**IN THE SUPREME COURT OF ZAMBIA APPEAL No.1/2009**

**HOLDEN AT NDOLA AND LUSAKA SCZ/8/269/2008**

**BETWEEN:**

**(CIVIL JURISDICTION)**

**FEBBY NSANJE AND 38 OTHERS**

**AND**

**WORKERS COMPENSATION FUND CONTROL BOARD**

**CORAM: SAKALA, CJ., CHIBESAKUNDA AND MWANAMWAMBWA JJS.**

 **ON 7TH SEPTEMBER, 2010 AND 4TH APRIL, 2012**

**FOR THE APPELLANT: MR. D. P. CHABU OF MESSRS LUMANGWE CHAMBERS WITH**

**MR. MWILA CHITABO OF MESSRS CHITABO CHIINGA ASSOCIATES**

**FOR THE RESPONDENT: MR. E. BANDA, SC. WITH**

**MR. N. NCHITO BOTH OF MNB ASSOCIATES**

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 **JUDGMENT**

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**SAKALA, CJ., delivered the Judgment of the Court.**

**Case referred to:**

1. The Attorney-General v Achiume [1983] ZR 1

This is an appeal against the judgment of the Industrial Relations Court dismissing the Appellants’ complaint of being sent on early retirement, instead of being declared redundant. There is also a cross-appeal by the Respondent against the dismissal of their Counter-Claim.

The brief facts of the appeal are that the Appellants were employed by the Respondent at various times in different capacities. On 31st May, 2007, they were placed on early retirement. They were paid their dues in accordance with the applicable conditions of service. Prior to the Appellants being placed on early retirement, the Minister of Labour and Social Security had announced, on 22nd March, 2007, that the Respondent would embark on a restructuring programme under which employees below 50 years of age and those who had served less than 25 years would be retrenched and paid according to the conditions of service obtaining at the time, and that the restructuring would be done in a transparent manner.

On 21st December, 2008, the Appellants commenced an action in the Industrial Relations Court by a Notice of Complaint. In the Notice, the Appellants stated that the Respondent abruptly and without any warning, terminated their employment by way of early retirement in breach of their conditions of service; when they should have been declared redundant.

The Appellants sought the following relief:-

1. An order to compel the Respondent to declare them

 redundant and pay them redundancy packages in

 accordance with their conditions of service;

1. An order to compel the Respondent to pay

 the Appellants damages for wrongful and illegal

 termination of employment;

1. An order that the Appellants were entitled to salaries

 and allowances from 1st June, 2007 to the date of

 judgment;

1. An order compelling the Respondent to pay the

 Appellants three months salary in lieu of notice;

1. An order that the Respondent should not tamper with

 the Appellants’ Pension benefits;

1. Interest on all sums found due; and
2. Costs.

By their answer and Counter-Claim, the Respondent contended that the Appellants were not retired abruptly without warning; that the Appellants were counseled about the impending retirement, that the restructuring exercise was an on-going exercise and being effected in a humane manner, consistent with the Minister’s announcement; that there was no breach of any condition of service; and that management had the right to effect early retirement on employees, who were 50 years of age or above or who had served for 25 years or more.

In the Counter-Claim, the Respondent claimed that the Appellants’ benefits were computed on the premise that the Zambia Revenue Authority had approved the change in the definition of “***salary***” in the ***Trust Deed*** and ***Scheme Rules***, when such approval was not granted by the Zambia Revenue Authority; and that in the circumstances, the Appellants were overpaid; and the Respondent was Counter-Claiming for the over payment in respect of each Appellant.

In support of their claims, the Appellants called four witnesses, while the Respondent called two (2) witnesses

The trial Court observed that the evidence on record and the submissions filed revealed a number of contentious issues; and that the first issue, related to the process leading to the early retirement of the Appellants.

On the evidence of CW1 and CW4 that sensitization meetings were held in 2007 following the meeting addressed by the Minister of Labour earlier, and that RW2, the Commissioner-General of the Appellant, had entrustedCW1 to issue a circular calling on any employee that desired to proceed on early retirement in accordance with the conditions of service to do so and that only CW3 responded to the invitation; the court accepted that the process leading to early retirement was done in a transparent and planned manner.

The next issue dealt with by the trial Court related to the mode of exit. On the evidence on record, the court again accepted that the Respondent had a discretion under ***Clause 7.3 and 6.6*** of the existing conditions of service to early retire non-unionized and unionized employees.

The third issue the court considered was whether the Appellants could and not should have been retrenched. The Court found that on the facts of the case, the Appellants could not have been placed on redundancy; and that their termination could not have been deemed to have been by reason of redundancy. Thus, the claim for three months salary in lieu of notice was dismissed.

In relation to the Counter-Claim, the court pointed out that the contention was that the packages for the Appellants were computed on an erroneous definition of “***salary***” which included some allowances.

The court considered the arguments and found no merit in the Counter-Claim and dismissed it.

In conclusion, the Court dismissed both the main claim and the Counter-Claim. Hence, this appeal and the cross-appeal to this Court. The Appellants filed a Memorandum of appeal containing five grounds:-

These are:-

1. that the trial court fell into serious error in fact and law when it failed to adjudicate on the issue of discrimination which had been specifically pleaded; and that had the trial court addressed its mind to the issue of discrimination it would inescapably have found that there was sufficient evidence to find for the Appellants;
2. that the trial court erred both in fact and in law by preferring conditions of service exhibited by the Respondent as the only applicable conditions of service to those exhibited by the Appellants; and that the said finding of fact was perverse and was not supported by any credible evidence;
3. that the trial court seriously misdirected itself in law and fact when it held that the Appellants could not have been placed on redundancy which was specifically pleaded, but early retirement with the result that the Appellants were only paid their accrued Pension benefits due at age of 55 years;
4. that the trial court misdirected itself in law and fact by failing to take sufficient account of the fact that a claim of commutation factor was pleaded under ground 4 (i) of the notice of Complaint as well as the Respondent’s Answer; and
5. that on the order on costs; that had the lower court properly analyzed the evidence it should have found for the Appellants and awarded them costs.

The Respondent filed an amended Memorandum of Cross-Appeal containing two (2) grounds, namely:-

1. that the Court below misdirected itself in law and in fact when it held that there was no merit in the Counter-Claim and proceeded to dismiss it on the premise that the decision of the Commissioner-General of the Zambia Revenue Authority to rescind or withdraw the approval of the alterations to the ***Scheme Rules*** of the **WORKCOME Trust Deed** was wrong as he possessed no such power; and
2. that further, the court below erred and misdirected itself in law and in fact when it purported to nullify (quash) the decision of the Commissioner-General of the Zambia Revenue Authority; thereby exceeding its jurisdiction in that it purported to review the Commissioner-General’s decision which review is a preserve of the High Court in Judicial review.

The parties filed detailed Heads of Argument based on the grounds of appeal and the Cross-Appeal, and they also submitted their oral arguments and relied on the submissions made in the court below.

We propose to deal with the main appeal first.

The gist of the arguments on ground one is that discrimination was specifically pleaded; but the trial court failed to adjudicate on it against the weight of evidence and no finding was made despite the overwhelming evidence that some serving employees had lower qualifications than those early retired; that it was against the law to terminate services of an employee on ground of status.

The summary of the arguments on ground two is that the trial court erred in preferring the conditions of service exhibited by the Respondent as the only applicable conditions to those exhibited by the Appellants and that the Court should have believed the evidence of the CW1, the custodian of the conditions of service.

The gist of the argument on the third ground of appeal is that the court misdirected itself when it contravened the “verb to restructure” as not synonymous with redundancy and concluded that the Appellants could not have been placed an redundancy but retirement; and that the conditions of service of the Appellants provided for both early retirement and redundancy.

The summary of the heads of argument on ground four is that a claim of commutation factor was pleaded; that according to the Appellants, the separation was through redundancy, and not early retirement and that the formula applicable was factor 15 and not one used by the Respondent for paying injured workers under ***Workers Compensation Act.***

The gist of the written argument on ground five relating to costs is that the Court misdirected itself, when it ordered each party to bear it’s own costs against the weight of evidence.

In responding to the Heads of Argument, grounds one, two and three were argued as one. The summary of the combined written response to the three grounds is that there is no dispute that the Appellants were employed under terms and conditions of service governed by provisions of a memorandum of conditions of service for senior and non unionized members of staff of the Board in respect of the Respondent’s non-unionized members of staff and a collective agreement in respect of unionized employees; that both copies of the documents were exhibited and produced in court; and that it was not in dispute that the terms and conditions of service made provisions for early retirement from the service of the Respondent.

It was contended that what was in issue was, firstly, which of the two versions of the terms and conditions of employment for non unionized employees exhibited by the respective parties was applicable and, secondly, whether the respondent had the right to place the Appellants on early retirement under the conditions of service.

On the first issue, it was submitted that the trial court was on firm ground to hold that the Respondent’s version of the terms and conditions of employment was the applicable one; and that the Appellants had not shown any grounds to warrant this court to overturn findings of fact by the trial court; that it is settled law that this court will not reverse findings of fact made by a trial judge; unless satisfied that findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings, which, on a proper view of the evidence, no trial court, acting correctly, could reasonably make, as per the case of ***The Attorney-General v. Achiume[[1]](#footnote-1)***; and that the record clearly shows that the trial court considered the two respective sets of conditions of service exhibited by the parties and the testimonies of both the Appellants and the Respondent.

It was further submitted that it is on record that prior to the Respondent embarking on the Restructuring exercise, the Respondent held a number of sensitization seminars for its employees; and that during the seminars, all the employees were informed that they would be laid off in accordance with the conditions of service.

It was pointed out that according to ***Clause 7.3*** of the conditions of service, early retirement may be triggered by either an employee, where that employee applies or by the employer, where the employer has that intention; that where the employer involves its discretion under ***Clause 7.3,*** the employer has the right to place the employee on early retirement on various grounds; that in respect of the Appellants, they were placed on early retirement pursuant to the restructuring programme which the Appellants were aware of; and that the trial court in fact found as a fact that the process was done in a planned and transparent manner.

It was also submitted, in the alternative, that the Appellants did not adduce any evidence to warrant a finding by the trial Court that they be deemed to have been declared redundant within the terms of ***Section 26B of the Employment Act, Cap 28 of the Laws***.

On the issue of discrimination, it was submitted that it was considered and tacitly dismissed for want of evidence proving discrimination on the part of the Appellants; and that the Appellants did not adduce any evidence on discrimination to have warranted the trial court to make a finding in their favour; that from the record none of the Appellants witnesses gave evidence that they were treated differently from their similarly circumstanced colleagues.

It was further submitted that no evidence was adduced to show that the Respondent left out from the retirement exercise, certain of the Appellants’ colleagues of the same age group and qualification; that to the contrary, the Appellants’ evidence was only to the effect that lesser qualified colleagues remained as opposed to them; and that the Appellants’ exit of employment was early retirement pursuant to the applicable conditions of employment.

It was contended that the fact of the appellants being in the same age group for restructuring purposes was not discriminatory on the ground of status in the eyes of the law.

The short summary of the written response to ground four is that payment of terminal benefits upon early retirement was prescribed in the terms and conditions of service for both unionized and non-unionized members of staff of the Respondent, which provide that upon an employee’s service being terminated by way of early retirement, the employee is entitled to proportionate retirement benefits payable by the Respondent and recoverable from the Pension Scheme; that to ascertain the proportionate retirement benefits payable, the respondent sought the services of ***actuaries,***

who recommended a commutation factor of 12.49 as per the actuarial valuation report of 31st March, 2007, which reflected the true picture of the Fund at the relevant time.

On ground five, the gist of the response is that the law on award of costs is very clear; that as a general rule the award is at the discretion of the court; that the successful party should not be deprived of his costs, unless his conduct in the course of the proceedings merits the court’s displeasure; and that in the instant case there was no justification to disturb the trial court’s discretion not to award costs.

We have carefully considered the evidence on record, the judgment of the trial court and the heads of argument on each ground on behalf of the parties. On account of the view we take of this appeal, we do not intent to delve into the issues raised in very great detail.

In it’s judgment, the trial court identified and dealt with three issues; namely:- the process leading to the early retirement of the Appellants; the mode of the Appellants’ exit from the Respondent’s employment; and whether the Appellants could and not should have been retrenched.

On the issue of the process leading to early retirement, the court considered the evidence that there were sensitization meetings with the staff on the impending restructuring exercise subsequent to the meeting earlier addressed by the Minister of Labour. The court concluded that the process leading to early retirement was done in a transparent and planned manner. On the evidence on record, which was not in dispute, we agree with this finding.

On the mode of exit, the trial court considered the Appellants conditions of service and found that the exit by way of early retirement was provided in the conditions of service; and that on the evidence, the Appellants termination was by early retirement and not by reason of redundancy. Again, on the evidence on record and on a consideration of the relevant conditions of service, we agree with this holding.

On the issue of whether the Appellants could and not should have been retrenched, the Court observed that it was related to the interpretation of the conditions of service and concluded that the Appellants’ termination could not be deemed to have been terminated by reason of redundancy.

The fore-going conclusions and findings clearly established that the determination of the Appellant case was based on the findings of fact. In our view, grounds two three and four, to the extent that they criticize the findings based on conditions of service, mode of exit and method used to determine the commutation factor, they raise findings of fact. This being the case, no appeal lies to this court against findings of fact. (see Section 97 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia).

Ground one relates to failure on the part of the trial court to adjudicate on the issue of discrimination. We take note that the trial court alluded to the submission on behalf of the Appellants that they were discriminated. However, the court found that there was no evidence on record suggesting that the Appellants were treated differently from their similarly circumstanced colleagues.

We agree with the submission on behalf of the Respondent that a careful examination of the record clearly shows that no evidence was adduced to show that the Respondent left out, from the retirement exercise, certain of the Appellants’ colleagues of the same age group and qualifications; but indeed to the contrary, the Appellants’ evidence was only to the effect that lesser qualified colleagues remained, and yet the restructuring exercise was an on going and planned out.

In our view, there was no evidence on which the court could have adjudicated on the issue of discrimination. This ground one also fails.

Ground five is a complaint against the order of the Court that each party bears its own costs. Our short answer is that costs are in the discretion of the court. In the instant case, the Appellants lost the action. They should have been ordered to pay costs; but court exercised its discretion in their favour and so they now complain against that favour. Indeed, the court having also denied the Counter-Claim, the order that each party bears its own costs was the most just in the circumstances. Ground five, therefore is also dismissed.

All the grounds of appeal having been unsuccessful, the whole appeal is dismissed. We also make no order as to costs in this court.

We now turn to the Cross-appeal.

The gist of the written arguments in ground one of the Cross-Appeal, relating to the dismissal of the Cross-Appeal by the trial court on the ground that the decision of the Commissioner-General of the Zambia Revenue Authority to rescind or withdraw the approval of the alterations to the ***Scheme Rules*** of the ***WORKCOM Trust Deed*** was wrong as he possessed no such powers; is that the undisputed facts showed that an amendment was made to the ***Scheme Rules of WORKCOM Trust Deed*** by the Trustees of the fund; that the amendment sought to alter the definition of the term “***salary***” to incorporate allowances, that the Pension Fund being an approved Fund in terms of the ***Income Tax Act, Cap. 323 of the Laws,*** the Trustees wrote to the Commissioner-General of the ***Income Tax*** seeking approval of the amendment; but that the Commissioner-General refused to approve the amendment and that the constitution of the Pension Fund itself prohibits the operation of the Fund without approval of the Commissioner-General.

It was pointed out that the position of the law in relation to approval and withdrawal of the Pension Schemes by the Commissioner-General, as set out in the Fourth Schedule of the ***Income Tax Act, Cap 323***, is self-explanatory in that the Commissioner-General is meant to approve a Pension Fund on the basis of the instruments tendered to him; that logically, if there is a change in those instruments, the Trustees must bring that change to the attention of the Commissioner-General; and that inherently, the Commissioner-General has the powers to refuse such amendment to the instruments as initially presented for his approval; and that a contrary interpretation of this provision of the law, which the trial court clearly took, would lead to a manifest absurdity; as the Trustees to a Pension Scheme would draft instruments in terms that the Commissioner-General would approve; but that upon obtaining such approval, the Trustees would then be free to willy nilly, amend such instruments, and that if that view was to be taken, then the Commissioner-General would not have power to such amendments.

It was submitted that that was not the law; that in much the same way that the Commissioner-General has powers to strike out objectionable clauses in the instruments presented to him at the point of application for approval, he retains the power to refuse an amendment that offends the principle upon which he initially approved a fund.

It was contended that it was the clear intention of the members of the ***Pension Fund,*** as stipulated in the **Trust Deed,** that the approval of the Commissioner-General was a necessary ingredient for the continued existence of the ***Pension Fund***; that theoretically; if the Commissioner-General withdraws his approval, the Fund would cease to exist. It was submitted that to sanction a clause struck out by the Commissioner-General was not only contrary to the Law on the issue; but flew in the face of the ***Pension Deed*** and the ***Rules*** themselves.

It was further submitted that on a reading of the ***Fourth Schedule of the Income Tax Act,*** as well as the ***Trust Deed***, the trial court erred in holding that the Commissioner-General had no power to strike out the clause in question; that the question that then arose in the light of the above was how the Appellants terminal benefits were to be computed in the light of the fact that the amendment to the Pension Scheme Rules incorporating allowances into the definition of “***salary***” was inapplicable.

It was submitted that the invalidation of the amendment to the pension Fund Rules meant that the Appellants terminal benefits could not be paid using the definition of “salary” under the altered ***Scheme Rules***; and that the Appellants terminal benefits could only be paid using the ***October, 1999 Scheme Rules***, whose definition of “***salary***” did not include allowances; and that there was thus an overpayment made to the Appellants upon early retirement; which over payment was the subject of the Counter-Claim.

The summary of the Appellants’ written response to the arguments on ground one of the Cross-Appeal on the counter-claim is that the trial court did not misdirect itself in law and in fact when it held that there was no merit in the counter-claim and dismissed it on the premise that the decision of the Commissioner-General to rescind or withdraw the approval of the alterations to the ***Scheme Rules*** of the ***WORKCOM TRUST DEED*** was wrong as he possessed no such power; that the trial court was on firm ground, when it stated that “the question of who has the authority to amend the ***Scheme Rules*** is a settled one as ***Rules 14 and 16 of the 1999*** and the amended ***2005 Scheme Rules*** and regulations made it clear that the power reposes in the Trustees.”

It was pointed out that the evidence of CW3 was that the Respondent approved the incorporation of housing and retention allowances into the definition of “***salary***” for purposes of computing one’s pension; that the Respondent’s Board, at its Special Meeting held on 7th January, 2000, passed a resolution to incorporate housing/house maintenance allowances and recruitment and retention allowances into basic salary for the purposes of pension contributions and computing retirement benefits; and that CW4 testified that changes to the Rules passed by the Board needed only to be notified to Zambia Revenue Authority.

It was submitted that no evidence contradicted CW3 and CW4’s evidence; and that the Respondent did not even call the Commissioner-General to testify.

We have carefully considered the arguments based on ground one of the Cross-Appeal.

In dealing with the issue surrounding the Counter-Claim, the trial court observed that the main issue was the definition of “***salary****;*” and that the Appellants’ packages were computed on an erroneous definition of “***salary***” which included allowances.

The trial court further observed that the Appellants’ arguments were that the allowances were legally incorporated into the definition of “***salary,****”* whereas the Respondent argued that such definition never received the approval of the Commissioner-General and was therefore, not valid.

The trial court accepted the evidence of CW3 that the Respondent approved the incorporation of housing and retention allowances into the definition of “***salary***” for the purposes of computing one’s pension; that the Respondent’s Board passed a resolution to incorporate the allowances into basic salary for the purposes of computing retirement benefits; and that any change to the ***Scheme Rules*** had to be notified to the Zambia Revenue Authority; that once a Fund is set up it requires Zambia Revenue Authority’s approval.

The Court noted that the question of who had authority to amend the ***Scheme Rules*** is settled as the power resposes in the Trustees. The trial court also noted that in 2005, the Trustees put into effect the resolution by incorporating into the amended Rules that definition of “***salary***” to include allowances; that RW1’s evidence on the issue was that the Trust reverted to pre 2005 definition of “***salary***” because Zambia Revenue Authority had not been notified of the amendment to the definition of “***salary***” and that the Zambia Revenue Authority purported to withdraw the approval granted earlier.

The trial court posed the question: whether Zambia Revenue Authority had power to approve and revoke an amendment properly made to the Scheme. The trial court, after considering paragraph 2 of the Fourth Scheme to the ***Income Tax Act, Cap 323,*** found that the Commissioner-General’s approval is required only when establishing a Fund or a Scheme, which approval makes it an approved Fund or Scheme; but observed that for alterations to the Fund or Scheme, approval is not required; but that what is required is only prompt notification, but that if the alterations are inimical, the Commissioner-General registers his disapproval of the alterations by withdrawing the recognition of the entire Fund or Scheme.

The trial court found that in the instant case, notification of the alteration was made to the Commissioner-General; but not promptly; that the Commissioner-General responded to the late notification by letter dated 28th April, 2008; but subsequently purported to have rescinded or withdrawn the approval by a subsequent letter dated 5th May, 2008. The trial court held that this was a wrong decision by the Commissioner-General because he possessed no power to approve alterations as he can only withdraw the initial approval of establishing a Fund and not alterations which only require that he be notified.

The court found that at the time that the Appellants received their cheques, together with letters of retirement, management was clear about the definition of “***salary***” that it included allowances. The Court found it curious that the Respondent raised the issue of alterations only after the Appellants commenced their action.

We totally agree with the trial court’s analysis of the history leading to the Appellant’s terminal benefits being computed on the basis that the definition of “***salary***” included allowances. But for the avoidance of any doubt, we must stress that in terms of the law, the Commissioner-General only gives approval when the Pension Scheme is being established. Amendments to the approved Pension Scheme do not require approval; but only notification to the Commissioner-General.

In the instant case, the court found that there was notification to the Commissioner-General of the alterations to the Pension Fund.

This finding too, on ground one of the Cross-Appeal, was a finding of fact based on the evidence on record. For the reasons stated in the main appeal, findings of fact by the Industrial Relations Court are not Appealable to this Court. Ground one of the Cross-Appeal is, therefore, dismissed.

Our discussions on ground one cover the arguments on ground two. The finding of the trial court, which we uphold, was that the Commissioner-General had no power to approve alterations to an established approved Pension Fund.

In the instant case, as per requirement of the ***Income Tax Act***, all that the Trustees were required to do, after carrying out alterations to the Scheme, was only to notify the Commissioner-General, which they did. The court found that, although not promptly, the Commissioner-General was notified. And that the Respondent, knowingly, computed the benefits on the basis that “***salary***” included allowances.

In our considered opinion the question of reviewing the powers of the Commissioner-General did not arise.

Ground two of the Cross-Appeal is, therefore, dismissed.

The whole Counter-Claim is also dismissed. We also make no order as to costs on the Counter-Claim.

E. L. SAKALA

**CHIEF JUSTICE**

L. P. CHIBESAKUNDA

**SUPREME COURT JUDGE**

M. S. MWANAMWAMBWA

**SUPREME COURT JUDGE**

1. ***(1983) ZR 1*** [↑](#footnote-ref-1)