

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

Appeal No. 274/2022

(Civil Jurisdiction)

22 AUG 2024

BETWEEN:

STANBIC BANK ZAMBIA LIMITED

APPELLANT

AND

NATASHA PATEL

RESPONDENT

***Kondolo SC, Majula and Banda-Bobo JJA
On 15th August, 2024 and 22nd August, 2024***

For the Appellant : Mrs. N. Simachela of Messrs. Nchito & Nchito

For the Respondent : Mr. P. Chulu of Messrs. Patrick Chulu Legal Practitioners

Mr. C. Chungu of Messrs. Nsapato & Co. Advocates

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Zambia National Commercial Bank Plc v. Joseph Kangwa - SCZ Appeal No. 54/2008.*
- 2. Moses Choongo v. Zesco Recreation Club - SCZ Appeal No. 168/2013.*
- 3. Redrilza Limited v. Abuid Nkazi and Others (SCZ Judgment No. 7 of 2011).*
- 4. Dansiano Phiri v. Afronet Trading Limited (T/a Fresh Dream Bakery) - COMP/IRCLK 283/2021.*

5. *Saviours Mundia v. Consolidated Farming Unit - COMP/IRCLK/442/2019.*
6. *Albert Mupila v. Yu-Wei Mwachilenga - COMP/IRCLK/222/2021.*
7. *Alistair Logistics v. Dean Mwachilenga - CAZ Appeal No. 232/2019.*
8. *David Chongo v. Group 4 Secure Solutions Limited COMP/IRCLK/275/2021.*
9. *Zubao Harry Juma v. First Quantum Mining & Operation Limited — Road Division - CAZ Appeal No. 102/2022*
10. *Masauso Zulu v. Avondale Housing Project Limited (1982) Z.R. 172.*

Legislation Referred to:

1. *Employment Code Act, No. 3 of 2019*

Authoritative Texts

1. *Bryan A Gamer's, Black's Law Dictionary. 9th Edition, (United States of America, Thomson Reuters (2009)*
2. *Mwenda, Winnie Sithole and Chungu, Chanda "A Comprehensive Guide to Employment Law in Zambia (2021) UNZA Press*
3. *Chungu Chanda (2021) Albert Mupila v. Yu-Wei COMP/IRCLK/222/2022, SAIPAR CASE REVIEW: Vol. 4: Issue Article 11, <https://scholarship.law.cornell.edu/scr/vol4/iss2/11>*
4. *Hansard of the National Assembly during the Second reading of the Employment Code Bill in the National Assembly.*

1.0 Introduction

- 1.1 This appeal emanates from the decision of Dr. W.S. Mwenda J. of the Industrial Relations Division of the High Court that was delivered on 6th September, 2022.

- 1.2 We have been called upon to interrogate whether an employee who was dismissed while serving on a permanent and pensionable contract of employment is entitled to an award of accrued service benefits and severance pay pursuant to **Section 54(1) (c)** of the **Employment Code Act**.

2.0 Background

- 2.1 The facts of this case are that the Respondent (Natasha Patel) was employed by the Appellant as a Teller on permanent and pensionable terms from 24th August, 2015 until 12th April, 2021 when she was dismissed from employment. Before her dismissal, the Appellant was charged with offences of causing loss as well as dishonest conduct contrary to clauses 8.9 and 3.1 of the schedule of offences set out in the Grievance and Disciplinary Code of Stanbic Bank Zambia Limited.
- 2.2 On 26th February 2021, the Respondent reacted to the charges by denying ever disregarding the Respondent's rules and procedures and being dishonest as alleged. She was eventually dismissed after a disciplinary hearing that was held on 31st March 2021. Her appeal against dismissal to the CEO of the Bank was also unsuccessful.
- 2.3 On 7th September 2021, the Respondent initiated a legal action against her former employer, Stanbic Bank Zambia Limited,

seeking relief through a Notice of Complaint and supporting affidavit.

- 2.2 The following reliefs were sought (a) declaration of wrongful and unfair dismissal, (b) 36 months' salary for damages due to unfair dismissal, (c) 36 months' salary for damages due to wrongful dismissal, (d) Damages for mental anguish, (e) All other accrued benefits, (f) Interest on the amounts found due and Costs.

3.0 Decision of the Lower Court

- 3.1 On 6th September, 2022, the learned Judge ruled that there was neither wrongful nor unfair dismissal in the manner that the Respondent was dismissed from employment. The lower Court held that the Respondent's dismissal was done in accordance with both the Disciplinary Code and the provisions of the law. The Court was, however, of the view that the Respondent should receive severance pay with interest in accordance with the provisions of **Section 54(1) (c)** of the **Employment Code Act**.

4.0 Grounds of Appeal

- 4.1 It is against this Judgment that the Appellant is appealing, raising three grounds set out below:

1. The Court below erred in law and fact by applying Section 54(1) (c) of the Employment Code Act to the

Respondent, who was employed on a permanent and pensionable basis.

2. The Court erred in its interpretation that a 'permanent contract of employment' as defined in Section 3 of the Employment Code Act includes a contract of fixed duration.

3. The Court erred in finding that an employee under a permanent contract terminated by dismissal is entitled to severance pay.

5.0 Appellant's Arguments

5.1 The Appellant's argument emphasizes that the Court misapplied the **Employment Code Act**, particularly in how it relates to permanent and pensionable employees regarding severance pay. The Court's interpretation of the Act and its application to the case are under scrutiny.

5.2 The Appellant argues that the provision for severance pay as stated in **Section 54(1) (c)** of the **Employment Code Act** applies only to employees with a fixed-duration contract. The terms 'contract period' and 'gratuity' used in the Act imply that the severance pay applies specifically to contracts with a clear start and end date, which is not the case for permanent and pensionable employees. Counsel for the Appellant highlights that this **Section** should not be stretched to apply to permanent and pensionable employees, as it targets employees on long-

term contracts exceeding twelve months or specific projects with a fixed termination date. Thus, only those on such contracts should be eligible for gratuity, not permanent employees.

- 5.3 It has been asserted by Counsel that according to **Section 73(1)** of the **Employment Code Act**, gratuity is only payable to employees on long-term contracts, not to those on permanent contracts like the Respondent. The Act specifies that gratuity is to be paid at the end of a long-term contract period at a rate of not less than 25% of the basic pay earned during that period. The Appellant underscores that if the legislators intended for severance pay to apply to employees on permanent contracts, it would have been explicitly stated in the Act. They argue that long-term and permanent contracts are distinct categories, with only the former being eligible for gratuity under **Section 54(1)(c)**.
- 5.4 In ground two (2), the Appellant challenges the lower court's interpretation of a "permanent contract of employment" under **Section 3** of the **Employment Code Act**. The court had defined a permanent contract as one that, if not terminated according to the Act, ends upon the employee reaching retirement age. The Appellant argues that this interpretation wrongly equates a permanent contract with a contract of fixed duration. They assert that a permanent contract should not be considered of fixed duration simply because it concludes upon retirement. A

true fixed-term contract, they argue, has specific start and end dates explicitly stated in the contract. The Appellant contends that the legislature intended to distinguish between fixed-term contracts and permanent contracts, as reflected in decisions by the Supreme Court. They maintain that these types of contracts should not be conflated.

- 5.6 The Appellant cites two cases, ***Zambia National Commercial Bank Plc v. Joseph Kangwa***¹ and ***Moses Choongo v. ZESCO Recreation Club***,² to support their argument that an employee cannot be simultaneously on a permanent and a fixed-term contract. In the ***Zambia National Commercial Bank*** case, the court noted that placing an employee on a fixed-term contract effectively changes their status from permanent to fixed-term. Similarly, the ***Moses Choongo***² case established that a change from a fixed-term to a permanent contract, or vice versa, constitutes a change in employment status.
- 5.7 The Appellant attests that the lower court erred in treating a permanent contract of employment as a contract of fixed duration. They assert that a permanent contract, which continues until retirement or termination under specific conditions, should not be considered the same as a fixed-term contract, which has specific start and end dates. The Appellant also challenges the court's assertion that retirement age is a fixed endpoint for permanent contracts, pointing out that the law allows for early, normal, and late retirement, making the

retirement age variable. They argue that these distinctions were not appropriately considered by the lower court in its decision.

- 5.8 The Appellant highlights that the Respondent's contract, referred to on page 107 of the Record of Appeal, had a commencement date but lacked a fixed end date, as it was a permanent contract. The only clear aspect of a permanent contract is that it continues until retirement age, unlike a fixed-term contract, which has a specified duration. Therefore, the Appellant argues, that the court below incorrectly treated the permanent contract as a fixed-term contract.
- 5.9 In relation to ground three (3), the Appellant contends that the trial Judge erred in law and fact by ruling that the Respondent, employed on a permanent contract, was entitled to severance pay upon termination by dismissal. The lower court had stated that permanent employees are entitled to severance pay when their employment ends for reasons other than redundancy, medical discharge, or death, suggesting that the reason for termination does not affect this entitlement. The Appellant disputes this interpretation, arguing that severance pay provisions should not apply to permanent employees in this context.
- 5.10 The Appellant submits that severance pay is governed by **Section 54 of the Employment Code Act**. They argue that the reason for an employee's termination is crucial in determining

their entitlement to severance pay, contrary to the lower court's finding. **Section 54** outlines five specific circumstances under which severance pay is owed:

1. When an employee is medically discharged according to Section 38(5).
2. When a fixed-duration contract has expired.
3. When a fixed-duration contract is terminated.
4. When an employee is dismissed due to redundancy as per Section 55.
5. When an employee dies in service.

5.11 The Appellant strongly argues that the entitlement to severance pay is limited to these situations, specifically highlighting that it applies where an employee's fixed-duration contract has expired, among other conditions. They argue that the Respondent, on a permanent contract, does not meet these conditions for receiving a severance pay.

5.12 The thrust of the Appellant's argument is that an employee on permanent conditions of service who is dismissed from employment does not qualify for severance pay under **Section 54** of the **Employment Code Act**. They cite **Black's Law Dictionary**¹ which defines severance pay as compensation paid to an employee beyond their wages on termination, particularly for reasons other than the employee's misconduct. This is

intended to help the employee adjust economically and compensate for losses attributable to the termination.

5.13 The Appellant's Counsel hinges their argument on the Supreme Court case of ***Redrilza Limited v. Abuid Nkazi and Others***³, which distinguishes between 'dismissal' and 'termination'. Dismissal involves loss of employment due to disciplinary action, whereas termination can occur without disciplinary action. They argue that the Respondent's departure, which was found to be due to her actions, does not warrant severance pay, which is meant as a reward for service.

5.14 Moreover, any benefits upon dismissal should be governed by **Section 51** of the **Employment Code**, not **Section 54**, which covers severance pay.

5.15 The Appellant argues that **Sections 51 and 54** of the **Employment Code Act** are mutually exclusive. Specifically, they contend that employees dismissed under **Section 51** cannot claim severance pay under **Section 54**. **Section 51** provides that upon summary dismissal, an employee should receive wages and other accrued benefits up to the date of dismissal.

5.16 In the case at hand, the Appellant complied with **Section 51**, as evidenced by the Respondent's dismissal letter, which

specified the terminal benefits due, including accrued leave days and salary for days worked up to the dismissal date.

5.17 The Appellant submits that these terminal benefits, as outlined in **Section 51**, were correctly provided. They argue that even if the court were to find the Respondent's employment was under a fixed-term contract, the applicable severance pay provision would be under **Section 54(1) (b)**. However, they maintain that the Respondent, being on permanent conditions of service, does not qualify for severance pay under **Section 54**.

5.18 The Appellant clarifies that under **Section 54(1)** of the **Employment Code Act**, severance pay can either be a gratuity of not less than 25% of the employee's basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme. They stress that for employees on permanent contracts, severance pay should be limited to retirement benefits from the social security scheme.

5.19 In this case, the Appellant provided the Respondent with a pension scheme option, consistent with **Section 54(1) (b)** of the **Act**. The Respondent was informed of two options regarding pension membership: a refund of contributions or a transfer of accumulated credit to another approved pension fund.

5.20 The Appellant asserts that they complied with the provisions of the **Employment Code Act**. They argue that the lower court erred in awarding severance pay of not less than 25% of the Respondent's basic pay, as stated in the judgment. The Appellant posits that such benefits were already covered under the provided pension scheme.

6.0 Respondent's Arguments

6.1 The Respondent argues that the lower court did not err in applying **Section 54(1) (c)** of the **Employment Code Act** to employees on permanent and pensionable contracts. It has been avowed that this section specifically provides severance pay for employees on fixed-duration contracts, including a gratuity of not less than 25% of the basic pay earned during the contract period.

6.2 The Respondent references the authors **Winnie Sithole Mwenda and Chanda Chungu's book titled A Comprehensive Guide to Employment Law in Zambia²**, who noted that **Section 54(1)(b) and (c)** of the Act were designed for employees on permanent, short-term, and seasonal contracts to receive gratuity when their employment ends for reasons other than redundancy, medical discharge, or death.

- 6.3 They insist that even if the Respondent was considered to be on a permanent contract, the severance pay provisions of **Section 54(1) (c)** should apply.
- 6.4 The Respondent argues that **Section 54** of the **Employment Code Act** specifies severance pay for various types of contracts, including permanent ones, but excludes casual, temporary, and probationary employees. They cite **Section 54(3)** of the Act, which explicitly excludes these categories from receiving severance pay, thus suggesting that permanent, short-term, and seasonal employees are eligible.
- 6.5 The Respondent yet again references legal authors **Winnie Sithole Mwenda and Chanda Chungu**, who affirm that **Section 54** applies to employees on long-term, seasonal, and permanent contracts. This interpretation was supported by the High Court in the case of *Dansiano Phiri v. Afronet Trading Limited*,⁴ where it was ruled that a permanent employee is entitled to severance pay in the form of gratuity under **Section 54(1)(c)**, calculated at not less than 25% of the basic pay during the contract period.
- 6.6 Therefore, she maintains that **Section 54** was intended to include employees on permanent contracts, like herself, who should receive severance pay as defined in the Act.

- 6.7 Additionally, the Respondent contends that their argument for gratuity under **Section 73 of the Employment Code Act**, which typically applies to long-term contracts, should also include permanent employees under **Section 54(1) (c)**. She asserts that permanent employees are entitled to severance pay in the form of gratuity, as the Act does not exclude them.
- 6.8 This interpretation is supported by the High Court in the case ***Saviours Mundia v. Consolidated Farming Unit***⁵, which clarified that employees on short-term, seasonal, and permanent contracts are eligible for severance pay in the form of gratuity. The court noted that these employees are considered to have a fixed duration from commencement to retirement, aligning them with the definition under **Section 54(1)(c)**.
- 6.9 Furthermore, the decision in ***Albert Mupila v. Yu-Wei Mwachilenga***⁶ confirmed that **Section 54(3)**, which excludes casual, temporary, and probationary employees from severance pay, does not extend this exclusion to permanent employees. Legal authors **Winnie Sithole Mwenda** and **Chanda Chungu** also support this view, asserting that **Section 54(1)(c)** is meant to provide severance benefits to permanent employees when their employment ends for reasons other than redundancy, medical discharge, or death. Therefore, the Respondent maintains that permanent employees are entitled to severance pay under the Act. They argue that this interpretation,

supported by High Court decisions, should be adopted by the Court of Appeal.

6.10 Pertaining to ground two (2), the Appellant disputes the lower court's ruling that a "permanent contract of employment" includes a contract of fixed duration. The Respondent on the other hand asserts that under Zambian law, no contract is indefinite; all contracts are considered to have a "fixed duration". This position is supported by the judgment in ***Alistair Logistics v. Dean Mwachilenga***⁷, which states that no contract is indefinite and has an "until death do us part" clause. The Respondent requests that ground two of the appeal be dismissed and the interpretation of **Section 54** upheld as per the cited legal precedent.

6.11 The Respondent argues that all contracts in Zambia, including permanent contracts, are considered to have a fixed duration. This is supported by the High Court decision in ***Albert Mupila v. Yu-Wei***,⁶ which stated that permanent contracts are also contracts of fixed duration because they are set to end upon the employee's retirement or earlier termination as per the **Employment Code Act**.

6.12 Further supporting this view, the ***David Chongo v. Group 4 Secure Solutions Limited***⁸ case highlighted that permanent contracts are defined to expire upon the employee's attainment

of retirement age unless terminated earlier under specific conditions.

6.13 The Respondent contends that these authorities confirm that both fixed-term and permanent contracts are covered under **Section 54(1) (c) of the Employment Code Act** for the purpose of severance pay. They argue that the distinction between fixed-term/long-term contracts and permanent/pensionable contracts is not relevant in this context.

6.14 Legal authors **Winnie Sithole Mwenda and Chanda Chungu** affirm that a contract for a fixed duration includes permanent contracts. They argue that permanent employees are entitled to severance pay in the form of gratuity when their employment ends for reasons other than redundancy, medical discharge, or death. This interpretation supports the view that permanent employees should receive severance benefits under **Section 54(1)(c)**.

6.15 Additionally, **Chanda Chungu**, in his article published in the **SAIPAR Case Review: Vol. 4 Issue 2³**, supports this interpretation, indicating that the provision for severance pay applies broadly to all types of contracts with a fixed duration. The Respondent concludes that being on a permanent contract, she should benefit from severance pay as provided under **Section 54(1) (c)**.

- 6.16 The Respondent argues that the intention behind the **Employment Code Act** was to provide terminal benefits, including gratuity and severance pay, to all employees in Zambia, both on long-term and permanent contracts. This intention is evident from the **Hansard of the National Assembly**⁴ discussions, which emphasized the need for protection and benefits for employees, including those on permanent contracts, against unemployment and as a reward for service.
- 6.17 They acknowledge that if the Appellant provided a private pension scheme, the Respondent would not be entitled to severance pay under **Section 54(1) (b)** of the **Employment Code Act**. This section specifies that severance pay is either a gratuity of not less than 25% of the employee's basic pay or the retirement benefits provided by the relevant social security scheme.
- 6.18 The Respondent concedes that membership in a social security scheme, like NAPSA, would mean that the employee benefits from the scheme in *lieu* of severance pay. This was confirmed in the case of **David Chongo v. Group 4 Secure Solutions Limited**⁸, which clarified that employees covered by a social security scheme receive benefits from that scheme instead of severance pay.

6.19 The Respondent elucidates that under **Section 54(1) (b)** of the **Employment Code Act**, an eligible employee can either receive gratuity at a rate of 25% of their basic pay or retirement benefits from the relevant social security scheme, like the National Pension Scheme Authority (NAPSA). An employee cannot receive both.

6.20 The Respondent's interpretation, supported by the **Hansard**³, is that the Act intended for all employees, including those on permanent contracts, to receive an additional benefit beyond NAPSA upon leaving employment. If a private pension scheme is provided, it would replace the need for severance pay.

6.21 The Respondent outlines specific circumstances under which severance pay in the form of gratuity does not apply:

1. Long-term, casual, temporary, or probationary contracts: employees on these types of contracts are not entitled to severance pay under Section 54.

Special Modes of Termination

2. Redundancy - Entitled to two months' pay for each year served (Section 55(3)).
3. Medical Discharge - Entitled to three months' pay for each year served (Section 38(5)).
4. Death - Entitled to two months' basic pay for each year served (Section 54(1)(e)).

5. Subscription to a Social Security Scheme - Employees subscribed to a social security scheme or a private pension scheme separate from NAPSA do not receive severance pay. Instead, they get the portability of benefits from the pension scheme. If no private pension scheme exists, they are entitled to severance pay.
6. Expatriate or Management Employees - These employees are exempt from severance pay benefits under **Section 54** due to specific **Employment Code (Exemption) Regulations**.

6.26 The Respondent requests the dismissal of Ground 3 of the appeal, arguing that these conditions exempt this group of employees from receiving severance pay under the **Employment Code Act**. It has been asserted that the law is clear on who qualifies for severance benefits and under what conditions.

7.0 Hearing of the Appeal

7.1 The appeal was heard on 15th August, 2024. In support of the appeal, Mrs. Simachela learned Counsel for the Appellant, relied on the heads of argument that she had filed and also made oral arguments. Her submission was that the appeal is anchored on **Section 54 of the Employment Code Act**. She stated that the Court must also have regard to the other provisions of the Act when determining the appeal.

- 7.2 She implored us to take note of the keywords 'gratuity' and 'long term contract' that have been used in **Section 54** as well as in the definition section of the **Code**. Her main contention was that **Section 54** does not apply to employees who were on permanent and pension contracts.
- 7.3 Concerning ground 2, the kernel of her submission was that a permanent contract of employment is not a contract of fixed duration. The applicable provision for those on permanent contracts, such as the Respondent who was a member of a pension scheme, is **Section 54(1) (b)**. In this regard, the Appellant complied with **Section 54(1) (b)** and there are no further benefits due to the Respondent.
- 7.4 On behalf of the Respondent Mr. Chulu and Mr. Chungu equally placed their faith in the amended heads of argument that were filed on 19th July 2024. By way of emphasis, Mr. Chungu reiterated that a permanent contract has not been excluded from the provisions of **Section 54**, hence the Respondent must be paid a severance pay in accordance with the cited section.
- 7.5 Mr. Chungu further asserted that in terms of **Section 127** of the Code, the more favourable provisions set out in the law must prevail over what is in the contract. He urged us to find in favour of the Respondent.

7.6 In her reply, Mrs. Simachela argued that **Section 127** does not apply to this case as it refers to a conflict between the contract and other laws, not the **Employment Code Act**. She reiterated that the appeal should succeed.

8.0 Consideration and Decision of The Court

8.1 We have conscientiously scrutinized the record of appeal as well as the rival arguments of Counsel. We propose to deal with the first two grounds together as they are entwined. Ground one outlines the Appellant's position, challenging the application of the **Employment Code Act** and emphasizing the importance of plain language interpretation in statutory law. The Appellant seeks to clarify the applicability of certain legal provisions and compensations under the law, arguing against the lower court's interpretation. The Appellant takes issue with the interpretation of **Section 54(1) (c)** of the **Employment Code Act** and contends that the lower court erred in law and fact by holding that it applies to employees like the Respondent, who were employed on a permanent and pensionable basis.

8.2 In the second ground, the Appellant is challenging the finding that a permanent contract of employment and a fixed-term contract can be regarded as synonymous.

8.3 The Respondent on the other hand has argued that the employment contract under review fits within the legal

definition of a fixed duration contract, thus justifying the application of severance pay provisions under the **Employment Code Act**. The interpretation aligns with statutory definitions and principles of natural meaning in legal terms.

- 8.4 Counsel for the Respondent concludes that a contract of employment on permanent and pensionable terms qualifies as a contract of fixed duration since it has a defined end date, i.e., the retirement age. Therefore, the lower court was correct in applying **Section 54(1) (c)** to the Respondent's employment situation.
- 8.5 We have deeply reflected on the arguments advanced. The starting point in our view is the provision of **Section 54(1)(c)** which enacts as follows:

“54(1) An employer shall pay an employee a severance pay, where the employee's contract of employment is terminated or has expired, in the following manner:

(c) where a contract of employment of a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period as at the effective date of termination.”

- 8.6 From where we stand, the natural and ordinary meaning of the foregoing is that this provision exclusively applies to employees

on fixed duration contracts. Our understanding is that the aforesaid provision applies to those contracts with a specified start and end date which entitles them to gratuity. We agree with the arguments advanced by the Appellant that employees on a permanent and pensionable basis are excluded as can be deduced from the terms 'contract period' and 'gratuity'.

- 8.7 We had occasion to pronounce ourselves on the applicability of **Section 54(1)(c)** in the case of **Zubao Harry Juma v. First Quantum Mining & Operation Limited — Road Division**⁹ when we stated as follows:

“Section 54, in our view, only applies to employees on a contract for a fixed duration. It is our considered view that the legislature used the phrases ‘contract period’ and ‘gratuity’, therefore, it entails that it applies to employees who have been employed to serve under contracts that are specific as to when they shall commence and when they shall terminate.

*We have looked at the provisions of the **Employment Code Act** in relation to the aforesaid phrases used in the Act. Gratuity is defined as:*

“A payment made to an employee in respect of a person’s service on the expiry of a long-term contract of employment based on basic pay earnings that have accrued to the employee during the term of service.”

Whereas the definition of a long-term contract reads as follows:

“Long-term contract” means a contract of service for—

(a) a period exceeding twelve months, renewable for a further term; or

(b) the performance of a specific task or project to be undertaken over a specified period of time, and whose termination is fixed in advance by both parties.”

*In light of the foregoing, we are of the considered view that eligibility to receive gratuity is restricted to employees on long-term contracts which is defined as a period exceeding 12 months renewable for a further term. From our perspective, an employee who has been employed on permanent and pensionable terms cannot seek to derive the benefits under **section 54(1)(c) of the Employment Code Act**. Further fortification for this position is to be found in **section 73 of the Act** which enacts as follows:*

“73. (1) An employer shall, at the end of a long-term contract period, pay an employee gratuity at a rate of not less than twenty five percent of the employee’s basic pay earned during the contract period.”

*We strongly disagree with the submission that a permanent and pensionable contract of employment contained in **section 3 of the Employment Code Act** is also a contract of fixed duration. We quickly turn to the provisions of*

section 3 of the Employment Code Act which define a permanent contract as:

“A permanent contract of employment, if not terminated in accordance with this Act, expires on the employee’s attainment of the retirement age specified under a written law.”

This compels us to state that there is a distinction between a permanent contract of employment and a contract of fixed duration. The Supreme Court has made the distinction between the two very clear in **Moses Choongo v. ZESCO Recreation Club Itezhi Tezhi**¹² when they held as follows:

“The conduct of the Appellant after he was placed on a fixed term contract of employment, in our view, shows that he impliedly acquiesced to the change of his terms of employment from permanent to fixed term contract.”
(Underlining ours)

Another illuminating case is that of **Zambia National Commercial Bank PLC v. Joseph Kangwa**⁵ wherein the apex Court had this to:

“On the 4th October 1999, the Appellant was placed on a fixed term contract and therefore, ceased to be on permanent and pensionable conditions of service.”
(Underlining ours)

It is manifest from the above two cited cases that there is indeed a clear distinction between a permanent contract and a contract for a fixed duration. To hold otherwise would be in contravention of the guidance given by the Supreme Court.”

- 8.8 The sum of our analysis is that a permanent contract of employment is not equivalent to a contract of fixed duration. Therefore, the lower court’s assertion that a permanent contract is also a contract of fixed duration because it expires at retirement (if not terminated in other ways) is incorrect as there is no single retirement age. Our law allows early retirement, normal retirement, and late retirement, meaning the retirement age is not fixed from the outset. This contrasts with fixed-term contracts, which have specified and fixed end dates.
- 8.9 In addition, we find that it was not the intention of the legislature for contracts of fixed duration and permanent contracts to be regarded as synonymous. This interpretation is supported by decisions of the Supreme Court we had cited which differentiate between fixed term contracts (or contracts with a fixed duration) and permanent contracts.
- 8.10 Before we conclude this ground, we find it imperative to address Mr. Chungu’s submission on his reliance on our judgment in ***Alistair Logistics v Dean Mwachilenga***⁷ where we stated that there is no contract that is indefinite and has an “until death do

us part” clause. We still stand by this position. It is our view that Mr. Chungu has, however, taken the holding by the Court out of context. It must be viewed within the context of each particular case. In the Aliastair case we held as follows:

“What must not be lost sight of is that every contract of employment is terminable by notice and if it is found that the contract has been breached, damages are awarded as compensation for the loss or injury suffered by the employee through the breach. The rationale is that the employee must be placed in the position as if the contract had been performed.

There is no contract that is indefinite and has an “until death do us part’ clause. Either party can terminate the contract in line with the provisions of their contract.”

8.11 The context in the foregoing is in relation to parties being at liberty to enter into contracts and exit the contract in line with the provisions of the contract. They are not forced to be in a contract in perpetuity. Of paramount importance is the mode of exit.

8.12 In *casu*, we are addressing the provisions of the law specifically the applicability of **Section 54** in relation to a contract of fixed duration and a permanent and pensionable one. We have cited in the preceding paragraphs our take on the same. Our

perspective is that the nature of each contract is guided by its terms and conditions.

8.13 From our eyes, there is a distinction between a contract of fixed duration and one that is permanent and pensionable.

8.14 In light of the foregoing, we find merit in grounds one and two and uphold them.

9.0 Ground Three - Entitlement to severance pay

9.1 In the third ground, the Appellant is aggrieved with the fact that the court below awarded severance pay to the Respondent who was under a permanent contract of employment and dismissed. It has been forcefully argued that the interpretation given to **Section 54** of the Code that a dismissed employee is entitled to severance pay is incorrect. In the arguments, they have outlined the instances when severance pay is payable.

9.2 The Respondent's unsurprisingly argues otherwise. They have drawn our attention to the **Hansard of the National Assembly**⁴ as it relates to the introduction of gratuity and severance pay. It has been argued that the legislature in enacting the **Employment Code Act** sought to provide gratuity and severance pay to all employees including those on permanent contracts. The Respondents have also conceded that if the Appellant had a private scheme, they would not be entitled to the benefit.

9.3 We turn to the provisions of **Sections 51(1) and 54(1)(b)** of the Employment Code Act which enacts that:

“51. (1) An employer who summarily dismisses an employee under section 50 shall pay the employee, on dismissal, the wages and other accrued benefits due to the employee up to the date of the dismissal.

54. (1) An employer shall pay an employee a severance pay, where the employee’s contract of employment is terminated or has expired, in the following manner:

(b) where a contract of employment is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than twenty-five percent of the employee’s basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme that the employee is a member of, as the case may be.”

9.4 We have pondered over the above provisions and take the view that **Section 51** is applicable to an employee who has been dismissed and it does not refer to severance pay under **Section 54**. We agree with the solidity of the arguments advanced by the Appellants that **Sections 51** and **54** are mutually exclusive, and an employee dismissed under **Section 51** of the **Act** cannot claim severance pay under **Section 54**.

9.5 We categorically stated in **Zubao Harry Juma**⁹ case on page J21 paragraph 13.6 as follows:

*“We are sure-footed to state that a dismissed employee is only entitled to accrued leave days and salary up to the date of dismissal. It would be erroneous to state that a dismissed employee can ride on the coattails of **section 54** and get severance pay. This would be in contravention of the law as regards accrued benefits that a dismissed employee is entitled to.”*

9.6 We further stated:

*“Might we add that employees who have been dismissed for misconduct are excluded from severance pay because their actions have fundamentally breached the terms of the employment contract. Severance pay is generally applicable when employment is terminated under circumstances such as redundancy or mutual agreement where the employee is not at fault (as per **Section 54(1)(c) of the Code**). If the dismissal is due to misconduct or other disqualifying reasons the employee will not be entitled to severance pay under this section.”*

9.7 We hold the firm view that the Appellant fully complied with the provisions of **Section 51**. The holding by the trial Judge is therefore found to be perverse and we are compelled to set it

aside on the strength of the case of *Masauso Zulu v. Avondale Housing Project Limited*¹⁰.

9.8 Ground three is therefore found to be meritorious and is consequently upheld.

9.9 In a nutshell, we hold as follows:

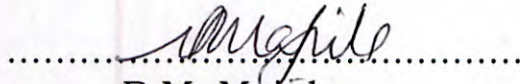
1. **Section 54(1)(c)** applies **only** to employees eligible for gratuity specifically those on long-term contracts of 12 months or more, renewable for further terms. It **does not apply to employees on permanent and pensionable contracts.**
2. A permanent contract of employment and a contract of fixed duration are distinguishable. For the avoidance of doubt, they are not synonymous.
3. An employee dismissed under **Section 51** of the **Code**, cannot claim severance pay under **Section 54.**
4. All three grounds of appeal are found to be meritorious and are upheld.

10.0 Costs

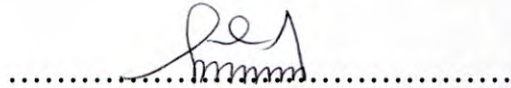
10.1 The matter having emanated from the Industrial and Labour Division of the High Court, each party shall bear their own costs.



.....
M.M. Kondolo, SC
COURT OF APPEAL JUDGE



.....
B.M. Majula
COURT OF APPEAL JUDGE



.....
A.M. Banda-Bobo
COURT OF APPEAL JUDGE