

MALAWI GOVERNMENT

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*All Communications should
be addressed to the District
Labour Officer.*



In reply please quote Ref. No. RDLO,

**Ministry of Labour,
Rumphi District Labour Office,
P. O. Box 55,
Rumphi,
Northern Region,
Malawi.**

REF. RU/INT. 198/2016/3

15th July, 2016.

RE: LABOUR COMPLAINT (ALLEGED UNFAIR TERMINATION): MR IL NYIRONGO OF CHISENGA VILLAGE, T/A M'MBELWA, MZIMBA DISTRICT VERSUS THE DIRECTOR, PEAK PVT SECONDARY SCHOOL, P.O. BOX 30, RUMPHI.

This labour complaint case No. Ref. RU/INT. 198/2016 involves Mr IL Nyirongo of Chisenga village, T/A M'mbelwa, Mzimba District versus The Director, Mr M^cAubrey Simon Chirambo, Peak Pvt Secondary school, P.O. Box 30, Rumphi. Mr IL Nyirongo, the complainant, approached Rumphi labour office on 27th June, 2016 and complained of unfair termination from work by his employer, Chirambo, Director of Peak Pvt secondary school. Nyirongo filed four claims against the employer: **1.** two month salaries (July & August 2016), **2.** Severance allowance, **3.** Annual leave pay, and **4.** Monetary refunds of Mk123, 000.00 from the employer.

The employer was summoned to call at labour office for joint discussion. The first joint discussion took place on 8th July, 2016. Both parties were present at labour office during when the employer stated that Nyirongo was terminated from work because of his underperformance contrary to his signed performance related contract and thus argued that the termination/dismissal was fairly done to the extent that he (Mr Chirambo) was thus not reliable, as employer, to pay the complainant his remaining two contract months up to 31st August, 2016, the contract expiry date. In addition, the employer argued that Mr Nyirongo was not entitled to be paid severance allowance because he was covered on pension scheme, which although he (the complainant) had requested on his own to be exempted – from pension, and thus employer had no objection but to agree to Mr Nyirongo's request.

This office was therefore responsible to mostly address two questions: **1.** whether or not his terminated contract before the expiry date of 31st August, 2016 was wrongly/correctly done, in line with his signed employment contract coupled with employer's evidence submitted/to be submitted in his defense; and, **2.** whether or not Mr Nyirongo, the complainant, under his contractual arrangements (for his connected contracts served) and the manner in which he was terminated, qualifies for severance allowance. As such, both parties were asked to present their details of which they did. Furthermore, case adjournment was agreed to 15th July, 2015 to allow for thorough preparations by both parties. Thus the second (final) joint discussion took place on 15th July, 2016. During this second meeting, the employer finished by maintaining his earlier stand (i.e. the employer felt his termination action against the complainant was fairly done).

However, the following is a summary of my view backed by law as a conciliating/mediating Labour officer regarding this case in attempt to provide responses to the two questions put forward as above.

On the issue of their agreement regarding pension exemption, I clarified that it was not allowed by labour laws (the Pension Act, 2011) for the employment parties to choose to agree to exempt one another from complying with the pension scheme requirements in cases where they are not exempted from complying. It was thus furthermore clarified, instead, that Mr Nyirongo, the complainant was to be exempted and indeed to be exempted from pension scheme on ground of overage. That is to say that at

the time of their employment engagement, May, 2012, Nyirongo who was 72 years old, was already far much less than three years old before the minimum and maximum mandatory retirement ages of 50 and 70 years respectively, that is, he was less than 3 years (see sections 3 – ‘retirement age’ definition and 86 (3) of the pension Act, 2011).

On the issue of annual leave pay, I agreed with the employer’s decision to pay the complainant leave grant as specified in their signed conditions of employment contract which according to their signed employment contract is 10 % of the employee’s basic pay. Thus the complainant will get **Mk16, 549.25** (which is 10 % of Mk165, 492.50, the employee’s monthly basic pay). This is according to section 27 (1) of the employment Act No. 6 of 2000 which provides that every employer shall give to each employee a written statement of particulars of employment and [this] statement by implication shall include, among other things, any provision for the termination of the contract other than those provided by the Employment Act {27(3)}. This provision gives legal effect of any conditions of employment agreed and signed between two parties for their own employment relationship provided such conditions are not in conflict with the provisions of the Employment Act and indeed of any other labour laws in Malawi.

On the issue of monetary refunds, it was agreed and calculated that Mr Nyirongo be paid his monetary refunds of **Mk107,750.00** + Mk 6,840.00 of which the latter be subject to final verification by the employer with respect to Nyirongo’s April, 2016 paid and signed monthly wage bill documents before it is paid to the complainant. This implies that Mk6, 840.00 may not be paid to the complainant if it is established that the whole Mk206, 840.00 monthly wage for April, 2016 and not just Mk200,000.00 was received by Mr Nyirongo.

In either Before going into details, I too **gogoin**

First, I learned from the complainant, Nyirongo, the facts that were not disputed by the employer, that the complainant had been employed with effect from May, 2012 and later entered into consecutive or rather connected one year performance related contracts with the employer starting from 1st September, 2012 (this first one year contract was signed on 3rd September, 2012); that the last one year contract scheduled to expire on 31st August, 2016 was agreed upon by both parties despite the fact that it was not formerly signed into (i.e. last employment contract document prepared and presented before me was not signed by both parties); that there was no specific job descriptions and indeed performance measures being specified in their said employment contracts despite the contract being of performance related nor was there any supplementary clause (s) to further specify that the incumbent/complainant was employed not only to serve as school teacher but also as a school head teacher responsible for the overall school administrative works as well.

Second, I also learned from employer’s presentations and/or submissions including his written termination letter for Nyirongo that there was no substantial and indeed enough evidence to fairly justify the complainant’s termination. The employer had only submitted two documents in his defense, that is, one dated 29th March, 2016, as confidential memo to the school head teacher and deputy head teachers on the under collection of school fees and the other one, undated, titled: Write up in support of termination of contract – Mr Nyirongo, the document that indicates three objectives purported to be key objectives for Mr Nyirongo’s work performance but all of which do appear in any of their employment signed contracts. Furthermore, the employer argued that the memo letter was used as a warning to the complainant although critically looking at it in line with labour laws, the letter does not deserve to be a warning letter to the employee as it does not address the employee (the complainant in question), among other features of a warning letter.

In respect to the above submissions, I mediated by determining that the employer in his termination decision for the complainant had not followed the correct procedures supported by labour laws to the effect that the following cited labour law provisions are relevant references with respect to my

determinations. Sections (1); (4); (5); (7) and (8) of the Employment Act, 2000 as amended which provide as follows:

25 (1) *Unless otherwise provided by this Act, this Part applies all types of contracts of employment.*

(2) *A contract of employment shall be in any one of the following forms--*

- (a) a contract for an unspecified period of time;*
- (b) a contract for a specified period of time; or*
- (c) a contract for a specific task.*

27.--(1) *Every employer shall give to each employee a written statement of particulars of employment.*

27 (3) *The written statement referred to in subsections (1) and (2) shall include the following particulars--*

- (a) the names of the employee and of the employer;*
- (b) the date of commencement of the contract;*
- (c) the rate of remuneration and the method of calculating remuneration;*
- (d) the intervals at which remuneration is paid;*
- (e) the nature of the work to be performed;*
- (f) normal hours of work;*
- (g) any provision for the termination of the contract other than those provided by this Act;*

This employment Act No. 6 of 2000 as amended under section 25(2) (b) allows employment parties to enter into a fixed employment contract i.e. a contract for a specified period of time. And sections 27(1) & 27(3) (g) of the same employment Act, provide that every employer shall give to each employee a written statement of particulars of employment {27(1)} and that [this] statement shall include, among other things, any provision for the termination of the contract other than those provided by the Employment Act {27(3)}. This provision gives legal effect of any conditions of employment agreed and signed between two parties for their own employment relationship provided such conditions are not in conflict with the provisions of the Employment Act and indeed of any other labour laws in Malawi.

And,

57 (1) *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 requirements of the undertaking.*

(2) *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.*

61 (1) *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.*

(2) In addition to proving that an employee was dismissed for reasons stated in section 57 (1), an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.

And thus with regard to the question of severance allowance, the following sections of the same cited Act were applied.

35 (1) On the termination of contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstance, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with Part I of the First Schedule.

(4) 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 this opportunity.

(5) For the purposes of subsection (1), termination includes termination by reason of the insolvency or death of the employer, but does not include--

(a) termination of a contract of employment for a specified period of time where termination occurs at the expiration of the specified period; or

(b) a contract of employment for a specified task where the termination occurs at the completion of the task.

(7) Subsection (1) shall not apply where the employee--(b) is fairly dismissed for a reason related to his conduct.

And furthermore, the complainant was right to complain to labour office as provided for under section 35 subsection 8 of the employment Act as amended which provides that:

(8) A complaint that a severance allowance has not been paid may be presented to a District Labour Officer within three months of its being due and if the District Labour Officer fails to settle the matter within one month of its presentation, it may be referred to the Court, in accordance with section 64 (2) or 64 (3), which, if the complaint has been proved, shall order payment of the amount due.

With reference to our joint discussions on both days as well as to the cited labour laws provisions, I concluded the case as follows:

That the complainant was unfairly terminated and as such he is entitled to severance allowance for 4 complete years he had worked for the employer up to his termination date

Finally, as I indicated, earlier on that on the last 3rd day of our joint discussions, both parties finished by maintaining their earlier stands. And having summarized everything that transpired at labour office, I advise either party to proceed to court, within the earliest time possible from this date of 14th February, 2014, if not satisfied with the case conclusions proposed in this office.



Thus all, (signed) Kalani Malema, District Labour Officer for Rumphi Labour office.
