failure to attend court. It was therefore not in the interests of justice to postpone the case as adjourning the matter would have been prejudicial and unfair to the applicant. In such situations the matter must proceed in the absence of the other party, see section 74 of the Labour Relations Act providing that if a party fails to attend or to be

represented at the proceedings of the Industrial Relations Court without good cause, the Industrial Relations Court may proceed in the absence of that party or representative.

The Law

The applicable law in this matter is the Employment Act and the Constitution, which in section 31 provides that every person has the right to fair labour practices. Fair labour practices entail the right to know the reason for dismissal and the right to have an opportunity to explain ones side and defend oneself, see section 57 (1) and (2) of the Employment Act.

The burden of showing the reason for dismissal and that it was a valid reason is on the respondent, see section 61 (1) of the Employment Act, which provides that:

“In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to provide the reason for dismissal and if the employer fails to do so, there shall be a conclusive presumption that the dismissal was unfair.”

In *Earl v. Slater and Wheeler (Airlyne) Ltd* [1973] 1 WLR 51 at 55, it was held that:

“It is for the employer to show what was the principal or only reason for dismissal and that it was a potentially valid reason. If the employer fails to discharge this burden, the tribunal must find that the dismissal was unfair.”

In the instant case the respondent did not attend court to show on a balance of probabilities a valid reason for dismissal. The only reason provided was that the applicant was HIV positive as adduced in her examination in chief.

Reason

The applicant stated that throughout her employment with the respondent she had never been incapacitated from work due to her HIV status. In fact she was so health that she was leading a normal life. It came as a shock therefore when the respondent dismissed her just for the mere fact that she had tested HIV positive.

Incapacity due to ill health is a ground for dismissal where the person is so sick that she can not perform the functions for which she was employed, see *Phiri V Lifupa Lodge* [Matter Number IRC 232 of 2002(unreported)].

In the instant case the applicant averred that she was healthy and that at no time had she failed to perform her functions to the satisfaction of the respondent. In any case the respondent did not ask the applicant for a clinical examination to verify her employment suitability. The court finds therefore that the only reason that the respondent dismissed the applicant was because she had tested HIV positive.

Anti Discrimination

Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of ones HIV status, it is to be implied that it is covered under the general statement of anti discrimination in any form. This is why the South African Constitutional Court held in *Hoffman v South African Airways* [2000]21 ILJ 2357 (CC) that:

“The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligations. South Africa has ratified a range of anti discrimination Conventions, including the African Charter on Human Rights. In the preamble to the African Charter, member States undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member States have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination.”

The position on anti discrimination enunciated in the *Hoffman* case fits squarely with the situation in Malawi. Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified Convention 111 on 22 March 1965 both of which, place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law.

In the *Hoffman* case, the appellant (Mr. Hoffman) went through interviews for the position of Cabin Attendant in the respondent's Airways Company. At the end of a selection process, the appellant was found to be the most suitable candidate for employment. The medical examination found him to be clinically fit and thus suitable for employment. However, a blood test showed that he was HIV positive. The company informed him that he could not be employed in view of his HIV status. The South African Labour Court found that the company's practice was not unfairly discriminatory. On appeal to the Constitutional Court, the Court found that the appellant's right to equality was violated. The Court ordered the respondent to employ the appellant.

In the instant case, the applicant was unfairly discriminated against for exactly the same reasons as those in the *Hoffman* Case. This court can adopt the reasoning in that case because in applying provisions of the Constitution, this court is empowered by section 11 (2) (c) of the Constitution to use comparable foreign case law. The reasoning leading to the finding of the Constitutional Court is in *pari materia* with the situation in Malawi, in terms of Malawi's international obligations under anti discrimination Conventions; the Constitution; and national policy.

Finding

The court finds that the respondent dismissed the applicant on prohibited grounds. Unfair discriminatory reasons are not grounds for dismissal. The respondent violated the applicant's right to equality and the right to fair labour practices under the Constitution. Therefore this dismissal was unfair.

Assessment of Remedy

Where there is a finding that a Constitutional right was violated, sections 41 and 46 of the Constitution mandate this court to make any orders that are necessary and appropriate to secure the enjoyment of the rights and freedoms guaranteed to the applicant. A remedy shall be assessed on a date to be fixed.

Any party not satisfied with this decision is at liberty to appeal to the High Court in accordance with section 65 (2) of the Labour Relations Act within 30 days of this date.

Pronounced in open court this 1st day of June 2005 at Lilongwe.

R. Zibelu Banda (Ms.)
CHAIRPERSON.