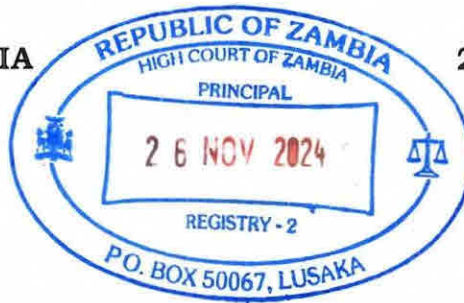


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)



2023/HP/1189

BETWEEN:

**HAROLD MUSHAKABANTU****PLAINTIFF**

AND

**FQM TRIDENT LIMITED****DEFENDANT***(Formerly Kalumbila Minerals Limited)*

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26<sup>th</sup> DAY OF  
NOVEMBER, 2024**

*For the Plaintiff : Mr. S.M. Lungwebungu, Messrs Lungwebungu Legal  
Practitioners*

*For the Defendant : Mr. H. Pasi, Messrs Mando and Pasi Advocates*

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## **J U D G M E N T**

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CASES REFERRED TO:

1. *Craig v Glasgow Corp* 1919 SC (HL) 1 at 6
2. *Marshall v Harland & Wolff Ltd* 1972 2 ALL ER 715
3. *Spencer v Paragon Wallpapers Limited* 1976 IRLR 373
4. *East Lindsey District Council v Daubney* 1977 IRLR 181 (EAT)
5. *Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited* 1980 ZR 135.
6. *Smart Banda v Wales Siame* 1988-1989 ZR 81
7. *Reid v Thompson Group Plc* 1989 3 ALL ER 228
8. *Davies v Clean Deale* 1992 13 ILJ 1230
9. *Smith and others v Moore Paragon Australia Limited* 2004 AIRC 57
10. *Attorney General v Roy Clarke* 2008 ZR 38 Vol. 1
11. *Standard Bank of South Africa v CCMA* 2008 4 BLLR 356 (LC)
12. *Barclays Bank Zambia Limited Plc v Weston Luwi and Suzgo Ngulube Appeal No. 7 of 2012*
13. *Chilufya Kusensela v Astridah Mvula SCZ No 3 of 2014*
14. *Peter Chiti v The Attorney General Appeal No 79/2014*
15. *BS v Dundee City Council* 2014 IRLR 131
16. *Christopher Kabwe Mwenya v Kalumbila Minerals Limited Appeal No 247 of 2021*

LEGISLATION REFERRED TO:

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

OTHER WORKS REFERRED TO:

1. ***A Comprehensive Guide to Employment Law in Zambia, by Winnie Sithole Mwenda and Chanda Chungu, University of Zambia Press, 2021***
2. ***Halsbury's Laws of England, 4<sup>th</sup> Edition Re-Issue, Volume 34***
3. ***Labour Law in Zambia: An Introduction, 2<sup>nd</sup> Edition, by Chanda Chungu and Ernest Beele, Juta and Company (Pty) Ltd, 2020***
4. ***Winfield and Jolowicz on Tort, 13<sup>th</sup> Edition***

**1. INTRODUCTION**

1.1 At the centre of controversy in this matter, is the realization of one's right to employment, following illness. Thus, Harold Mushakabantu, on 11<sup>th</sup> July, 2023, sued FQM Trident Limited (formerly Kalumbila Minerals Limited), by Writ of Summons which was accompanied by a statement of claim and the other documents claiming:

- i. *A declaration and Order that the termination of Harold Mushakabantu's employment was not valid, as it was harsh and unreasonable in the circumstances;*
- ii. *An Order that the medical discharge of Harold Mushakabantu was wrongful and unfair;*
- iii. *Damages for wrongful and unfair termination of Harold Mushakabantu's employment;*
- iv. *Damages for negligence;*
- v. *Damages for anguish and mental torture;*

- vi. An award of payment of the underpaid terminal benefits, allowances, leave days, shift rest allowance and severance payment;*
- vii. Any other relief that the Court may deem fit in the circumstances; and*
- viii. Costs of and incidental to the suit.*

## **2. STATEMENT OF CLAIM**

- 2.1 The background leading to the Writ of Summons being issued, shows that Harold Mushakabantu was employed by FQM Trident Limited a mining company, that is incorporated in Zambia, as a Grader Operator on 9<sup>th</sup> February, 2015, initially on a One (1) year contract. Harold Mushakabantu contended that sometime in 2017, he developed lower back pain. Then in 2021, he underwent surgery after which, he was given One (1) month bed rest.
- 2.2 It was further his averment, that when he returned to work, FQM Trident Limited, assigned him lighter duties. Contention was made that from the time that Harold Mushakabantu returned from best rest following the surgery, he did not take any sick leave, but rather, he would only take days off, and he continued being assigned duties by FQM Trident Limited.
- 2.3 He stated that on 12<sup>th</sup> April, 2022, FQM Trident Limited medically discharged him from employment without following the laid down procedure. Allegation was made that the medical discharge was not valid, but was harsh and unreasonable, and was accordingly wrongful and unfair.

Harold Mushakabantu's assertion was that the chronic back pain illness was due to FQM Trident Limited's negligence and failure to provide him with a safe working environment.

2.4 The particulars of negligence were alleged as:

- i. Failure to provide adequate, safety precautions and sufficient measures, thereby, causing Harold Mushakabantu to hit a rock while operating a grader;*
- ii. Failure to provide Harold Mushakabantu with adequate sick leave to enable him to fully recover from the surgery;*
- iii. Failure to ensure that Harold Mushakabantu correctly and timely received proper healing following the surgery.*

2.5 The contention was that as a result, Harold Mushakabantu suffered damage, injury, pain and suffering, and had been put to loss and expense.

2.6 It was also Harold Mushakabantu's assertion, that he was underpaid his dues following the alleged wrongful and unfair medical discharge, and that he was never paid shift rest allowance which was due.

2.7 He stated that unless the Court intervened, he would be subjected to greater trouble and suffering, and FQM Trident Limited would never be held accountable.

### **3. DEFENCE**

3.1 In the defence, which was filed on 3<sup>rd</sup> August, 2023, the capacities of the parties, as alleged in the statement of claim was admitted. Further admission was made, that Harold Mushakabantu was initially employed on a One (1) year fixed

term contract, the addition being that after the expiry of that contract on 9<sup>th</sup> February, 2016, he was reemployed on a permanent and pensionable contract.

- 3.2 In response to the assertion that Harold Mushakabantu developed lower back pain in 2017, FQM Trident Limited stated that Harold Mushakabantu was diagnosed with long-standing back pain in September, 2020, and he was treated at FQM Trident Limited's medical service providers' health institutions in Kalumbila, and that he further received specialised treatment in Lusaka at FQM Trident Limited's cost.
- 3.3 The contention that Harold Mushakabantu underwent surgery in 2021, and he was given One (1) month's bed rest after which he returned to duty was admitted, only to the extent that Harold Mushakabantu did in fact undergo surgery. It was denied that he was only given One (1) month's bed rest after the surgery, the assertion being that he was on sick leave for more than Six (6) months.
- 3.4 Thus, the allegations that Harold Mushakabantu would only take days off, and that he was not on sick leave were denied. Further denial was made that the medical discharge of Harold Mushakabantu was not valid, the defence being that Harold Mushakabantu had been on restricted duties and sick leave for more than Six (6) months, and the medical discharge was based on certification by qualified medical practitioners, who established that Harold Mushakabantu

was indefinitely incapacitated from performing his duties due to his medical condition.

3.5 It was also contended that Harold Mushakabantu's medical discharge was in accordance with Clause 5.1b of his contract of employment, which was dated 9<sup>th</sup> February, 2016, the collective agreement which was applicable to him and the law.

3.6 The allegations of negligence as pleaded were denied, and FQM Trident Limited contended that in fact, it was Harold Mushakabantu who was negligent, when he refused to undergo surgery which was recommended by the specialist, and which made his medical condition permanent. This it was stated, was the basis for him being declared medically unfit to work as a dozer operator.

3.7 The particulars of negligence on Harold Mushakabantu's part were contended as:

*"Harold Mushakabantu was negligent when he declined to undergo surgery which was recommended by specialist doctors who were treating him after he was diagnosed with long-standing low back pain due to lumbar spine stenosis."*

3.8 It was denied that Harold Mushakabantu had suffered damage, injury, pain and suffering, and had been put to loss and expenses. The defence was that if at all Harold Mushakabantu did suffer such, the same was perpetuated by his refusal to undergo surgery to treat his medical

condition, whose costs, travel, accommodation and upkeep would have been met by FQM Trident Limited.

- 3.9 The assertion that Harold Mushakabantu was underpaid his dues on the alleged wrongful and unfair medical discharge and that he was not paid shift rest allowance was denied. It was contended that he was paid all his medical discharge benefits when the contract was terminated on medical grounds.

#### **4. EVIDENCE LED AT TRIAL**

- 4.1 At trial, Harold Mushakabantu was the only witness for his case, and FQM Trident Limited called One (1) witness.

##### **PW1- HAROLD MUSHAKABANTU**

- 4.2 Harold Mushakabantu produced his witness statement as his evidence. It was his testimony in that witness statement, that on 7<sup>th</sup> February, 2015, he did pre-employment medicals at Mary Begg Health Services in Ndola which medicals deemed him fit to work for FQM Trident Limited. Thus, on 9<sup>th</sup> February, 2015, Harold Mushakabantu was employed as a Grader Operator for FQM Trident Limited on a One (1) year contract.
- 4.3 It was further his evidence that in 2016, FQM Trident Limited employed him on another contract, which was in his bundle of documents.
- 4.4 Harold Mushakabantu testified that in his employment as a Grader Operator, he worked under difficult conditions, as he was made to grade on roads after blasting, instead of using a wheel dozer to clear the roads. He also stated that he was

made to use a grader to clear the flying rocks and tools, which were left during and after blasting.

- 4.5 Harold Mushakabantu's evidence was further that due to the nature of the above stated work environment, the accumulator bottles on the machine that provides protection to the operator, became damaged. Thus, there was no protection from the machine, when he was grading hard ground or if he hit a rock which was hidden in the ground.
- 4.6 He added that most seats of the graders that he was operating were damaged, which resulted in him not being protected by the safety provisions of the machine, especially due to the rigid position of the grader machines, especially graders 1-6, which he operated.
- 4.7 Further, in his testimony, Harold Mushakabantu stated that there was a culture of intimidation in the workplace, especially from his supervisor. In that regard, his evidence was that each time he reported to his supervisor that the machine needed to be fixed by the maintenance department, he was subjected to insults, and he was called all sorts of names, such as "poleka", meaning a lazy person.
- 4.8 Harold Mushakabantu also testified that sometimes, cartels would be formed within the corteges to intimidate employees by using two-way radio messages, mostly, in the afternoon and night shifts.
- 4.9 His evidence was regards when one fell sick, and they reported their condition to the supervisor on the two-way messages, was that the supervisor would leave them

unattended to up to the end of the shift, without being taken to the mine site clinic.

- 4.10 It was stated that in line with Harold Mushakabantu's contract and terms and conditions, and employee was required to rest for Twenty (20) minutes per shift. However, in the Seven (7) years that Harold Mushakabantu worked at FQM Trident Limited, he was not given that time to rest, especially in the morning and afternoon shifts. He stated that he would at times be given rest during the night shift.
- 4.11 Harold Mushakabantu still in his testimony, testified that from 2017 to 2020, he developed lower back pain during the course of his employment. His evidence was that Mary Begg Health Services prescribed some pain killers for him which he depended on. It was stated that when Harold Mushakabantu was examined by Dr Sakala at Mary Begg Health Services, he was put on light duties, with 7<sup>th</sup> December, 2020 being the last day that he operated the grader machine.
- 4.12 Further in his evidence, Harold Mushakabantu told the Court, that in December, 2020, he did the first MRI scan of his back at Progress Medical Hospital, and Dr Sakala recommended that he sees another neurosurgical specialist at Coptic Hospital in Lusaka. That was how, in 2021, Harold Mushakabantu began seeing Dr Kachinga Sichizya, a neurological specialist at Coptic Hospital in Lusaka.
- 4.13 He testified that he received his first epidural injection in his spine through Dr Kachinga Sichizya in Lusaka, on 14<sup>th</sup>

January, 2021, the second one on 23<sup>rd</sup> April, 2021, the third one in August, 2021 and the fourth one in November, 2021.

- 4.14 The evidence that was given was that all these injections were received when Harold Mushakabantu was not on leave, and he had continued working for FQM Trident Limited, except when he came to Lusaka to the hospital for review.
- 4.15 It was Harold Mushakabantu's testimony that he was informed that he had to undergo surgery on his lower back which would involve removal of the bone, and replacing it with an artificial bone. He stated that he refused to undertake the surgery, suggesting to Dr Kachinga Sichizya that would take the other option, which involved the creation of a hole in the back and removing the dirt.
- 4.16 Harold Mushakabantu testified that Dr Kachinga Sichizya agreed, and the surgery was done. Then after the surgery was done, Dr Kachinga Sichizya recommended that Harold Mushakabantu should be taking flights from Kalumbila to Lusaka and back, until he recovered. His evidence was that however, management at FQM Trident Limited, decided to transport him in an ambulance, knowing very well that the roads were in bad condition, especially from Ndola to Lusaka.
- 4.17 It was his testimony that as a result, he had to change from sleeping on a bed to sleeping on the front seat of the ambulance. Further, due to the long periods that were spent sitting in the ambulance, the disc on Harold Mushakabantu's back collapsed, as shown by the

examination which was done by Dr Kachinga Sichizya, after an MRI scan was done.

- 4.18 Then in April, 2022, when Harold Mushakabantu was in Lusaka for review, he was expecting to receive his monthly pay by 25<sup>th</sup> April, 2022. Therefore, when he did not receive it, he had called the Human Resource Manager at FQM Trident Limited, Mr. Brighton Mwiinga, who advised him that his contract of employment had been terminated.
- 4.19 Harold Mushakabantu's testimony, was that this surprised him, as he was not consulted by management on whether he wished to continue working, or that he should be medically discharged. It was stated that Harold Mushakabantu received the letter notifying him of the termination of his employment by way of medical discharge, on 11<sup>th</sup> May, 2022. He testified that contrary to the contents of the letter, he was never on Six (6) months leave to recover after the surgery.
- 4.20 Rather, from 19<sup>th</sup> December, 2021, he was on sick leave and in January, 2022, he came to Lusaka for review at Coptic Hospital. Then, in February, 2022, he reported for work and he was carrying out light duties. Harold Musahakabantu further testified that in April, 2022, he returned to Lusaka for review at Coptic Hospital, and he was not on Six (6) months sick leave continuously.
- 4.21 He contended that he wanted to justice to prevail, as he was unlawfully dismissed from employment on medical discharge.

- 4.22 It was also his evidence that being a person who was on permanent and pensionable employment, he believed that he was underpaid. The testimony that Harold Mushakabantu gave in that regard, was that the monthly ticket closed on the 15<sup>th</sup> day of each month, and he was paid on the 25<sup>th</sup> day of every month. He stated that this meant that the 16<sup>th</sup> day of each month, was the beginning of the month, and it ended on the 15<sup>th</sup> day of the next month.
- 4.23 Harold Mushakabantu's evidence was also that he worked from 16<sup>th</sup> March, 2022 until 15<sup>th</sup> April, 2022, but he did not receive his salary, and he thereafter worked from 16<sup>th</sup> April, 2022 until 11<sup>th</sup> May, 2022, and he still did not receive his salary. Thus, he was not paid for Two (2) months.
- 4.24 It was testified that Harold Mushakabantu did not benefit from the salary increment which was awarded by the Government in 2022, and FQM Trident Limited did not pay him the previous salaries that were owed to him. He alleged that it only paid him part of the money based on the old law, minus the 11% salary increment for 2022.
- 4.25 Further in his evidence, Harold Mushakabantu stated that on 4<sup>th</sup> May, 2021, FQM Trident Limited served him a letter which gave him notice of the accrued retirement benefits. However, Harold Mushakabantu refused to sign the letter, as the calculation was based on One (1) month's basic salary for each completed year of service, instead of Three (3) months' pay for each year served.

- 4.26 Still in his testimony, Harold Mushakabantu testified that he reported the matter to the Labour Office, and Mr. Kambwenji and FQM Trident Limited were summoned. However, the matter could not be resolved as FQM Trident Limited did not show up.
- 4.27 Then on 12<sup>th</sup> August, 2022, in an effort to have the matter resolved, Harold Mushakabantu wrote to the Human Resources Manager, Mr. Brighton Mwiinga, at FQM Trident Limited, but he did not respond to the letter. He stated that on being called, Mr. Brighton Mwiinga confirmed having received the letter, and he had informed him that he would respond to it, if he felt like it.
- 4.28 Harold Mushakabantu testified that when Mr. Brighton Mwiinga stopped answering his phone calls, he had engaged the General Manager at FQM Trident Limited, whom he spoke with from December, 2022 until 1<sup>st</sup> April, 2023.
- 4.29 The testimony that Harold Mushakabantu further gave, was that on 31<sup>st</sup> March, 2023, a meeting was held with FQM Trident Limited at which the underpayment of Harold Mushakabantu's package, as wrong calculations were used, wrong calculation of his children's school fees, back pay not paid after the salary increment of 2022, redundancy pay being calculated on the old rate instead of the new rate of 11% increment of 2022, the dismissal being unlawful and the bad treatment of himself by FQM Trident after working for it for Eight (8) years without a charge, was discussed.

- 4.30 However, nothing was resolved, and Harold Mushakabantu engaged Counsel. Harold Mushakabantu testified that this matter had affected him in many ways, especially mentally, as he had lost hope of healing, as the medical treatment was expensive, and it had left him bankrupt. He also stated that due to the actions by FQM Trident Limited, he became depressed and he nearly took his life.
- 4.31 He added that even the Four (4) months that FQM Trident Limited gave him so that he could be attending the clinic, was of no use, as he was nursing his wife who had undergone surgery at Ndola, Mary Begg Hospital on 7<sup>th</sup> May, 2022. Then on 9<sup>th</sup> May, 2022, FQM Trident Limited terminated his wife's medical insurance after she had surgery, and Harold Mushakabantu had to incur extra costs for her treatment, even when he contributed ZMW220.00 per month for a family of Six (6) dependents.
- 4.32 Further in his testimony, Harold Mushakabantu stated that there is only One (1) hospital in Kalumbila, and it was hard for his family and himself to receive medical treatment, especially for his wife who needed the stitches removed from her neck. However, each hospital that they went to, informed them that she could not be attended to, as they were scared of complications that could arise from the surgery, given that it was not them that carried out the surgery.
- 4.33 Harold Mushakabantu testified that at the time that he took out the witness statement, the stitches were still on his wife's neck, and they had been giving her complications and pain.

- 4.34 On other hardships that he faced, Harold Mushakabantu's evidence was that after his employment was terminated, FQM Trident Limited only gave himself and his family, Two (2) weeks to stay in the mine house, that is from 15<sup>th</sup> May, 2022 until 30<sup>th</sup> May, 2022.
- 4.35 He contended that this was done without remorse for his physical health and situation, which made him feel like he was being treated like a criminal, despite having worked for FQM Trident Limited for Seven (7) years.
- 4.36 Harold Mushakabantu's testimony was that during that period, he lost most of his property, as he had to sell them at cheap prices in Order to look after his family. He explained that FQM Trident Limited paid him less than what was due to him, and this could be seen from his bank statement which was in his bundle of documents.
- 4.37 In conclusion, Harold Mushakabantu stated that he had been subjected to physical and emotional pain as a result of FQM Trident Limited's actions, as well as great loss, inconvenience and expense.

#### **CROSS EXAMINATION OF HAROLD MUSHAKABANTU**

- 4.38 In cross examination, Harold Mushakabantu testified that initially, he was employed on a One (1) year contract, from 20<sup>th</sup> February, 2014. He agreed that it was a fixed term contract, after which he was paid leave days. Harold Mushakabantu admitted that in 2016, he was employed on permanent and pensionable conditions.

- 4.39 Further in cross examination, Harold Mushakabantu stated that under Clause 5 (b) of his employment contract, it provided that his contract could be terminated on medical grounds, if he had an illness that prevented him from performing his duties. Admission was made, that there was provision for sick leave, so that if one was sick, they could recover and report back for work.
- 4.40 Harold Mushakabantu contended that a team of doctors did not medically declare him unfit to work as a Grader Operator. His position was that he was referred to see a Neurosurgeon in Lusaka, being Dr Kachinga Sichizya, who examined him and recommended that he undergoes surgery for his back problem.
- 4.41 When cross examined further, Harold Mushakabantu testified that he refused to undergo surgery. He explained that he last worked as a Grader Operator on 7<sup>th</sup> December, 2020, and that he was medically discharged on 11<sup>th</sup> May, 2022. His testimony, when he was referred to the Medical Status Report from Mary Begg Health Services, which was at pages 36-37 of FQM Trident Limited's bundle of documents, especially in lines 1-3 at page 37, was that he still denied that the doctors declared him medically unfit.
- 4.42 On being referred to paragraph 8 of the statement of claim at page 3 of the agreed bundle of pleadings, Harold Mushakabantu's testimony was that FQM Trident Limited did not inform him that a decision had been made that he be medically discharged from employment. He added that he

was not formally written to, to inform him that he was medically discharged. It was however his evidence, that he only received the letter, on 11<sup>th</sup> May, 2022, after his employment had been terminated.

- 4.43 Harold Mushakabantu agreed that in the letter terminating his employment, he was informed that he would be paid One (1) month's pay in lieu of notice. His evidence was further that other than Three (3) months' pay for each year served, and repatriation, he received money for over deduction of school fees. However, Harold Mushakabantu testified that he did not receive payment from the FQM Trident Limited pension fund.
- 4.44 He told the Court that initially, he was paid K153, 000.00 and he queried the payment. It was his continued testimony in cross examination, that he was unaware that the years that he had served were moved from Six (6) to 6.22, as he was not told. He nevertheless testified that he was paid over K12, 000.00.
- 4.45 Still in cross examination, Harold Mushakabantu stated that he joined the FQM Trident Limited private pension scheme which is managed by Prudential. He was unaware whether his pension accumulation was paid by FQM Trident Limited into the scheme, stating that there was no such agreement.
- 4.46 Whilst agreeing that he had produced the collective agreement in his bundle of documents, as he was a unionized employee, Harold Mushakabantu testified that he had read it, although time had passed. He did nevertheless

testify that it was agreed that FQM Trident Limited would transfer his pension into the pension scheme

- 4.47 It was his testimony that there was a new agreement, but that the collective agreement was what was applicable when he left employment. Harold Mushakabantu explained that the Union and Management refused to give him the new agreement.
- 4.48 He testified, when he was referred to Clause 19 of the Collective Agreement, which was at page 35 of his bundle of documents, that it was his understanding that the Union and Management agreed that money for the pension was transferred to the pension scheme. He stated that as a unionized employee, he was bound by that Clause.
- 4.49 Harold Mushakabantu's evidence was that FQM Trident Limited did not write to him and inform him about his accrued retirement benefits. When referred to the letter which was at pages 47-48 of his bundle of documents, which was dated 4<sup>th</sup> May, 2021, and was authored by FQM Trident Limited to himself, Harold Mushakabantu testified that he was informed about the accrued retirement benefits.
- 4.50 He contended that he was a member of the pension fund as FQM Trident Limited paid his accrued pension into the fund. He was unaware whether the pension fund was responsible for paying his pension in accordance with the scheme rules.
- 4.51 In respect of his work as a Grader Operator, Harold Mushakabantu testified that he would clear the roads. He stated that when he was employed in 2015, the mine was at

development stage. It was further his testimony that in clearing the roads, he would clear trees, stones etc, using a grader. His evidence when he was cross examined further, was that a grader does not remove trees, but it clears the earth to make a road. It was added that stones and trees would be found on such.

- 4.52 Harold Mushakabantu's evidence was also that he agreed on being employed, that he would do such work. His testimony was that he complained when he found a rock as he was grading the road, and that was the basis for his allegations of negligence against FQM Trident Limited. Harold Mushakabantu explained that the back problem started in 2015, when he hit a rock even though he had no evidence of this, or a medical report for 2015 to support the assertion.
- 4.53 He agreed that according to the documents, he was only treated for the back problem in 2020, and that the doctor wrote that he had a back problem since 2020 which was degenerative. Harold Mushakabantu did not know what degenerative means, and he stated that he did not ask the Doctor.
- 4.54 It was agreed that on being discharged on medical grounds, Harold Mushakabantu was paid Three (3) months' pay for each year served, and that in paragraph 12 of his statement of claim, he did not elaborate on his claim for underpayment. Harold Mushakabantu also testified that on being discharged on medical grounds, he was given opportunity to attend FQM Trident Limited's medical facilities for Four (4)

months, and that this was indicated in the letter which notified him of the medical discharge.

**RE-EXAMINATION OF HAROLD MUSHAKABANTU**

- 4.55 Harold Mushakabantu, in re-examination, clarified that he did not refuse to do the operation, but the type of operation that would involve removal of the bone from his back and replace it with an artificial one. His evidence was that rather, he had asked the doctor to make a hole and remove the collapsed disc, and the doctor agreed. However, there was no machine to do so.
- 4.56 Thus, Harold Mushakabantu was told that he would be given injections until the machine was brought, and when the machine came, the operation was done.
- 4.57 On the pension scheme, Harold Mushakabantu testified that when the Union addressed them, they refused, as they were supposed to choose whether to join the scheme or not. He added that they refused to transfer money to the scheme, and that it would be noted that the calculations that he had been produced in his bundle of documents was not signed. Thus, he did not agree to transfer to the pension scheme.
- 4.58 On the letter at pages 47-48 of his bundle of documents, Harold Mushakabantu clarified that he was informed of his accrued pension benefits, but he like the other employees, refused.
- 4.59 He further stated that in 2015, he went to the hospital, but no medical report was issued, as it was a clinic.
- 4.60 That marked the close of the case for Harold Mushakabantu.

**DW1-MOSES KAYAMBA**

- 4.61 This witness, a Human Resource Practitioner, who held the position of Superintendent Employee Relations, Strategy and Change at FQM Trident Limited, produced his witness statement as his evidence. He testified therein, that his duties included assuming oversight responsibility for protecting the employer-employee relationship, by upholding fairness in discharging each party's obligations to the relationship or the contract of employment, managing human resource or legal risk mitigation, project management, as well as the formulation and monitoring of the Company's human resource strategy.
- 4.62 As regards Harold Mushakabantu, Moses Kayamba testified that he was employed by FQM Trident Limited on 9<sup>th</sup> February, 2015, as a Grader Operator on a One (1) year fixed term contract. Then later on 9<sup>th</sup> February, 2016, he was employed in the same capacity, on a permanent and pensionable basis, as seen at pages 1-17 of FQM Trident Limited's bundle of documents.
- 4.63 Moses Kayamba's evidence was further that Harold Mushakabantu was diagnosed with long-standing lower back pain in September, 2020, and he was treated for the same, at FQM Trident Limited's medical service provider's health institution in Kalumbila. It was also his testimony, that Harold Mushakabantu further received specialist treatment in Lusaka, at FQM Trident Limited's cost. The Medical Status Report from the medical service providers'

health institution in Kalumbila, was said to be at pages 36 to 37 of FQM Trident Limited's bundle of documents.

- 4.64 Moses Kayamba still in his testimony, stated that Harold Mushabantu underwent surgery in 2021, and he was on sick leave for more than Six (6) months. It was also his evidence, that the Medical Status Report, which was at pages 36-37 of FQM Trident Limited's bundle of documents, indicated Harold Mushabantu's fitness to work history.
- 4.65 He added that those documents showed that Harold Mushakabantu was on alternative duties from 17<sup>th</sup> September, 2020, and on sick leave from 15<sup>th</sup> December, 2020, and that on 21<sup>st</sup> May, 2021 when the status report was issued, he was still on sick leave.
- 4.66 The testimony that Moses Kayamba further gave, was that Harold Mushakabantu's medical discharge was valid, as he had been on restricted duty and sick leave for more than Six (6) months. Further, the said medical discharge was on certification by qualified medical practitioners, which were at pages 36-37 and 40-41 of FQM Trident Limited's bundle of documents.
- 4.67 Moses Kayamba's evidence in that regard, was that Harold Mushakabantu had been alternating between restricted duty and sick leave from 1<sup>st</sup> September, 2020, and he was still doing so when the medical report was issued on 4<sup>th</sup> March, 2020. It was also his evidence, that Harold Mushakabantu's Work Capacity Certificates, Trident Occupational Health and Wellness Centre Attendance Form, and the Notice of Medical

Discharge had all been produced at pages 38-39 and 42-44 of FQM Trident Limited's bundle of documents.

- 4.68 The continued testimony by Moses Kayamba, was that Harold Mushakabantu was incapacitated from performing his job due to his medical condition, and the termination of his contract of employment on medical grounds was in accordance with Clause 5.1 (b) of the contract of employment which was at pages 22-34 of FQM Trident Limited's bundle of documents.
- 4.69 Allegation was made that Harold Mushakabantu was negligent when he refused to undergo the surgery, which was recommended by the specialist doctors. It was stated that Harold Mushakabantu agreed to only receive the epidural injection for management of the back pain. Moses Kayamba testified that this made Harold Mushakabantu's medical condition permanent, and as a result, he was declared medically unfit to work a Dozer Operator, with pages 36-37 of FQM Trident Limited's bundle of documents again being referred to.
- 4.70 It was Moses Kayamba's evidence that upon being discharged on medical grounds, Harold Mushakabantu was paid all his medical entitlements upon the expiration of his fixed term contract, as well as all his medical discharge benefits, when his contract of employment was terminated on medical grounds. The Employee Pay Statement and Proof of Payment were stated as having been produced at pages 55-56 of FQM Trident Limited's bundle of documents.

4.71 In conclusion, Moses Kayamba testified that Harold Mushakabantu enquired on the benefits/entitlements that he was paid, as seen from the correspondence which was at pages 48-54 of FQM Trident Limited's bundle of documents.

**CROSS EXAMINATION OF MOSES KAYAMBA**

4.72 In cross examination, Moses Kayamba's testimony was that from 2017-2020, Harold Mushakabantu experienced lower back pain, and then in 2020, he was diagnosed with lower back pain. On being referred to the medical report from Progress Medical Centre, which was at page 28 of Harold Mushakabantu's bundle of documents, Moses Kayamba told the Court that the document showed that Harold Mushakabantu was examined in 2020.

4.73 His evidence was that page 13 of the said bundle of documents, showed the date of examination as 4<sup>th</sup> August, 2021, while page 25 showed the date of attendance as 2022. Moses Kayamba agreed that the said hospital reports were from 2020 to 2022.

4.74 It was further his testimony in cross examination, that page 63 of Harold Mushakabantu's bundle of documents was the Notice of his medical discharge, and that in paragraph 4 of the said document, it stated that Harold Mushakabantu was on restricted duties and sick leave. His evidence was that restricted duty meant that Harold Mushakabantu was reporting for work, and that he was doing lighter duties than that which he was employed to do.

- 4.75 The document at page 50 of Harold Mushakabantu's bundle of documents, was stated as being dated 4<sup>th</sup> March, 2022, and that on 1<sup>st</sup> March, 2022, Harold Mushakabantu underwent functional capacity evaluation, which showed significant yellow flags, and that Harold Mushakabantu had been alternating between restricted duty and sick leave from 1<sup>st</sup> September, 2020.
- 4.76 Moses Kayamba's evidence was that Harold Mushakabantu was referred to psychotherapy, and not physiotherapy after the surgery in 2021. He stated that at page 51 of the said bundle of documents, Mary Begg Health Services indicated that Harold Mushakabantu was currently unfit to work as a Grader Operator, and that he would continue to work with restrictions. He testified that the document also stated that further re-assessment at QH was to be done.
- 4.77 It was Moses Kayamba's evidence, that current does not mean permanent. He agreed that the doctor gave a management plan for Harold Mushakabantu on 4<sup>th</sup> March, 2022, and at page 63, the Notice of medical discharge was dated 12<sup>th</sup> April, 2022, about a month and Seven (7) days after the Doctor's letter. Moses Kayamba told the Court that the Doctor's letter did not state that Harold Mushakabantu was permanently unfit to work as a Grader Operator.
- 4.78 The evidence that Moses Kayamba further gave, was that there was no evidence to show that Harold Mushakabantu was on sick leave for a continuous period of Six (6) months. As for the Medical Status Report which was at pages 36-37

of FQM Trident Limited's bundle of documents, it was Moses Kayamba's evidence that it was issued on 21<sup>st</sup> May, 2021.

- 4.79 His testimony was that at that stage, Harold Mushakabantu's condition was known, and that from 17<sup>th</sup> September, 2020, Harold Mushakabantu had been on restricted duty, and on sick leave from 15<sup>th</sup> December, 2020. He agreed that the report was done before the operation. Moses Kayamba told the Court that the status report did not recommend that Harold Mushakabantu could still work for FQM Trident Limited. He testified that after the letter, Harold Mushakabantu was sent on sick leave.
- 4.80 It was Moses Kayamba's evidence, that page 38 of FQM Trident Limited's bundle of documents, was a Work Capacity Certificate which the doctor issued, adding that they did not issue sick notes. It was stated that sick leave was ticked on that document, as Harold Mushakabantu was temporarily unfit, and it was for a period of One (1) week.
- 4.81 On the Notice of Medical Discharge, which was at page 63 of Harold Mushakabantu's bundle of documents, Moses Kayamba testified that it stated that an employee was entitled to full emoluments for Three (3) calendar months and thereafter, at half pay for Three (3) months. He, however, clarified that for this to kick in, an employee had to first fall sick, so that they could recover, and they had to be off work, within a period of Twelve (12) calendar months.
- 4.82 Moses Kayamba's continued testimony in cross examination, was that there was a medical report that spoke

to the recommendations, which were made at page 63, being page 37 of FQM Trident Limited's bundle of documents. Addition was made, that FQM Trident Limited acted on both medical reports to terminate Harold Mushakabantu's employment.

- 4.83 He denied that the workplace at FQM Trident Limited could be classified as high risk, stating that it was just like any other place of work. Moses Kayamba did however agree that they had to provide protective clothing for certain categories of employees, as some areas of work were high risk compared to others.
- 4.84 His evidence was that he did not supervise Harold Mushakabantu. It was stated as regards the averments in paragraphs 3 and 4 of Harold Mushakabantu's witness statement, that the grievance procedures were clear, and any issue ought to have been brought to management's attention. Moses Kayamba testified that he was not aware of the averments, as stated in the said paragraphs.
- 4.85 It was agreed that Moses Kayamba had never operated a grader, but he testified that if a safety concern was raised, they could have sorted it out. He could not deny or accept the allegations.
- 4.86 Moses Kayamba also testified in cross examination, that he was unaware of the recommendations that the doctor made, stating that they were not brought to his attention. His testimony was that he joined FQM Trident Limited in 2023,

and that he did not know that Harold Mushakabantu's wife also used to work for FQM Trident Limited.

- 4.87 When referred to the Medical Discharge Form which was at page 66 of Harold Mushakabantu's bundle of documents, it was Moses Kayamba's testimony that it was for Rudinness Mayonde.
- 4.88 He maintained that Harold Mushakabantu was negligent when he refused to go for specialised treatment as recommended by the doctor. It was stated when he was cross examined further, that Harold Mushakabantu underwent an operation, but not the one that was recommended by the doctor. Moses Kayamba testified that as a patient, Harold Mushakabantu had the right to choose what operation he wanted to have undertaken.
- 4.89 Still in cross examination, Moses Kayamba testified that measures were taken to address the allegations of negligence on the part of Harold Mushakabantu. He agreed that on an employee being employed, they were given safety equipment, but that there was no evidence before Court to show that Harold Mushakabantu was given any safety equipment.
- 4.90 His evidence was that shift allowance was paid after the supervisor confirmed, and that an employee would fill in the form, and submit it to the supervisor or any other person who was assigned. However, Moses Kayamba clarified that when one was on restricted duty, they were basically not working, so they were not entitled to shift rest allowance.

- 4.91 He testified that it was not automatic that a Grader Operator was entitled to shift rest allowance, as this depended on whether they were performing that duty. It was stated that the forms for shift rest allowance on being completed, were left with FQM Trident Limited. Moses Kayamba also testified that he had no evidence to show that Harold Mushakabantu was paid shift rest allowance.
- 4.92 As to the payment that Harold Mushakabantu received on being discharged on medical grounds, Moses Kayamba's evidence was that it was payment for medical discharge, and not a severance package in the form of pension or severance pay, in accordance with the ***Employment Code Act***.
- 4.93 Pages 47-48 of Harold Mushakabantu's bundle of documents was testified as being the notice which was intended for 30<sup>th</sup> April, 2020, and at page 48, it indicated that Harold Mushakabantu had accrued K37, 292.08. Moses Kayamba agreed that at the bottom of that page, there was provision to sign, but it was not signed, in line with Clause 91.1 (b) of the said bundle of documents.

#### **RE-EXAMINATION OF MOSES KAYAMBA**

- 4.94 In re-examination, Moses Kayamba testified that restricted duty was helpful, as it helped an individual to recover, and they would be appointed to perform other lighter duties. He stated that in such instances, the employee would usually just report for work, but they would not be assigned any duties to perform. Rather, they would just sit at Administration.

- 4.95 With reference to page 63 of Harold Mushakabantu's bundle of documents, Moses Kayamba stated that it indicated that from 2020 to 2022, Harold Mushakabantu was on full pay and not on prorated pay.
- 4.96 He clarified that shift rest allowance was paid to those who worked in shifts, and when one was on restricted duty, they would not be entitled to the payment of shift rest allowance, as they were not performing their role.
- 4.97 That marked the close of the case for FQM Trident Limited.

## **5. DECISION OF THE COURT**

- 5.1 I have considered the evidence and the submissions.

### **FACTS NOT IN DISPUTE**

- 5.2 It is common cause that Harold Mushakabantu was employed as a Grader Operator by FQM Trident Limited on 9<sup>th</sup> February, 2015, initially on a One (1) year contract. The facts that are further not in dispute, are that Harold Mushakabantu was further employed by FQM Trident Limited on permanent and pensionable employment in 2016, as a Grader Operator.
- 5.3 It is not in contention, that FQM Trident Limited on 12<sup>th</sup> April, 2022, gave Harold Mushakabantu notice to terminate his employment, by way of medical discharge on 30<sup>th</sup> April, 2022. The facts that are also not in dispute, are that Harold Mushakabantu alleges that the termination of his employment by way of medical discharge was not valid, and that it was harsh and unreasonable in the circumstances.

- 5.4 It is further common cause that Harold Mushakabantu contends that the termination of his employment, was wrongful and unfair, and he is therefore, entitled to damages as a result. It is not in dispute that Harold Mushakabantu also claims that he is entitled to damages for negligence, anguish and mental torture, and that he was underpaid his terminal benefits, allowances, leave days, shift rest allowance and severance pay.

#### **FACTS IN DISPUTE**

- 5.5 It is in dispute whether the termination of Harold Mushakabantu's employment, by way of medical discharge was unlawful, and it should therefore be declared invalid. The facts that are also in dispute, are whether the termination of Harold Mushakabantu's employment was wrongful and unfair, and he is entitled to damages.
- 5.6 Also, in dispute, is whether Harold Mushakabantu is entitled to damages for negligence, anguish and mental torture.
- 5.7 It is further in dispute whether Harold Mushakabantu is entitled to underpayment of his terminal benefits, allowances, leave days, shift rest allowance and severance pay.

#### **ANALYSIS**

- 5.8 Harold Mushakabantu in his evidence, testified that on 7<sup>th</sup> February, 2015, he did pre-employment medicals at Mary Begg Health Services in Ndola, which medicals deemed him fit to work for FQM Trident Limited. Then, on 9<sup>th</sup> February,

2015, he was employed as a Grader Operator by FQM Trident Limited on a One (1) year contract.

- 5.9 Harold Mushakabantu also testified that in 2016, FQM Trident Limited employed him on another contract. He explained that in his employment as a Grader Operator, he worked under difficult conditions, as he was made to grade on roads after blasting, instead of using a wheel dozer to clear the roads. Harold Mushakabantu's evidence was that he was also made to use a grader to clear the flying rocks and tools, which were left during and after blasting.
- 5.10 He stated that due to the nature of the work environment, the accumulation of bottles on the machine that provides protection to the operator became damaged. Thus, there was no protection from the machine, when he was grading hard ground or if he hit a rock that was hidden in the ground.
- 5.11 Further on the unsafe working conditions, Harold Mushakabantu testified that most seats for the graders that he was operating were damaged, which resulted in him not being protected by the safety provisions of the machine, especially due to the rigid position of the grader machines, especially graders 1-6, which he operated.
- 5.12 He also stated that there was a culture of intimidation in the workplace, especially from his supervisor, giving instances that each time he reported to his supervisor that the machine needed to be fixed by the maintenance department, he was subjected to insults, and he was called all sorts of names, such as "poleka", meaning a lazy person.

- 5.13 Harold Mushakabantu further testified that sometimes, cartels would be formed within the corteges to intimidate employees by using two-way radio messages, mostly, in the afternoon and night shifts.
- 5.14 As to what happened when one fell sick, and they reported their condition to the supervisor on the two-way messages, Harold Mushakabantu explained that the supervisor would leave them unattended to, up to the end of the shift, without being taken to the mine site clinic.
- 5.15 Harold Mushakabantu's contention was that in line with the contract and the terms and conditions, an employee was required to rest for Twenty (20) minutes per shift. However, in the Seven (7) years that he worked at FQM Trident Limited, he was not given that time to rest, especially in the morning and afternoon shifts. Harold Mushakabantu's evidence was that he would at times be given rest during the night shift.
- 5.16 In respect of his injury, Harold Mushakabantu stated that from 2017 to 2020, he developed lower back pain during the course of his employment. It was his testimony, that Mary Begg Health Services prescribed some pain killers for him which he depended on. Then, when he was examined by Dr Sakala at Mary Begg Health Services, he was put on light duties, with 7<sup>th</sup> December, 2020 being the last day that Harold Mushakabantu operated the grader machine.
- 5.17 It was stated that, Harold Mushakabantu did the first MRI scan of his back at Progress Medical Hospital in December,

2020, and Dr Sakala recommended that he sees another neurosurgical specialist at Coptic Hospital in Lusaka. That was how, in 2021, Harold Mushakabantu began seeing Dr Kachinga Sichizya, a neurological specialist at Coptic Hospital in Lusaka.

- 5.18 He explained that he received his first epidural injection in his spine through Dr Kachinga Sichizya in Lusaka, on 14<sup>th</sup> January, 2021, the second one on 23<sup>rd</sup> April, 2021, the third one in August, 2021, and the fourth one in November, 2021.
- 5.19 Harold Mushakabantu contended that when all these injections were received, he was not on leave, and he had continued working for FQM Trident Limited, except when he came to Lusaka to the hospital for review.
- 5.20 Harold Mushakabantu's testimony was that he was informed that he had to undergo surgery on his lower back, which would involve removal of the bone, and replacing it with an artificial bone. However, he refused to undertake the surgery, suggesting to Dr Kachinga Sichizya, that he would take the other option, which involved the creation of a hole in the back and removing the dirt.
- 5.21 It was also his testimony, that Dr Kachinga Sichizya agreed and the surgery was done. Then after the surgery was done, Dr Kachinga Sichizya had recommended that Harold Mushakabantu should be taking flights from Kalumbila to Lusaka and back, until he recovered. Harold Mushakabantu alleged that however, management at FQM Trident Limited decided to transport him in an ambulance, knowing very well

that the roads were in bad condition, especially from Ndola to Lusaka.

- 5.22 He testified that as a result, he had to change from sleeping on a bed to sleeping on the front seat of the ambulance. Then due to the long periods that were spent sitting in the ambulance, the disc on Harold Mushakabantu's back collapsed, as shown by the examination which was done by Dr Kachinga Sichizya, after an MRI scan was done.
- 5.23 The contention was that, contrary to the contents of the letter, Harold Mushakabantu was never on Six (6) months leave to recover after the surgery. His position was that from 19<sup>th</sup> December, 2021, he was on sick leave, and in January, 2022, he came to Lusaka for review at Coptic Hospital. Then, in February, 2022, he reported for work, and he was carrying out light duties.
- 5.24 Harold Musahakabantu further testified that in April, 2022, he came back to Lusaka for review at Coptic Hospital, and he was not on Six (6) months sick leave continuously.
- 5.25 On the part of FQM Trident Limited, Moses Kayamba, a Human Resource Practitioner and Superintendent Employee Relations, Strategy and Change at FQM Trident Limited testified that Harold Mushakabantu was employed by FQM Trident Limited on 9<sup>th</sup> February, 2015 as a Grader Operator on a One (1) year fixed term contract.
- 5.26 Then later on 9<sup>th</sup> February, 2016, he was employed in the same capacity on a permanent and pensionable basis.

- 5.27 This witness also testified that Harold Mushakabantu was diagnosed with long-standing lower back pain in September, 2020, and he was treated for the same, at FQM Trident Limited's medical service provider's health institution in Kalumbila and he also received specialist treatment in Lusaka at FQM Trident Limited's cost.
- 5.28 Evidence of the said treatment was said to be contained in the Medical Status Report from the medical service providers' health institution in Kalumbila, which was at pages 36 to 37 of FQM Trident Limited's bundle of documents.
- 5.29 Moses Kayamba also testified that Harold Mushabantu underwent surgery in 2021, and he was on sick leave for more than Six (6) months. It was also his evidence that the Medical Status Report which was at pages 36-37 of FQM Trident Limited's bundle of documents showed Harold Mushabantu's fitness to work history.
- 5.30 In that regard, Moses Kayamba testified that those documents evidenced that Harold Mushakabantu was on alternative duties from 17<sup>th</sup> September, 2020, and on sick leave from 15<sup>th</sup> December, 2020, and that on 21<sup>st</sup> May, 2021 when the status report was issued, he was still on sick leave.
- 5.31 His evidence was further that Harold Mushakabantu's medical discharge was valid, as he had been on restricted duty and sick leave for more than Six (6) months. Moses Kayamba also testified that the said medical discharge was on certification by qualified medical practitioners, which was

at page 36-37 and 40-41 of FQM Trident Limited's bundle of documents.

- 5.32 He added that Harold Mushakabantu was alternating between restricted duty and sick leave from 1<sup>st</sup> September, 2020, and was still doing so, when the medical report was issued on 4<sup>th</sup> March, 2020.
- 5.33 Moses Kayamba explained that Harold Mushakabantu's Work Capacity Certificates, Trident Occupational Health and Wellness Centre Attendance Form and Notice of Medical Discharge had all been produced at pages 38-39 and 42-44 of FQM Trident Limited's bundle of documents.
- 5.34 Moses Kayamba contended that Harold Mushakabantu was incapacitated from performing his job, due to his medical condition, and that the termination of his contract of employment on medical grounds, was in accordance with Clause 5.1 (b) of the contract of employment which was at pages 22-34 of FQM Trident Limited's bundle of documents.
- 5.35 Moses Kayamba alleged that Harold Mushakabantu was negligent when he refused to undergo the surgery which was recommended by the specialist doctors. This was on the basis that Harold Mushakabantu agreed to only receive the epidural injection for management of the back pain.
- 5.36 He stated that this made Harold Mushakabantu's medical condition permanent, and as a result, he was declared medically unfit to work a Dozer Operator, with pages 36-37 of FQM Trident Limited's bundle of documents being stated as evidence of the same.

5.37 As for the payment on medical discharge, Moses Kayamba's testimony was that Harold Mushakabantu was paid all his medical entitlements upon the expiration of his fixed term contract, as well as all his medical discharge benefits, when his contract of employment was terminated on medical grounds. He referred to the Employee Pay Statement and Proof of Payment which were at pages 55-56 of FQM Trident Limited's bundle of documents.

**DECLARATION THAT THE TERMINATION OF HAROLD MUSHAKABANTU'S BY WAY OF MEDICAL DISCHARGE WAS NOT VALID BUT WAS HARSH AND UNREASONABLE IN THE CIRCUMSTANCES**

- 5.38 The evidence on record shows that Harold Mushakabantu testified that from 2017 to 2020, he developed lower back pain during the course of his employment. He stated that Mary Begg Health Services prescribed some pain killers for him which he depended on. Then when he was examined by Dr Sakala at Mary Begg Health Services, he was put on light duties, with 7<sup>th</sup> December, 2020 being the last day that Harold Mushakabantu operated the grader machine.
- 5.39 It was also his testimony that he did his first MRI scan of his back at Progress Medical Hospital in December, 2020, and Dr Sakala recommended that he sees another neurosurgical specialist at Coptic Hospital in Lusaka. That was how, in 2021, Harold Mushakabantu began seeing Dr Kachinga Sichizya, a neurological specialist at Coptic Hospital in Lusaka.

- 5.40 Harold Mushakabantu's evidence was that he received the first epidural injection in his spine through Dr Kachinga Sichizya in Lusaka, on 14<sup>th</sup> January, 2021, the second one on 23<sup>rd</sup> April, 2021, the third one in August, 2021, and the fourth one in November, 2021.
- 5.41 His contention was that when all these injections were received, he was not on leave, and he had continued working for FQM Trident Limited, except when he came to Lusaka to the hospital for review.
- 5.42 Harold Mushakabantu's testimony was that he was informed that he had to undergo surgery on his lower back, which would involve removal of the bone, and replacing it with an artificial bone. However, he refused to undertake the surgery, suggesting to Dr Kachinga Sichizya that would take the other option, which involved the creation of a hole in the back and removing the dirt.
- 5.43 It was also his testimony, that Dr Kachinga Sichizya agreed and the surgery was done. Then after the surgery was done, Dr Kachinga Sichizya recommended that Harold Mushakabantu should be taking flights from Kalumbila to Lusaka and back, until he recovered. Harold Mushakabantu alleged that however, management at FQM Trident Limited decided to transport him in an ambulance, knowing very well that the roads were in bad condition, especially from Ndola to Lusaka.
- 5.44 He testified that as a result, he had to change from sleeping on a bed to sleeping on the front seat of the ambulance. Then

due to the long periods that were spent sitting in the ambulance, the disc on his back collapsed, as shown by the examination which was done by Dr Kachinga Sichizya, after an MRI scan was done.

- 5.45 Harold Mushakabantu testified that in April, 2022, when he was in Lusaka for review, he was expecting to receive his monthly pay by 25<sup>th</sup> April, 2022. When he did not receive it, he had called the Human Resource Manager at FQM Trident Limited, Mr. Brighton Mwiinga, who advised him that his contract of employment had been terminated.
- 5.46 Harold Mushakabantu stated that this surprised him, as he was not consulted by management on whether he wished to continue working, or that he should be discharged on medical grounds. His evidence was that he received the letter notifying him of the termination of his employment by way of medical discharge on 11<sup>th</sup> May, 2022.
- 5.47 He contended that contrary to the contents of the letter, he was never on Six (6) months leave to recover after the surgery. Harold Mushakabantu's position was that from 19<sup>th</sup> December, 2021, he was on sick leave, and in January, 2022, he came to Lusaka for review at Coptic Hospital. Then, in February, 2022, he reported for work, and he was carrying out light duties.
- 5.48 Harold Musahakabantu further testified that in April, 2022, he came back to Lusaka for review at Coptic Hospital, and he was not on Six (6) months sick leave continuously.

5.49 In submitting that the termination of his employment was not valid, Harold Mushakabantu referred to the provisions of **Sections 38 (5), 52(2) and 53 (3) of the Employment Code Act No 3 of 2019**. He further relied on the case of **Peter Chiti v The Attorney General** <sup>(14)</sup>, as well as the case of **East Lindsey District Council v Daubney** <sup>(4)</sup> stating that *Philips J* in that matter stated inter alia that:

***“Unless there are wholly exceptional circumstances before an employee is dismissed on the grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him....***

***There are many possibilities but only one thing is certain, that is that if the employee is not consulted and given an opportunity to state his case, an injustice may be done.”***

5.50 The submission was that in this case, Harold Mushakabantu was merely prescribed pain killers by Dr Sakala at Mary Begg Health Services, after he developed lower back pain in 2017. That it was only in 2020, when he did an MRI scan of his back at Progress Medical Hospital, and after he saw a neurosurgeon at Coptic Hospital, that he underwent an operation.

5.51 The contention was that as seen from the medical evidence which was at pages 13-28 of Harold Mushakabantu’s bundle of documents, Harold Mushakabantu did not proceed on

sick leave for a period of Six (6) months. Rather, he would only proceed on short periods of sick leave.

5.52 It was stated that the witness for FQM Trident Limited, Moses Kayamba confirmed that Harold Mushakabantu did not proceed on sick leave for a continuous period of Six (6) months in line with the Collective Bargaining Agreement and his contract of employment, and indeed the **Employment Code Act**.

5.53 The argument was that Moses Kayamba, by the documents which were at pages 38 and 42 of FQM Trident Limited's bundle of documents, sought to state that, that was evidence of Harold Mushakabantu's sick leave. However, a close analysis of those documents, revealed that in 2021, Harold Mushakabantu only went on leave for One (1) week in 2021 and in 2024, he was on leave for Four (4) weeks.

5.54 Reference was made to the medical report which was authored by the doctor to the Human Resources Department at FQM Trident Limited, which was at pages 50-51 of Harold Mushakabantu's bundle of documents, stating that it gave the occupational history for Harold Mushakabantu. The submission was that the said medical report stated that Harold Mushakabantu alternated between restricted duty and sick leave from 1<sup>st</sup> September, 2021 to 4<sup>th</sup> March, 2022, which was the date of the medical report.

5.55 Further submission was made, that the medical report had provision for a management plan, and recommended that Harold Mushakabantu continued with the treatment,

rehabilitation, TTC doctor and specialist follow ups. The submission was that the doctor stated in that report, that Harold Mushakabantu was currently unfit to work as a Grader Operator, and that he had to continue working on restricted duty, as described in the Work Capacity Certificate (WCC).

- 5.56 It was also Harold Mushakabantu's submission, that Moses Kayamba agreed in cross examination that the medical report which was at pages 50-51 of FQM Trident Limited's bundle of documents formed the basis of discharging Harold Mushakabantu from employment on medical grounds, with the assertion being that the document showed that Harold Mushakabantu had been on sick leave for a period of more than Six (6) months.
- 5.57 However, the contention was that Harold Mushakabantu was not accorded an opportunity to be heard prior to being terminated from employment by way of medical discharge. The law in **Section 38 (5) of the Employment Code Act No 3 of 2019** was stated as providing that an employee is entitled to proceed on sick leave for a continuous period of Six (6) months at full pay, and thereafter, for a further period of Three (3) months on half pay.
- 5.58 It was asserted that it was only after then, if the employee had not recovered, that the sick leave would cease, and on recommendation from a doctor, the employer could terminate the employment of the employee, on medical grounds.

- 5.59 The submission was that there was no evidence on record, which showed that Harold Mushakabantu went on leave as alleged above. The medical report which was at pages 50-51 of Harold Mushakabantu's bundle of documents was argued having stated that Harold Mushakabantu was currently unfit to work as a Grader Operator.
- 5.60 It was also stated that use of the word "currently" did not mean permanently, and this could even be seen from the doctor's recommendations at that page, which were to the effect that Harold Mushakabantu should continue to receive treatment.
- 5.61 On FQM Trident Limited's part, Moses Kayamba testified that Harold Mushakabantu was diagnosed with long-standing lower back pain in September, 2020, and he was treated for the same, at FQM Trident Limited's medical service provider's health institution in Kalumbila. He also stated that Harold Mushakabantu further received specialist treatment in Lusaka at FQM Trident Limited's cost.
- 5.62 Evidence of the said treatment was said to be contained in the Medical Status Report from the medical service providers' health institution in Kalumbila, which was at pages 36 to 37 of FQM Trident Limited's bundle of documents.
- 5.63 Moses Kayamba's evidence was also that Harold Mushabantu underwent surgery in 2021, and he was on sick leave for more than Six (6) months. He told the Court that the Medical Status Report, which was at pages 36-37 of FQM

Trident Limited's bundle of documents showed Harold Mushabantu's fitness to work history.

- 5.64 In that regard, Moses Kayamba testified that those documents evidenced that Harold Mushakabantu was on alternative duties from 17<sup>th</sup> September, 2020, and on sick leave from 15<sup>th</sup> December, 2020. He added that on 21<sup>st</sup> May, 2021 when the status report was issued, Harold Mushakabantu was still on sick leave.
- 5.65 Moses Kayamba contended that Harold Mushakabantu's medical discharge was valid, as he had been on restricted duty and sick leave for more than Six (6) months. He testified that the said medical discharge was on certification by qualified medical practitioners, which was at page 36-37 and 40-41 of FQM Trident Limited's bundle of documents.
- 5.66 It was further Moses Kayamba's testimony that Harold Mushakabantu was alternating between restricted duty and sick leave from 1<sup>st</sup> September, 2020, and that he was still doing so, when the medical report was issued on 4<sup>th</sup> March, 2020.
- 5.67 Moses Kayamba explained that Harold Mushakabantu's Work Capacity Certificates, Trident Occupational Health and Wellness Centre Attendance Form and Notice of Medical Discharge had all been produced at pages 38-39 and 42-44 of FQM Trident Limited's bundle of documents.
- 5.68 He stated that Harold Mushakabantu was incapacitated from performing his job, due to his medical condition, and that the termination of his contract of employment on

medical grounds, was in accordance with Clause 5.1 (b) of the contract of employment, which was at pages 22-34 of FQM Trident Limited's bundle of documents.

5.69 Moses Kayamba alleged that Harold Mushakabantu was negligent when he refused to undergo the surgery which was recommended by the specialist doctors. This was on the basis that Harold Mushakabantu agreed to only receive the epidural injection for management of the back pain.

5.70 He stated that this made Harold Mushakabantu's medical condition permanent, and as a result, he was declared medically unfit to work a Dozer Operator, with pages 36-37 of FQM Trident Limited's bundle of documents being stated as being evidence of the same.

5.71 FQM Trident Limited in its' submissions, stated that it was clear from the testimonies and the documents that were on record, that it gave reasons for Harold Mushakabantu's termination of employment. The submission was that it was because Harold Mushakabantu was unable to fulfill his contractual obligations due to his medical condition.

5.72 The provisions of **Section 38 of the Employment Code Act** were highlighted, as well as Clause 4.5 of the contract of employment, which was at pages 1-12 of FQM Trident Limited's bundle of documents.

5.73 The said clause was stated as providing as follows:

***“The Company has the right to end this contract by placing an employee on medical discharge where the employee continues to be incapacitated***

***after the initial six months period on the report of a registered medical doctor.”***

- 5.74 It was submitted that even as admitted by Harold Mushakabantu, he had a medical condition, and he was treated at FQM Trident Limited's medical services providers health institutions in Kalumbila and Ndola, and he was further referred for specialised treatment in Lusaka, where he was diagnosed with long standing chronic back problem, and he was treated at FQM Trident Limited's cost.
- 5.75 Therefore, the medical discharge was valid, as Harold Mushakabantu was on restricted duty and sick leave for a period of more than Six (6) months. The Medical Status Report which was at pages 36-37 of FQM Trident Limited's bundle of documents was stated as being evidence in support of the submission.
- 5.76 It was further submitted that the said document showed that Harold Mushakabantu alternated between restricted duties from 17<sup>th</sup> September, 2020, and sick leave from 15<sup>th</sup> December, 2020, to the date of the report on 21<sup>st</sup> May, 2021.
- 5.77 The further submission was that as at 21<sup>st</sup> May, 2021, Harold Mushakabantu had been on sick leave for more than Six (6) continuous months.
- 5.78 Contention was also made, that when Harold Mushakabantu was on restricted duty, it entailed that he did not perform the duties that he was employed to do, and that from his testimony, he last performed his duties as a Grader Operator on 7<sup>th</sup> December, 2020.

- 5.79 The further submission was that even the medical report which was at pages 40-41 of Harold Mushakabantu's bundle of documents, confirmed that he had been alternating between restricted duty and sick leave from 1<sup>st</sup> September, 2020 to the date of the report on 4<sup>th</sup> March, 2021.
- 5.80 Thus, being medically incapacitated, FQM Trident Limited had the right to discharge Harold Mushakabantu from employment. It was also stated that as shown on the medical report, which was at page 36 of FQM Trident Limited's bundle of documents, Harold Mushakabantu had long standing back pain due to Lumbar Spine Stenosis, and he had refused to undergo surgery as advised by the specialist.
- 5.81 Therefore, he was declared medically unfit to work as a dozer operator. It was also stated that due to that, Harold Mushakabantu's condition may be permanent, if he did not undergo surgery, and it was recommended that he should be permanently redeployed.
- 5.82 Thus, Harold Mushakabantu was placed on restricted duties as his prognosis was unclear, as he had declined to undergo surgery. Further submission was made, that the medical report which was at pages 40-41 of FQM Trident Limited's bundle of documents, was very clear that Harold Mushakabantu was permanently incapacitated from working as a Grader Operator due to the following findings:
- i. That Harold Mushakabantu underwent spine surgery in December, 2021;
  - ii. That full recovery was going to take a long time;

iii. That in future, Harold Mushakabantu's condition could only allow light duty.

- 5.83 As for Harold Mushakabantu's contention that the procedure to medically discharge him was not followed, as he should have exhausted the continuous Six (6) months sick leave before being discharged, FQM Trident Limited's submission was that there was irrefutable evidence on record, that Harold Mushakabantu was on sick leave from 15<sup>th</sup> December, 2020.
- 5.84 The submission was that he had never been declared medically fit from that date, not even for alternative duty. The addition was that he was on sick leave which would be extended on expiry, until his contract of employment was terminated, which cumulatively exceeded Six (6) months, and there was no requirement that the said leave had to be on consecutive days.
- 5.85 Further submission was made, that the employer's right to terminate a contract of employment on medical grounds is independent of an employee's entitlement to sick leave of up to Six (6) months, although, the two may coincide.
- 5.86 To support this position, the submission was that where a doctor certifies that an employee is permanently or indefinitely incapable of performing his duties and recommends medical discharge under **Section 38 (5) of the Employment Code Act**, upon an employee not recovering after Six (6) months from the date of the illness, the employer

is entitled to discharge the employee forthwith, and the employee's sick leave ceases.

- 5.87 The contention was that the Six (6) months relates to when the disease is contracted, and not from when the sick leave is granted, and that the grounds for recommendation need not be total incapacity, but failure to perform one's normal duties.
- 5.88 It was stated that the basis for granting sick leave is to enable an employee, who is temporarily incapacitated from performing their duties to recover, so that they can resume their normal duties. If they do not, the employer may terminate the contract, and where the doctor has recommended medical discharge, there is no requirement to give the employee sick leave.
- 5.89 The contention was that Harold Mushakabantu had exhausted his entitlement to sick leave and he was certified permanently unfit to perform his normal duties.
- 5.90 The learned authors, **Chanda Chungu and Ernest Beele** in the book; ***Labour Law in Zambia: An Introduction, 2<sup>nd</sup> Edition, Juta and Company (Pty) Ltd, 2020*** in **paragraph 2.6.1 at page 20** state that:

***“Legislation has provided for the terms and conditions of service enjoyed by employees in Zambia. Terms imposed by statute can be referred to as default rules that apply to all applicable contracts of employment unless otherwise agreed.”***

5.91 The learned authors further state in paragraph 2.6.3 that

***“In Zambia, authorised representatives of employees, namely trade union representatives have the legal capacity to bind employees. A collective agreement is a legally binding contract between the parties and anything done outside these contractual agreements is of no legal effect. Where trade unions enter into collective agreements with employers or employers’ organisations that set out various agreements between the parties, the agreed terms in the collective agreement by implication form part of the contracts of service of the trade union members.”***

5.92 Consequently, the law in the ***Employment Code Act No 3 of 2019***, the contract of employment and the Collective Agreement which the Union executed with FQM Trident Limited governed Harold Mushakabantu’s employment with FQM Trident Limited, Harold Mushakabantu having been a unionized employee.

5.93 ***Section 38 of the Employment Code Act No 3 of 2019*** makes provision for sick leave and medical discharge. It states that:

***“38. (1) An employee who is unable to perform that employee’s normal duties due to illness or injury not occasioned by the employee’s default shall notify the employer of the illness or injury***

*and proceed on sick leave on production of a medical certificate from a health practitioner.*

*(2) Where an employee is incapacitated due to illness or injury not occasioned by the employee's default, the employee is entitled to sick leave under subsection (1), and—*

*(a) an employee on a short-term contract shall be paid full pay for the equivalent of twenty-six working days of the sick leave and thereafter, half pay for the equivalent of the next twenty-six working days of the sick leave; or*

*(b) an employee on a long-term contract shall be paid full pay during the first three months of the sick leave and thereafter, half pay for the next three months of the sick leave.*

*(3) Despite subsection (2), this section shall not apply where the incapacity arises from an occupational related accident or disease as provided for under the Workers Compensation Act, 2019; and*

*(4) Despite subsection (2), the wages payable to an employee under this section shall be reduced by the amount of any compensation received by the employee during the period of incapacity under the Workers Compensation Act, 2019.*

***(5) An employer may, on the recommendation of a medical doctor, discharge an employee on medical grounds where the employee does not recover from the illness or injury, under subsection (1), after six months of the date of the illness or injury, and the employee's entitlement to sick leave shall cease.***

***(6) An employee whose employment is terminated on medical grounds under subsection (4) is, in addition to any other accrued benefits, entitled to a lump sum of not less than three months' basic pay for each completed year of service.***

***(7) Subject to the provisions of any other written law, an employer shall not terminate a contract of an employee while any of the provisions of this section apply unless otherwise agreed between the employee and employer.***

***(8) Despite subsection (6), an agreement between the parties to a contract of employment shall not be less favourable than the provisions of this section."***

5.94 It will further be seen that in the contract of employment which is at pages 1-12 of Harold Mushakabantu's bundle of documents, and pages 4-17 of FQM Trident Limited's bundle of documents, Clause 4.5 provided as follows as regards sick leave:

***“In the event that the employee is unavoidably absent from his responsibilities through illness or accident and produces a letter from an approved Medical Practitioner, the employee shall be entitled to full emoluments for the period of three calendar months and a further three months at half pay in any one 12-month period.***

***Whilst on paid sick leave, the employee may not leave the environs of Solwezi without the permission of the Company.***

***The Company has the right to end this contract by placing the employee on Medical Discharge, where the employee continues to be incapacitated after the initial six months period on the report of a registered medical practitioner.”***

- 5.95 Harold Mushakabantu in his bundle of documents produced at pages 13-27, the Quantum Health Wellness Specialist Medical Reports. The one at pages 13-15 shows the date of attendance as 4<sup>th</sup> August, 2021. The diagnosis on that report, was degenerative disc disease at L4/L5 level with moderate thecal compression; associated myofascial spasms in the lumbar spine area.
- 5.96 It further stated that Harold Mushakabantu was a patient of chronic lower back pain, and he had undergone Two (2) previous injection treatments, and that he had reported improvement to the lower back pain. The management plan

was for Harold Mushakabantu to be given lumbar myofascial injections on both sides of the midline.

- 5.97 Then on the one at pages 16-18, it has 22<sup>nd</sup> November, 2021 as the date of attendance, with the diagnosis as on the previous documents. The investigations revealed a sequestered disc as new pathology, that was not previously there in the previous MRI images, and that it explained the exacerbation of symptoms.
- 5.98 The management plan was for Harold Mushakabantu to have surgical management in the form of foraminotomy and microdiscectomy at right L4/L5 level.
- 5.99 Then the report at pages 19-21 has the date of attendance as 16<sup>th</sup> December, 2021. It shows that Harold Mushakabantu underwent successful foraminotomy and microdiscectomy on Wednesday 8<sup>th</sup> December, 2021. The management plan was wound cleaning, analgesics and antibiotics, and that he was due for discharge on 22<sup>nd</sup> December, 2021.
- 5.100 On the further comments, it was stated that Harold Mushakabantu should avoid weight bearing responsibilities and standing for long periods of time. Further comment was made, that with assessment of occupational therapy, recommendation was strongly made to transfer to light duties.
- 5.101 It will further be seen that on the report at pages 22-24, it has the attendance date as 29<sup>th</sup> January, 2022. The findings of the examination were that the wound had healed,

although there was tenderness above and below the scar. It was further recorded that Harold Mushakabantu had normal mobility, and that the sensation was intact. The investigations revealed that the MRI showed evidence of prior microdiscectomy at L4/L5 on the right side with insignificant breakaway from where the earlier herniated disc was removed.

- 5.102 The management plan was for Harold Mushakabantu to be given analgesics, do physiotherapy and exercises. The prognosis was that Harold Mushabantu's condition was fair to good, and that due to his condition, healing would take a long time.
- 5.103 Then on the report at pages 25-27, the attendance date is 23<sup>rd</sup> April, 2022. The findings of the examination were that Harold Mushakabantu had mobilized fully and independently with normal power. It was also stated that the tone and reflexes were preserved, and that raising the leg straight was less than 60 degrees bilaterally.
- 5.104 The findings on investigation, were that the repeat MRI showed evidence of prior microdiscectomy at L4/L5 on the right side with good compression, and that there was no significant foramina compression.
- 5.105 The management plan recommended analgesics, physiotherapy and exercises. On the further comments, the doctor's opinion was that Harold Mushakabantu's condition could only allow light duties, and that he should use a lumbar corset for lumbar spine support.

- 5.106 Then at page 28 of the said bundle of documents, is a Progress Medical Centre MRI report, which has the date of examination as 9<sup>th</sup> December, 2020. The document shows that Harold Mushakabantu was diagnosed with Lumbar Spine Stenosis.
- 5.107 At page 39 of the said bundle of documents, is a medical report from Mary Begg Health Services, which is dated 12<sup>th</sup> December, 2020. History is given on Harold Mushakabantu's condition, stating that the lower back pain started after he hit a rock whilst he was operating a Grader. It also states that the pain was on and off, and Harold Mushakabantu was treated for a month.
- 5.108 However, the pain did not go away, and Harold Mushakabantu had been attending physiotherapy. On that date, he was referred to a Neurosurgeon, and sick leave was recommended.
- 5.109 Pages 41-42 is a First Quantum Health Wellness report which is dated 12<sup>th</sup> October, 2021. In that document, it was stated that in Order for Harold Mushakabantu to return to work, the extreme self-limitations had to be addressed. There is another report from First Quantum Health Wellness at pages 43-44, which is dated 1<sup>st</sup> March, 2022. The report states that on assessment, the score indicated very minimal chance of Harold Mushakabantu returning to work and reporting any improvement regardless of intervention.

- 5.110 It was noted that his physical abilities could not be compared to the physical demands, as no objective comment on abilities could be made.
- 5.111 Then at page 45, is a medical report which is dated 14<sup>th</sup> January, 2021. That report shows that after Harold Mushakabantu was diagnosed with degenerative disc disease at L4/L5 and moderate thecal compression resulting in central canal stenosis and bilateral foraminal narrowing, the management intervention was that he was counselled, and he was informed of the need for surgery in the near future.
- 5.112 The report also states that Harold Mushakabantu was offered a caudal epidural injection which he accepted, and he was given the same on 11<sup>th</sup> January, 2021. The recommendation was that he be given One (1) week sick off and that when he returns, he be given lighter duties.
- 5.113 There is another medical report at page 46 of the same bundle of documents. That report which is dated 8<sup>th</sup> April, 2021, shows that Harold Mushakabantu underwent bilateral L4/L5 facet blocks with added left side para-spinal muscle block and he experienced immediate relief of the symptoms, and he was discharged on analgesics and physiotherapy.
- 5.114 The recommendation was that Harold Mushakabantu be given One (1) week sick leave, and that on return to work, that he be given lighter duties.

- 5.115 Dr Kachinga Sichizya recommended that Harold Mushakabantu be transported to Solwezi by road.
- 5.116 In FQM Trident Limited's bundle of documents, is a Medical Status Report for Harold Mushakabantu at pages 36-37, which has a date stamp for 21<sup>st</sup> May, 2021. That report shows that Harold Mushakabantu had long standing low back pain since September, 2020 and that follows up with the Orthopaedic Surgeon, saw trials of medication with no relief. It further stated that Harold Mushakabantu attended physiotherapy for his back from 20<sup>th</sup> July, 2020, and had slight improvement in the pain levels in his back.
- 5.117 Further report was made, that Harold Mushakabantu was referred to a Neurosurgeon for assessment, and that an MRI scan revealed a degenerative disc disease and herniation at level L4/L5 and moderate thecal compression, resulting in central canal stenosis and bilateral foramina narrowing.
- 5.118 It was also stated that the Neurosurgeon initiated analgesic medications with the option of surgery, if the outcome was unsatisfactory. However, Harold Mushakabantu had refused the surgery and had only agreed to epidural injections for management of the back pain. The report also indicated that Harold Mushakabantu had been on alternative duties from 17<sup>th</sup> September, 2020 and from sick leave from 15<sup>th</sup> December, 2020 to the date of the examination.
- 5.119 The management plan was that Harold Mushakabantu was advised by the specialist to have the back operation so that his condition could improve. However, as he had declined,

he was permanently declared unfit as a dozer operator and he had to continue with the medication which was prescribed. As for the duration of the restrictions, the doctor indicated that this depended on Harold Mushakabantu's improvement although the prognosis was unclear, as he had not complied with the specialist treatment plan.

5.120 The recommendations that were made were:

- i. That Harold Mushakabantu should not drive or operate any mobile equipment;
- ii. Harold Mushakabantu should not bend forward or withstand sustained vibrations;
- iii. Harold Mushakabantu should not lift heavy things;
- iv. Harold Mushakabantu should not sit for a long time without changing posture;
- v. Office based work is more advisable for Harold Mushakabantu.

5.121 Then at page 38, is a Work Capacity Certificate, which is dated 17<sup>th</sup> August, 2021. On that document, Harold Mushakabantu was given sick leave for One (1) week. Page 39 is an attendance form for Harold Mushabantu at the Trident Occupational Health and Wellness Centre which is dated 24<sup>th</sup> February, 2022. Harold Mushakabantu on that document, was given sick leave from 25<sup>th</sup> February, 2022 to 4<sup>th</sup> March, 2022.

5.122 At page 40-41 of FQM Trident Limited's bundle of documents, is a letter dated 4<sup>th</sup> March, 2022, which was addressed to the FQM Trident Limited Human Resource

Department from Mary Begg Health Services. It gave a medical history for Harold Mushakabantu, highlighting that he underwent an operation on 8<sup>th</sup> December, 2021. Note was made, that while the review of 19<sup>th</sup> January, 2022 indicated that the prognosis was good, the doctor observed that recovery would take a long time, and Harold Mushakabantu's condition would only allow light duty.

5.123 It was stated that Harold Mushakabantu was unfit as a Grader Operator, and that he had to continue with restrictions, as described in the Work Capacity Certificate.

5.124 Then at page 42, is another Work Capacity Certificate, which is dated 4<sup>th</sup> March, 2022. That document indicates that Harold Mushakabantu was temporarily unfit to undertake duties, and sick leave for the next Four (4) weeks was recommended.

5.125 A careful reading of all these documents show that Harold Mushakabantu commenced physiotherapy for the lower back pain in July, 2020, and that on 9<sup>th</sup> December, 2020, he was diagnosed with lumbar spine stenosis, after an MRI scan was done. The documents further show that Harold Mushakabantu was given epidural injections, and he underwent an operation on 8<sup>th</sup> December, 2021.

5.126 Then thereafter, he was reviewed until the doctor wrote the document which is at pages 40-41 of FQM Trident Limited's bundle of documents and pages 50-51 of Harold Mushakabantu's bundle of documents on 4<sup>th</sup> March, 2022 stating that Harold Mushakabantu was currently unfit to

work as a Grader operator, and that he had to continue with the work restrictions as described in the Work Capacity Certificates.

5.127 From the evidence that is on record, it reveals that Harold Mushakabantu was on restricted duty from 17<sup>th</sup> September, 2020 and that after he underwent the operation on 8<sup>th</sup> December, 2021, he was on sick leave. He last worked as a Grader Operator on 7<sup>th</sup> December, 2020.

5.128 It will further be noted from the documents, that Harold Mushakabantu would be given sick leave from the time of the diagnosis in December, 2020, which periods varied.

5.129 As seen from the Notice of Medical Discharge which is at page 63-64 of Harold Mushakabantu's bundle of documents and pages 43-44 of FQM Trident Limited's bundle of documents, which is dated 12<sup>th</sup> April, 2022, it gave Notice that Harold Mushabantu would be medically discharged from employment effective 30<sup>th</sup> April, 2022.

5.130 His contention is that the medical discharge was contrary to **Section 38 of the Employment Code Act No 3 of 2019**, as he was not on sick leave for a continuous period of Six (6) months, and furthermore, he was not consulted before he was discharged on medical grounds from employment.

5.131 In defence, it has been seen that FQM Trident Limited submitted that the medical discharge was lawful, as Harold Mushakabantu was on sick leave cumulatively for a period of over Six (6) months, when he was reviewed. Further, he used to alternate between restricted duty and sick leave from

17<sup>th</sup> September, 2020 to December, 2021, and that from then, he was on sick leave, until his medical discharge.

5.132 Argument was also made, that the employer's right to terminate an employee's employment on medical grounds is independent of an employee's entitlement to exhaust sick leave of up to Six (6) months, although the two may coincide.

5.133 The basis for the argument, was that this is in line with **Section 38 (5) of the Employment Code Act** which provides that this can be done where the doctor certifies that an employee is permanently or indefinitely incapable of recovering from the illness after Six (6) months from the date of the illness, and the sick leave shall cease. It was contended that the Six (6) months is from the date of the illness, and not from when the sick leave was granted.

5.134 A critical analysis of **Section 38 (5) of the Employment Code Act** reveals that an employer may, on the recommendation of a medical doctor, discharge an employee on medical grounds where the employee does not recover from the illness or injury, under subsection (1) after six months of the date of the illness or injury, and the employee's entitlement to sick leave shall cease.

5.135 **Subsection (1) of that Section**, provides that:

***“An employee who is unable to perform that employee's normal duties due to illness or injury not occasioned by the employee's default shall notify the employer of the illness or injury and***

***proceed on sick leave on production of a medical certificate from a health practitioner.”***

- 5.136 This provision entails that an employee who is unable to perform their normal duties due to illness or injury, which is not occasioned by their default, may proceed on sick leave on production of a medical certificate from a health practitioner.
- 5.137 Then under ***Subsection (2) (b) of the said Section***, an employee who is employed on a long-term contract, such as Harold Mushakanbantu was, would be paid full pay during the first Three (3) months of the sick leave, and thereafter, at half pay for the next Three (3) months of the sick leave.
- 5.138 In my understanding, an employee who is unwell is entitled to sick leave at full pay for the first Three (3) months and at half pay for the next Three (3) months should they be sick for that long.
- 5.139 However, when it comes to discharging an employee on medical grounds from employment, ***Sub Section (5) of Section 38 of the Employment Code Act*** provides that this may be done where the doctor makes such recommendation, after Six (6) months from the date of illness, on grounds that the employee has not recovered from the illness or injury.
- 5.140 It therefore follows, that once an employee is known to be unwell or they sustain injury, and if they do not recover within Six (6) months after the same, if the doctor recommends that they have not recovered, they can be

discharged from employment on medical grounds. During the period of illness, the employee will be entitled to sick leave on production of a medical certificate for a period of Six (6) months.

5.141 Consequently, as long as Harold Mushakabantu was unwell for a period of Six (6) months after he became unwell, and the doctor recommended that he had not recovered, then FQM Trident Limited was within its' rights to discharge him on medical grounds from employment.

5.142 It will be noted that the document at pages 40-41 of FQM Trident Limited's bundle of documents, and which is also at pages 50-51 of Harold Mushakabantu's bundle of documents, which is dated 4<sup>th</sup> March, 2022 stated that Harold Mushakabantu's recovery would take long. This document was authored more than Six (6) months after Harold Mushakabantu was placed on restricted duty on 13<sup>th</sup> September, 2020.

5.143 In the book, ***A Comprehensive Guide to Employment Law in Zambia, by Winnie Sithole Mwenda and Chanda Chungu, University of Zambia Press, 2021***, the learned authors at page 221, state that the Court in the case of ***Chilufya Kusensela v Astridah Mvula*** <sup>(13)</sup> in guiding on what indicators constitute permanent disability, state that permanent disability is one which is long term, and severe in nature, and has detrimental physical, mental, social and economic impact on the wellbeing of a person.

- 5.144 The learned authors further state that the Constitution in defining permanent disability, defines a person with disability, as one with physical, mental, intellectual or sensory impairment.
- 5.145 Therefore, in the case of ***Smart Banda v Wales Siame*** <sup>(6)</sup>, the Supreme Court determined that where a person is able to return to full use of their physical functions without residual problems after going through a period of pain and suffering, there would no permanent injury.
- 5.146 Then in the case of ***Spencer v Paragon Wallpapers Limited*** <sup>(3)</sup> the Court noted that the tribunal directed their minds to the correct question, which was that they took into consideration, the nature of the illness, the likely length of continuing absence, and the need for the employers to have the work done which the employee was engaged to do.
- 5.147 In this matter, the doctor having made recommendation that Harold Mushakabantu had not recovered after Six (6) months of the illness, and that his recovery would take long, there was no breach of ***Section 38 of the Employment Code Act*** as regards the period that Harold Mushakabantu was unwell, and the doctor recommended that he was unfit to work as a Grader Operator as I have highlighted above.
- 5.148 The question that however arises is whether the termination of Harold Mushakabantu's employment by way of medical discharge was wrongful and unfair?

**WHETHER HAROLD MUSHAKABANTU'S TERMINATION OF EMPLOYMENT WAS WRONGFUL AND UNFAIR?**

- 5.149 Harold Mushakabantu in relation to this claim, testified that in April, 2022, when he was in Lusaka for review, he was expecting to receive his monthly pay by 25<sup>th</sup> April, 2022. When he did not receive it, he had called the Human Resource Manager at FQM Trident Limited, Mr Brighton Mwiinga, who advised him that his contract of employment had been terminated.
- 5.150 His evidence was that this surprised him, as he was not consulted by management on whether he wished to continue working, or that he should be discharged on medical grounds. His evidence was that he received the letter notifying him of the termination of his employment by way of medical discharge on 11<sup>th</sup> May, 2022.
- 5.151 In his submissions, Harold Mushakabantu stated that considering that the law relating to the medical discharge of an employee from work was not followed, it followed then, that the termination of his employment was without valid reasons, as provided in **Section 52 (2) of the Employment Code Act No 3 of 2019**.
- 5.152 This was argued, as being because, under that provision of the law, the termination related to performance, and FQM Trident Limited was required to accord Harold Mushakabantu opportunity to be heard in line with **Section 52 (3) of the Employment Code Act**. The case of **East Lindsey District Council** <sup>(4)</sup> was further relied on.

5.153 FQM Trident Limited in response, stated that the contract of employment with Harold Mushakabantu became frustrated, and therefore, in line with **Section 52 of the Employment Code Act**, it could be terminated. It was stated that the said Section provides that a contract of employment may be terminated in accordance with any other provisions of the law.

5.154 Thus, the common law doctrine of frustration of contract applied, whose effect is that the parties to the said contract, are excused from further liability under the contract. Cited as authority, was the case of **Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited** <sup>(5)</sup>.

5.155 Reliance was also placed on the Australian case of **Smith and others v Moore Paragon Australia Limited** <sup>(9)</sup> stating that the Federal Court in that matter, held that:

***“The traditional view was that when an employee is so incapacitated by illness or injury that he cannot work at least in the longer term, the contract may be frustrated, and thus terminated by operation of law, and not at the initiative of the employer. This is the doctrine of frustration of contract. It is also clear that considerations are given to the nature of the illness, the period of time involved and what performance of the contract would look like in future.”***

5.156 The case of **Marshall v Harland & Wolff Ltd** <sup>(2)</sup> was also relied on as authority. Therefore, the submission was that

the contract of employment was frustrated as Harold Mushakabantu could not continue working as a Grader Operator. It was further submitted that even redeploying him would have entailed changing his job, which would have been a radical change from what he was employed to do, and it would have required consent from both parties to alter his conditions and terms of employment.

5.157 The Work Capacity Certificates were submitted as having been admitted by Harold Mushakabantu in cross examination, as having restricted him from carrying out his normal duties due to the long standing (chronic) lower back pain or degenerative disease by the Neurologist for a period of over Two (2) years or the correctness of the work restrictions.

5.158 Reliance was placed on the case of **Christopher Kabwe Mwenya v Kalumbila Minerals Limited** <sup>(16)</sup>, stating that in that matter, the appellant was discharged from employment on medical grounds after he was diagnosed with a brain tumour in January, 2019, and he was successfully operated on.

5.159 The submission was that doctors had certified that the appellant needed Six (6) months to fully recover, and he was placed on restricted duty as a driver. Then on being reviewed, the doctors certified that he would not be in a position to resume his normal duties for at least Sixty (60) months, after which his condition would be reviewed by his

occupational health doctor. Recommendation was made for his redeployment to accommodate his work restrictions.

5.160 Thus, he was placed on Three (3) months sick leave with full pay, and thereafter on a further Three (3) months on half pay. The Appellant was terminated Six (6) days before the Six (6) months sick leave expired.

5.161 The contention was that the Court of Appeal in that matter, agreed with the High Court's decision to uphold the termination of the Appellant's contract of employment on medical grounds, as the medical doctors had determined that he was medically unfit to perform his duties.

5.162 It will however be seen that the Courts have held that before an employee is medically discharged from employment, they have to be consulted.

5.163 In the case of ***East Lindsey District Council Daubney*** <sup>(4)</sup>, which has been relied on by Harold Mushakabantu in his submissions, the Court held that unless there are wholly exceptional circumstances before an employee is dismissed on grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him.

5.164 The Court in that matter further stated that in one way or the other, steps should be taken to discover the true medical position, which are sensible, according to the circumstances of the case.

5.165 From the authorities that have been cited, it is clear that where an employee has not recovered after a period of sick leave, and they are incapable of performing their duties or

their job, the contract may be regarded as frustrated. Thus, it may terminate by operation of the law, and not at the employer's instance.

5.166 At page 223 of ***A Comprehensive Guide to Employment Law in Zambia***, the learned authors state that termination of an employee based on ill health must be procedurally and substantially fair. They further recommend that the approach that the Court took in the case of ***Standard Bank of South Africa v CCMA*** <sup>(11)</sup> should be adopted.

5.167 In that case, the approach which was outlined was:

- i. Consult the employee about his concerns and on the effect that the absences due to ill health are having on the employer;
- ii. Determine if the employee is unable to perform his work-this will involve reviewing the employee's situation and obtaining independent medical advice if necessary;
- iii. If not, the extent to which the employee is capable of working. This will be determined by consulting the employee against the medical report;
- iv. Can the employee's circumstances be adapted? This will involve discussing with the employee to see if there can be an adaptation of his work if his condition improves; and
- v. If not, is alternative work available? The employer must act in good faith and take reasonable steps to find alternative work, if the employee is capable of doing so.

- 5.168 In the case of ***Davies v Clean Deale*** <sup>(8)</sup> it was held that in determining substantive fairness in a dismissal based on ill health, it must be established whether the employer ascertained whether the employee is or is not capable of performing the work that they previously performed, and for which they were employed. It was further stated in that case, that the employee has to participate to the extent necessary to protect their interest, and the employee may be asked to perform tasks to demonstrate their ability or lack of it.
- 5.169 Thus, upon doing so, the employer will ascertain whether the duties required of the employee or the manner in which those duties are to be performed, can be adapted so that the employee is capable of fulfilling their previous function either alone or with such assistance, as is reasonable under the circumstances.
- 5.170 That if the employee cannot be placed in his former position, the employer has to ascertain whether alternative work, even at a reduced salary is available within the employer's organisations.
- 5.171 Other factors that are stated by the learned authors of ***A Comprehensive Guide to Employment Law in Zambia***, that should be taken into consideration, in line with the decision in the case of ***BS v Dundee City Council*** <sup>(15)</sup> is that the length of service is not so clear cut, but it may show that an employee is a good and willing worker, with a good attendance record, and that they would do their utmost to get back to work as soon as they could.

- 5.172 In this matter, the record shows that there is medical evidence which reveals that Harold Mushakabantu was assessed by First Quantum Health Wellness at Mary Begg Health Services on 1<sup>st</sup> March, 2022, after the surgery was done on 8<sup>th</sup> December, 2021, as shown on the document which is at page 43 of Harold Mushakabantu's bundle of documents. On the heading in that document under, "capacity to work explored", it stated that based on the results of FABQ work subscale, a score of 66 severely raised fears, negative beliefs and poor attitude with work.
- 5.173 The document further showed that the score indicated very minimal chance of the client ever returning for work and reporting any improvement regardless of the intervention. It also stated that Harold Mushakabantu's physical capacities could not be compared to the physical demands, as no objective comment on abilities could be made.
- 5.174 The summary and recommendations noted that Harold Mushakabantu was a demotivated individual with low mood and chronic back pain. It was further noted that he was not attending any counselling at wellness, although he was compliant with physiotherapy and medication. The limitations in Harold Mushakabantu's physical performance was classified as being due to self-limiting tendencies, poor movement quality and safety concerns.
- 5.175 It was recommended that Harold Mushakabantu continues physiotherapy, which should include movement control and function optimization. Counselling at Wellness was also

recommended due to the elevated yellow flags, which was attributed to poor understanding of the condition, negative beliefs and poor attitude.

5.176 Then at pages 50-51 of Harold Mushakabantu's bundle of documents is a First Quantum Health Wellness from Mary Begg Health Services document which is dated 4<sup>th</sup> March, 2022. That document as already seen, is also at pages 40-41 of FQM Trident Limited's bundle of documents.

5.177 It states that on 1<sup>st</sup> March, 2022, Harold Mushakabantu as per the Neurosurgeon's recommendations, underwent a Functional Capacity Evaluation, which showed that he was demotivated with low mood, self-limitation with significant yellow flags. It states that yellow flags are psychosocial factors that increase the risk of developing long term disability, and work loss associated with low back pain.

5.178 The report noted that Harold Mushakabantu had been referred to wellness for psychotherapy, and that he had been alternating between restricted duty and sick leave from 1<sup>st</sup> September, 2020 to that date.

5.179 The recommendation was that Harold Mushakabantu be referred to wellness and counselling to address the reasons for the yellow flags which were identified during the FCE. It was further recommended that he continues with the current treatment, rehabilitation, TTC doctor and specialist follow ups. It was also recommended that Harold Mushakabantu was currently unfit as a Grader Operator,

and that he had to continue with the restrictions as described in the Work Capacity Certificates (WCC)

5.180 The recommendation was further that reassessment be done at QH to check progress as per WCC.

5.181 While the above documents addressed Harold Mushakabantu's condition, and the possibility of him returning to work, the document at pages 43-44 of Harold Mushakabantu's bundle of documents did not address the possibility of Harold Mushakabantu being considered for alternative work.

5.182 There is no evidence to show that the Human Resources Department was actually consulted on that possibility, in line with Harold Mushakabantu's physical, and emotional condition.

5.183 In the document at page 50-51 of Harold Mushakabantu's bundle of documents, the doctor recommended continued rehabilitation and counselling for Harold Mushakabantu, to address the yellow flags, which were identified during the FCE. This entailed that the doctor recognised the need for Harold Mushakabantu to be healed both physically and mentally, as a continuing process.

5.184 In Order for that to have been achieved, as he was currently unfit to work as a Grader Operator, it was imperative that possible redeployment of Harold Mushakabantu to another position as that process was continued, should have been explored. Like I have said, there is no evidence to show that

this was undertaken, and it was established that it was not possible.

5.185 Therefore, not all the steps as laid down in the case of ***Standard Bank of South Africa v CCMA*** <sup>(11)</sup> were considered, such that it can be said that there was procedural fairness in the medical discharge of Harold Mushakabantu from employment, which made the dismissal on medical grounds unfair.

5.186 The termination on medical grounds brought the said dismissal within the ambit of ***Section 52 (2) of the Employment Code Act*** as it related to whether he could perform any other alternative duties having been certified unfit to work as a Grader Operator.

5.187 That Section provides as follows:

***“(2) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.”***

5.188 The measure of damages for unfair dismissal is the period of notice. Clauses 5.2 and 5.3 of Harold Mushakabantu’s contract of employment provided that either the employer or the employee, respectively, could give One months’ notice to terminate the employment.

5.189 In the case of ***Barclays Bank Zambia Limited Plc v Weston Luwi and Suzgo Ngulube*** <sup>(12)</sup>, the Supreme Court held that:

*“At common law the measure of damages for wrongful termination of the contract of employment, is determined by the period of notice. The award is equivalent to the salary for the period of notice. However, there are exceptions. The case of Swarp Spining Mills Limited v Sebastian Chileshe and Others which Mr. Lukangaba cited, clearly sets out what some of the exceptions to nominal damages are. At this stage, we take the liberty to correct Mr. Lukangaba’s assertion that mental anguish is the only exception. What we said in that case is that the normal measure of damages is departed from where the circumstances and justice of the case so demand.” Therefore, termination inflicted in a traumatic fashion causing undue distress or mental suffering is, but one example. Loss of employment opportunities is another.*

...

*Similarly, we hold that the trial Court was entitled, based on the evidence before it, to award damages for cover of distress and inconvenience. An award of 24 months’ salary as damages, therefore does not come to us with a sense of shock, as being excessive, to warrant being set aside.”*

5.190 Therefore, where the termination is done in a traumatic fashion, the payment can be enhanced.

5.191 In this matter, while Harold Mushakabantu was assessed with a view to establish his return to work, he was not engaged by Human Resources on the outcome of that assessment, and consideration made on whether he could be redeployed to another department, making it unfair, and I so find.

5.192 I accordingly award Harold Mushakabantu damages for unfair dismissal being Six (6) months' pay. The amount shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.

**WHETHER FQM TRIDENT LIMITED WAS NEGLIGENT**

5.193 In respect of this claim, Harold Mushakabantu submitted that due to the negligence by FQM Trident Limited, he developed the medical condition of lower back pain due to Lumbar Spine Stenosis. It was stated that Harold Mushakabantu had testified that he developed the condition after he hit a rock whilst he was operating a grader.

5.194 Harold Mushakabantu's contention was further that he worked under difficult conditions as a Grader Operator, as he was made to grade the roads after blasting was done, instead of using a wheel dozer to clear the roads. It was submitted that Harold Mushakabantu had also testified that he was made to use a grader to clear flying rocks and stones which were left after the blasting, and that bottles accumulated on the machine which provided protection to the operator, and it became damaged.

5.195 Thus, there was no protection from the machine when an operator graded hard ground, and Harold Mushakabantu hit a rock. Harold Mushakabantu's submission was that his testimony was that FQM Trident Limited did not provide adequate and sufficient Personal Protective Equipment (PPE). It was stated that Moses Kayamba had testified that he was new at FQM Trident Limited, and that he did not supervise Harold Mushakabantu.

5.196 However, he confirmed that FQM Trident Limited provided protective equipment to employees, who signed for it on getting it. The submission was that Moses Kayamba agreed that no such evidence was before Court.

5.197 Reliance was placed on ***Winfield and Jolowicz on Tort, 13<sup>th</sup> Edition at page 45*** as stating that:

***“Negligence as a tort is breach of a legal duty to take care which results in damage, undesired by the Defendant to the Plaintiff. The ingredients necessary to prove negligence are stated as:***

***a) a legal duty to take care owed by the Defendant to the Plaintiff;***

***b) There must be breach of the duty of care owed to the Plaintiff by the Defendant; and***

***c) The Plaintiff must suffer damages as a result of the breach of duty by the Defendant.”***

5.198 The submission was also that in the case of ***Reid v Thompson Group Plc*** (7), Raiph Gibson stated as follows:

***“The duty has for very many years always been referred to in terms of the physical safety and well-being of the servant.”***

5.199 Based on the above, the submission was that FQM Trident Limited owed a duty to Harold Mushakabantu, to provide him a safe work environment, and to provide him with personal protective equipment. The contention was that there was breach of that duty, as Harold Mushakabantu hit a rock, and he did not have personal protective equipment. Thereafter, he developed medical problems which led to his discharge from employment.

5.200 ***Halsbury’s Laws of England, 4<sup>th</sup> Edition*** at page 477 was relied on by FQM Trident Limited as stating as follows:

***“It is for the Plaintiff to prove facts from which the proper inference is that the injury complained of was as a result of the Defendant’s negligence. If the plaintiff only establishes facts which are equally consistent with the accident being the result of his own or the Defendant’s negligence he cannot succeed. He cannot recover when the cause of damage is left in doubt or is attributable with equal reason to some cause than the defendant’s negligence.”***

5.201 Further reliance was placed on the case of ***Craig v Glasgow Corp*** <sup>(1)</sup> stating that in that case, the Plaintiff sought damages for personal injuries which were caused by a

tramcar which was driven by one of the Defendant's employees.

5.202 The submission was that *Lord Buckmaster* in that matter noted that:

***“It is a common and familiar principle that in an action seeking such relief, it is incumbent upon the pursuer to prove both that the defenders were guilty of negligence, and that such negligence was caused, or materially contributed to the injuries received.”***

5.203 Submission was made, that in this matter, all the medical reports that had been produced by Harold Mushakabantu and FQM Trident Limited, showed that Harold Mushakabantu had been suffering from long-standing back pain. In that regard, pages 13, 16, and 19 of Harold Mushakabantu's bundle of documents referred, while pages 22 and 25 of the said bundles of documents, showed that he was diagnosed with degenerative disc disease.

5.204 Submission was further made, that in paragraph 12 of his statement of claim, Harold Mushakabantu had described the lower back pain illness as chronic. It was contended that in medicine, the words “degenerative” and “chronic” refer to the deterioration of a health condition, or development of a disease slowly over a period, as opposed to a sudden disease.

5.205 Thus, the assertion by Harold Mushakabantu that his health condition was caused by the negligence of FQM

Trident Limited, as he hit a rock whilst he was operating a grader, was inconsistent with the medical evidence.

5.206 It was also submitted that Harold Mushakabantu failed to adduce evidence to show that the machines that he was operating were unsafe or faulty as claimed. Further, Harold Mushakabantu had not shown any details or evidence of having hit a rock whilst he was operating a grader during the course of his duties, and neither had he shown any medical report to support his claims that his illness was caused by the incident.

5.207 The assertion was that even assuming that such an incident took place, FQM Trident Limited's contention was that it would still not have sufficed as proof of negligence on its' part, without Harold Mushakabantu showing how that incident was its' fault, and not his.

5.208 FQM Trident Limited submitted that Harold Mushakabantu in cross examination, admitted that he was employed to make roads using a grader, and that rocks were expected to be present during that process.

5.209 It was stated that in the particulars of negligence which were alleged in paragraph 10 (i) of the statement of claim, Harold Mushakabantu merely stated that FQM Trident Limited failed to provide adequate measures, safety precautions and safety measures thereby causing him to hit a rock, whilst he was operating a grader.

5.210 The contention was further that Harold Mushakabantu had not stated what those measures were, and neither had he

adduced evidence to prove that there were any such measures that FQM Trident Limited ought to have taken to avoid Grader Operators from encountering rocks whilst they graded the roads.

5.211 With respect to the particulars of negligence as stated in paragraph 10 (ii) and (iii) of the statement of claim, to the effect that FQM Trident Limited was negligent in not providing Harold Mushakabantu with adequate sick leave, so that he could recover from his illness, FQM Trident Limited's submission was that the contention was unsubstantiated.

5.212 The basis for this conclusion, was that the events allegedly occurred after the diagnosis and not before. Therefore, the alleged acts of negligence could not have caused the very illness that Harold Mushakabantu alleged, that he was not given enough time to recover from. Secondly, from the time that Harold Mushakabantu was diagnosed with the illness, he did not work as a Grader Operator.

5.213 The argument was that the evidence on record showed that FQM Trident Limited abided by the doctor's recommendations for sick leave and restricted duty that was recommended in the Work Capacity Certificates. It was added that Moses Kayamba in cross examination, testified that even when Harold Mushakabantu was recommended to be placed on restricted duty, he was not assigned any work by his supervisors.

- 5.214 The submission was that this was because he was never redeployed to another section or department, where he could be assigned office work, and the only work that was available in his section, was that of a Grader Operator.
- 5.215 Reference was made to the medical report which was at page 36 of FQM Trident Limited's bundle of documents, which was dated 21<sup>st</sup> May, 2021. It was stated that the said medical report indicated that the Neurosurgeon had stated in that report, that they had initiated a trial of analgesic medications with an option for surgery in case of unsatisfactory outcome, and for improvement of Harold Mushakabantu's condition.
- 5.216 However, Harold Mushakabantu had declined the procedure that was suggested by the Neurosurgeon, and had only agreed to the epidural injection for management of his back pain. It was further submitted that at page 37 of the said bundle of documents, it was indicated that as Harold Mushakabantu had declined to undergo the surgery, he was therefore declared permanently unfit as a dozer operator.
- 5.217 Also submitted, was that Harold Mushakabantu during cross examination, had explained that he did not refuse the operation, but the type of operation which would have involved removal of the bone from his back and replacing it with artificial one, and that Harold Mushakabantu had requested for another operation.
- 5.218 This it was submitted, was clear that Harold Mushakabantu refused to undergo the surgery that was recommended,

which would have improved his condition. The assertion was that by refusing the surgery, Harold Mushakabantu perpetuated his medical condition and the incapacity to perform his duties.

5.219 Thus, at the point that Harold Mushakabantu was made aware of the treatment that could improve his medical condition and the chances of him returning to normal duty, but he refused to undergo surgery, his inability to perform his duties was occasioned by own fault. Consequently, the provisions of **Section 38 (1) of the Employment Code Act No 3 of 2019** applied.

5.220 It was submitted that as a result, Harold Mushakabantu was not even entitled to sick leave when the incapacity to perform his normal duties became his own fault, as he refused to undergo treatment for his condition.

5.221 **Halsbury's Laws of England, 4<sup>th</sup> Edition Re-Issue, Volume 34 in paragraph** in paragraph 1 at page 3, states that negligence is a specific tort, and in any given circumstances, it is the failure to exercise the care which the circumstances demand. Further, that what amounts to negligence depends on the facts of each particular case.

5.222 Therefore, where there is no duty to exercise care, negligence in the popular sense has no legal consequences. However, where there is a duty to exercise care, reasonable care must be taken to avoid acts, or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property.

- 5.223 The learned authors state in that paragraph, that the degree of care required in a particular case depends on the surrounding circumstances, and may vary according to the amount of risk encountered, and to the magnitude of the prospective injury. They further state that the duty of care is owed only to those who are in the area of foreseeable danger, and the fact the defendant has violated his duty of care to a third person, does not enable the plaintiff who is also injured by the same act, unless he is also within the area of foreseeable danger.
- 5.224 The elements of negligence as stated by Harold Mushakabantu which have been seen above, are that the Defendant must owe the Plaintiff a duty of care, which must be breached, and damage or injury results to the Plaintiff.
- 5.225 On the burden of proving negligence, ***Halsbury's Laws of England, 4<sup>th</sup> Edition Re-issue Volume 34 in paragraph 54*** states that:

***“The burden of proof in an action for damages for negligence rests primarily on the Plaintiff, who to maintain an action, must show that he was injured by a negligent act or omission for which the Defendant is in law responsible. This involves the proof of some duty owed by the Defendant to the Plaintiff, breach of that duty and injury to the Plaintiff between which and the breach of duty, a causal connection must be established.”***

- 5.226 In paragraph 10 of the statement of claim, Harold Mushakabantu alleged that FQM Trident Limited was negligent as it failed to provide safety precautions and sufficient measures which resulted in him hitting a rock whilst he was operating a Grader, and that it did not provide him with enough sick leave to enable him recover from the surgery.
- 5.227 The defence by FQM Trident Limited was that the allegations and particulars as pleaded by Harold Mushakabantu were denied. FQM Trident Limited instead alleged negligence on Harold Mushakabantu's part by him refusing to undergo the operation which was recommended by the specialist, and this resulted in his medical condition becoming permanent, and thus he was declared permanently unfit to work as a Grader Operator.
- 5.228 In the submissions, FQM Trident Limited alleged that Harold Mushakabantu had not highlighted what the breach of duty on its' part was, and therefore he had not proved that it was negligent. It was further submitted that Harold Mushakabantu had not established that his medical condition was attributable to its' negligence.
- 5.229 I have highlighted that ***Halsbury's Laws of England*** which has been seen above, states that a Plaintiff has to prove a causal connection between the duty of care that the Defendant owes them and breach of that duty of care which results in damage or injury.

- 5.230 The particulars of negligence on FQM Trident Limited's part as alleged, show that Harold Mushakabantu contends that it did not provide adequate safety measure and precautions which caused him to hit a rock whilst he was operating a Grader, and that was the genesis of his lower back pain and the eventual diagnosis of Lumbar Spine Stenosis. Further, he was not given opportunity to recover from the said illness.
- 5.231 The record shows that the incident which gave rise to Harold Mushakabantu's medical condition was not reported to FQM Trident Limited and it was recorded. The only evidence pointing to what could have possibly happened other than Harold Mushakabantu's assertion, is given in his medical history, which is in Mary Begg Health Services Report dated 12<sup>th</sup> December, 2020, which is at page 39 of Harold Mushakabantu's bundle of documents.
- 5.232 The history states that Harold Mushakabantu had lower back pain for Three (3) years which started after he hit a rock whilst he was operating a grader.
- 5.233 It will further be seen that Harold Mushakabantu in his testimony, told the Court that he was made to use a grader to clear the roads after blasting, instead of using a wheel dozer, and that he was also made to use a grader to clear the flying rocks and tools which were left during and after blasting.
- 5.234 He stated that this resulted in the accumulator bottles on the machine that provides protection to the operator becoming damaged. Therefore, there was no protection from

the machine when he graded hard ground. Harold Mushakabantu also testified that the seats for most graders that he operated were damaged, and they did not provide him with any protection.

5.235 It is on record that Harold Mushakabantu was employed as a Grader Operator. Therefore, he was aware of the nature of his job. However, FQM Trident Limited as his employer, owed him a duty of care in operating the graders, to ensure that his working conditions were safe.

5.236 The learned authors, ***Chanda Chungu and Ernest Beele, in Labour Law in Zambia: An Introduction, 2<sup>nd</sup> Edition, Juta and Company (Pty) Ltd, 2020***, state at page 163, that the duty to provide a safe system of work is one of the implied terms of a contract of employment. Therefore, an employer has to ensure that employees are safe in carrying out their duties.

5.237 Then under ***Section 94 of the Employment Code Act***, provision is made as follows:

***“94. (1) An employer shall, provide an employee with medical attention and medicines and where necessary, transport to a health facility during the illness of the employee under—***

***(a) collective agreement;***

***(b) a contract of employment; or***

***(c) the general conditions of service of the undertaking.***

**(2) Despite subsection (1) an incapacity falling within the provisions of any law relating to worker's compensation shall be subject to the Workers Compensation Act, 2019.**  
**(3) In this section, "health facility" has the meaning assigned to the words in the Health Professions Act, 2009."**

- 5.238 However, other than alleging that FQM Trident Limited failed to provide safety precautions and sufficient measures, Harold Mushakabantu did not state what exactly those measures entailed, and he did not adduce any evidence to support the assertion.
- 5.239 It is true that Moses Kayamba in cross examination testified that FQM Trident Limited does provide protective equipment to its' employees who sign for it on being given. He agreed that there was no evidence before Court to show that Harold Mushakabantu signed for the protective equipment whose records were kept by FQM Trident Limited.
- 5.240 While that was Moses Kayamba's testimony, Harold Mushakabantu as the person alleging negligence on FQM Trident Limited's part, bore the burden of establishing firstly, what protective equipment FQM Trident Limited was supposed to provide him as a Grader Operator, and secondly to establish that the Graders were in a condition that exposed him to the injury that he sustained, as their safety components which protect an Operator were damaged, as alleged in Harold Mushakabantu's witness statement, even

though that was not pleaded in the particulars of negligence in the statement of claim.

5.241 However, FQM Trident Limited did not object to that evidence which related to the particulars of negligence which were not pleaded being adduced. Thus, in line with the decision in the case of **Attorney General v Roy Clarke** <sup>(10)</sup> which was that, a party cannot rely on matters that are not pleaded except where evidence on the matters that are not pleaded has been adduced in evidence without objections from the opposing party, I am not precluded from considering it.

5.242 Nevertheless, while testimony was led as to the particulars of the negligence which was alleged on FQM Trident Limited's part, it was merely an allegation that was not supported by any evidence.

5.243 A grader being a piece of equipment that requires specialised training and knowledge to use, entailed that any deficiencies in such equipment, would have to be specifically pointed out, and what the effects of such is as regards the safety of the operator.

5.244 Further, it has been seen that Harold Mushakabantu was diagnosed with Lumbar Spine Stenosis. None of the medical reports that are on the Court record, have explained to cause of the condition. Therefore, in establishing a causal connection between the duty of care and breach of it by FQM Trident Limited on the one part, and the injury in the form of the said medical condition on Harold Mushakabantu's

part, Harold Mushakabantu needed to adduce evidence to show that the Lumbar Spine Stenosis which condition he has, was caused as a result of FQM Trident Limited's breach of the duty to ensure that he operated the graders in a safe way, and that they breached that duty by making him operate the graders which were unsafe, hence the injury that he suffered.

5.245 Harold Mushakabantu's medical condition and its' cause could best have been explained by a medical practitioner, while the safety of a grader could have been explained by a person who is specialised in that field.

5.246 In light of the fact that there is no evidence before Court, Harold Mushakabantu's assertions are merely speculative and do not establish negligence on FQM Trident Limited's part.

5.247 As for the assertion that Harold Mushakabantu was negligent in refusing to undergo surgery to treat his condition which resulted in his condition becoming permanent, and he was as a result, declared unfit to work as a Grader Operator, it is common cause that Harold Mushakabantu underwent surgery on 8<sup>th</sup> December, 2021. That surgery was not the one that was recommended which would have involved the bone being removed from his back and being replaced with an artificial one.

5.248 In re-examination, Harold Mushakabantu testified that he agreed to have surgery that involved making a hole and removing the disc which had collapsed.

5.249 It is trite, that a person has a right to choose what medical procedures to undergo. In this case, it has not been shown that the medical procedure that Harold Mushakabantu agreed to, was not appropriate, or that it would not have treated his condition. If that was the position, then it would have weighed heavily on Harold Mushakabantu having unreasonably refused to be treated, knowing that the treatment would have healed his condition.

5.250 Further, that in itself, would have impacted his continued sick leave and possibly frustrating the contract of employment, as he would have been unable to perform the duties for which he was employed.

5.251 In the absence of the efficacy of the treatment that Harold Mushakabantu chose, and the fact that he has a right to choose what medical treatment to undergo, I cannot hold that Harold Mushabantu was negligent in refusing treatment and he contributed to his condition making him permanently unfit to work as a Grader Operator.

5.252 Having found that negligence on FQM Trident Limited's part has not been proved, the claim for negligence fails, and it is dismissed.

**UNDERPAYMENT OF TERMINAL DUES AND/OR WAGES  
AND ALLOWANCES**

5.253 With respect to payment on being discharged from employment on medical grounds, the evidence that Harold Mushakabantu gave, was that being a person who was on permanent and pensionable employment, he believed that he

was underpaid. He explained that the monthly ticket closed on the 15<sup>th</sup> day of each month, and he was paid on the 25<sup>th</sup> day of every month.

5.254 Harold Mushakabantu stated that this meant that the 16<sup>th</sup> day of each month, was the beginning of the month, and it ended on the 15<sup>th</sup> day of the next month. It was his evidence was that he worked from 16<sup>th</sup> March, 2022 until 15<sup>th</sup> April, 2022, but he did not receive his salary, and he thereafter worked from 16<sup>th</sup> April, 2022 until 11<sup>th</sup> May, 2022, and he still did not receive his salary. Therefore, he was not paid for Two (2) months.

5.255 Harold Mushakabantu also testified that he did not benefit from the salary increment from the Government in 2022, and that FQM Trident Limited did not pay him the previous salaries which were owed to him. He alleged that it only paid him part of the money based on the old law, minus the 11% salary increment for 2022.

5.256 It was also his testimony that on 4<sup>th</sup> May, 2021, FQM Trident Limited served him a letter which gave notice of the accrued retirement benefits. However, he refused to sign the said letter, as the calculations were based on One (1) month's basic salary for each completed year of service, instead of Three (3) months' pay for each year served.

5.257 The evidence that Harold Mushakabantu further gave, was that on 31<sup>st</sup> March, 2023 a meeting was held with FQM Trident Limited, at which underpayment of Harold Mushakabantu's package as wrong calculations were used,

wrong calculation of his children's school fees, back pay not paid after the salary increment of 2022, redundancy pay being calculated on the old rate instead of the new rate of 11% increment of 2022, the dismissal being unlawful and the bad treatment of himself by FQM Trident after working for it for Eight (8) years without a charge, was discussed.

5.258 Harold Mushakabantu in his submissions contended that Moses Kayamba in cross examination, agreed that he was entitled to shift rest allowance up to 2020 when he was placed on restricted duty. It was further submitted that Harold Mushakabantu submitted that the monthly ticket closed on the 15<sup>th</sup> day of each month, and that he worked from 16<sup>th</sup> March 2022 up to 15<sup>th</sup> March, 2022 without receiving his salary.

5.259 Then he worked from 16<sup>th</sup> April, 2022 to 11<sup>th</sup> May, 2022 again without receiving a salary. Thus, he was not paid for Two (2) months before his contract of employment was terminated by way of medical discharge.

5.260 Harold Mushakabantu referred to pages 47-48 of his bundle of documents, as showing the calculation of his benefits at One (1) month basic pay for each year served, instead of at Three (3) months' pay. The submission was that because of that, Harold Mushakabantu refused to sign the same, and also because he did not consent to the same. Therefore, he was underpaid.

5.261 In response, FQM Trident Limited submitted that in paragraph 13 of the statement of claim, Harold

Mushakabantu had stated that he claimed underpayment of terminal benefits, allowances and severance pay. However, the basis for seeking the said reliefs had not been stated, and neither had any averments been made of the facts which gave rise to the claim.

5.262 Rather, in paragraph 12 of the statement of claim, Harold Mushakabantu had pleaded that at trial, he would show that he was underpaid his dues following allegations of wrongful and unfair medical discharge, and that he was not paid shift rest allowance.

5.263 Then in paragraph 15 of his witness statement, Harold Mushakabantu had testified that he was claiming payment for the months, April and May 2022. It was stated that FQM Trident Limited had produced a pay statement which showed that Harold Mushakabantu was paid his April 2022 salary in full.

5.264 The contention was that as Harold Mushakabantu's contract of employment was terminated effective 30<sup>th</sup> April, 2022, he was not entitled to be paid a salary for May, 2022, as he was not in employment during that period.

5.265 Submission was made that Harold Mushakabantu was paid One (1) month's salary in lieu of notice, as stated in the letter which terminated his contract, which was at page 44 of FQM Trident Limited's bundle of documents.

5.266 Further in submission, it was stated that Harold Mushakabantu had alleged that he did not benefit from the salary increment which the Government gave in 2022. The

reaction to this, was that the contention was devoid of any discernible or plausible cause of action, as Harold Mushakabantu's conditions of employment were governed by his contract of employment which was at pages 1-12 of his bundle of documents, and pages 22-34 of FQM Trident Limited's bundle of documents, respectively.

5.267 It was also submitted that it was not in dispute that Harold Mushakabantu was a unionized employee, and therefore his conditions of employment were also governed by the Collective Agreement which was at pages 29-38 of his bundle of documents.

5.268 It was stated that FQM Trident Limited's position was that Harold Mushakabantu was paid all his dues upon his contract of employment being terminated by way of medical discharge, as seen from the letter, which was at page 43 of FQM Trident Limited's bundle of documents.

5.269 The submission was that the said letter stated that Harold Mushakabantu would be paid Three (3) months' pay for each year served as severance package, repatriation allowance and One (1) month's pay in lieu of notice. It was contended that Harold Mushakabantu had not denied that he was paid the severance pay as stated in the letter, which statement of pay was at page 55 of his bundle of documents.

5.270 FQM Trident Limited's submission was also that the document indicated that Harold Mushakabantu was paid ZMW7, 000.00 on 29<sup>th</sup> April, 2022, and ZMW156, 284.00 on 13<sup>th</sup> May, 2022, bringing the total sum paid to ZMW163,

284.00, which was the amount that was shown on his April, 2022 pay statement.

- 5.271 Reference was made to Clause 19 of the Collective Agreement, which was at page 35 of Harold Mushakabantu's bundle of documents as providing for the payment benefits at Three (3) months' pay for each served, where the employee was discharged on medical grounds.
- 5.272 The argument was that Harold Mushakabantu was only entitled to be paid severance pay, repatriation allowance, commutation of accrued leave days and accrued wages at the time that his contract of employment was terminated. It was contended that he was not entitled to retirement benefits as pleaded in paragraphs 17 and 22 of his statement of claim, as he did not retire, and he was not entitled to redundancy pay, as he was not declared redundant.
- 5.273 Further submission was made that when Harold Mushakabantu queried his severance payment, FQM Trident Limited re-calculated the same by prorating the uncompleted year of service, which showed a variance of ZMW1, 471.54, as seen at page 53 of FQM Trident Limited's bundle of documents. It was stated that the said payment was paid, as evidenced at page 55 of the said bundle of documents. Then as seen at page 54, FQM Trident Limited paid school fees which were deducted in advance.
- 5.274 As for the claim relating to shift rest allowance, FQM Trident Limited's submission was that Harold Mushakabantu had not shown any evidence to prove his entitlement to the same.

The argument was that the same was not provided for in his contract of employment, the collective agreement and neither was it stipulated by the law.

5.275 It was also stated that in any event, shift rest allowance was only payable to employees who were performing their normal duties upon confirmation by their supervisor, and that it was not an automatic allowance.

5.276 With reference to Clause 2.15 of Harold Mushakabantu's contract of employment, and Clause 24 of the Collective Agreement, the submission was that Harold Mushakabantu was entitled to access the medical facilities for FQM Trident Limited as an incidence of his employment, which would cease upon the termination of his employment.

5.277 However, by virtue of the letter giving Notice of his medical discharge, Harold Mushakabantu was entitled to Four (4) months' pay post his employment, which was extended to him ex-gratia.

5.278 It is not in contention in this matter, that Harold Mushakabantu's contract of employment was terminated by way of medical discharge. The said Notice is at page 43 of FQM Trident Limited's bundle of documents. The Notice stated that Harold Mushakabantu would be paid the following:

- i. Three (3) months' basic salary for each year served-K156, 481.14;
- ii. Repatriation allowance of K5, 000.00;
- iii. One month's salary in lieu of notice-K8, 458.44

iv. Total - K169, 939.58 less all monies due to the company.

5.279 In Clause 19.3 of the Collective Agreement which was effective 1<sup>st</sup> May, 2020, it provided that:

***“An employee who is medically discharged shall be paid benefits at a rate of Three (3) months basic salary for each year of service.***

***Severance packages above will only be paid for bona fide cases or retirement, redundancy and medical discharge.”***

5.280 It will be seen that this provision is in line with **Section 38 (6) of the Employment Code Act No 3 of 2019**, which provides that:

***“(6) An employee whose employment is terminated on medical grounds under subsection (4) is, in addition to any other accrued benefits, entitled to a lump sum of not less than three months’ basic pay for each completed year of service.”***

5.281 In terms of evidence relating to the payment of benefits for the medical discharge, the pay statement which is at page 45 of FQM Trident Limited’s bundle of documents, shows that Harold Mushakabantu was paid K163, 284.40.

5.282 Then after Harold Mushakabantu queried the payment, the dues were recalculated as seen at page 53 of FQM Trident Limited’s bundle of documents, and he was paid the difference of K1, 417.54, as evidenced at pages 55 and 56 of the said bundle of documents. Therefore, in terms of the

payment for the medical discharge, Harold Mushakabantu was paid, and there is nothing else that is due.

5.283 Harold Mushakabantu also claims underpayment as seen in paragraph 12 of his statement of claim. In paragraph 15 of his witness statement, Harold Mushakabantu's testimony was that the monthly ticket closed on the 15<sup>th</sup> day of each month, and he was paid on every 25<sup>th</sup> day of each month. Therefore, the month began on the 16<sup>th</sup> day of each month up the 15<sup>th</sup> day of the following month.

5.284 Thus, he worked from 16<sup>th</sup> March, 2022 to 15<sup>th</sup> April, 2022 and from 16<sup>th</sup> April, 2022 to 11<sup>th</sup> May, 2022 without being paid. The months claimed are for April and May, 2022.

5.285 The defence by FQM Trident Limited was that Harold Mushabantu was paid all his dues, and in its' submissions, it was noted that Harold Mushakabantu in his pleadings, did not specify what he claimed as underpayment, other than stating in paragraph 12, that he was underpaid his dues on being unlawfully and unfairly discharged from employment on medical grounds, and that he was not paid shift rest allowance.

5.286 Indeed, the particulars of the underpayment was not pleaded. However, the contents of paragraph 15 of the witness statement not having been objected to, I am not precluded from considering that evidence, even though it was not pleaded.

5.287 At page 35 of FQM Trident Limited's bundle of documents is the pay statement for Harold Mushakabantu for the

month ending March 2016. While the defence is that Harold Mushakabantu was paid, that document does not establish that Harold Mushakabantu was paid his March, 2020 salary contrary to his assertions. It is trite that an employer produces the pay slip for an employee and gives it to them.

5.288 Harold Mushakabantu's claim is that he was not paid his salary starting from 16<sup>th</sup> March, 2022 to 15<sup>th</sup> April, 2022. At page 44 of FQM Trident Limited's bundle of documents, Harold Mushakabantu was informed in the Notice that terminated his employment on medical grounds on 12<sup>th</sup> April, 2022, that the termination was effective 30<sup>th</sup> April, 2022, and he would be paid One (1) month's salary in lieu of notice.

5.289 Page 45 which is the pay statement for April, 2022, shows that he was paid One month's salary in lieu of notice. Therefore, his April salary was paid.

5.290 The issue then, is the March 2022 salary. In his evidence, Harold Mushakabantu stated that in April, 2022, he was in Lusaka attending review, when he noted that the salary for that month, which he usually received around the 25<sup>th</sup> day of the month had not been paid. Thus, he had called the Human Resources Manager, and he was informed that the said salary had not been paid, as he had been terminated on medical grounds.

5.291 It has been seen that the April, 2022 salary was paid in lieu of the notice that terminated Harold Mushakabantu's employment on medical grounds.

- 5.292 As for the March 2022 salary, other than Harold Mushakabantu alleging that it was not paid, he did not adduce any evidence to support the assertion. Therefore, the claim not having been proved, it fails and it is accordingly dismissed.
- 5.293 In respect of the shift differential allowance, while this was pleaded, the basis for the payment was not stated in terms of the period for which it was claimed.
- 5.294 Moses Kayamba in cross examination agreed that Grader Operators were entitled to payment of the same if they worked in shifts. However, FQM Trident Limited in its' submissions, contended that it was not provided for in the collective agreement, the contract of employment and the law. He nevertheless stated that only those who performed their normal duties were entitled to the said shift rest allowance.
- 5.295 Consequently, a person who was not performing their normal duties who would otherwise be entitled to the same, would not be paid the allowance.
- 5.296 Harold Mushakabantu has not shown that he claims shift rest allowance for the period that he was on restricted duty or on sick leave, or for the period prior to being placed on restricted duty or sick leave.
- 5.297 Going by Moses Kayamba's evidence that only an employee who performed their normal duties, and who was entitled to the same would be eligible to the payment, Harold Mushakabantu has not proved the claim, and it fails.

5.298 Coming to any other payments that Harold Mushakabantu claims, from paragraph 17 of his witness statement, he testified that on 4<sup>th</sup> May, 2021, he was served a letter by FQM Trident Limited giving notice of his accrued retirement benefits, which he declined to sign, as it was calculated at One (1) months' pay for each year served, as opposed to Three (3) months' pay for each year served.

5.299 In cross examination, he was referred to Clause 19 (3) of the Collective Agreement which is at page 35 of his bundle of documents. That Clause provides that:

***(a) The retirement package for employees on permanent and pensionable contracts shall be replaced by the pension scheme in clause 8 above.***

***(b) The company shall calculate and communicate in writing all accrued retirement benefits as at 30<sup>th</sup> April, 2020.***

***(c) In accordance with the existing conditions, the calculated accrued benefits will be paid/discharged upon an employee's retirement. No payments shall become payable in the event of resignation or dismissal in accordance with current contractual and collective bargaining agreements."***

5.300 In response, Harold Mushakabantu testified that in his understanding, the Union and management agreed that the money pension would be transferred to the pension scheme, and that as a union member, he was bound by that clause.

He did not know whether the pension fund was responsible for paying his pension.

5.301 At pages 47 and 48 of Harold Mushakabantu's bundle of documents, is the Notice of Accrued retirements benefits which is dated 4<sup>th</sup> May, 2021, in the sum of K37, 292.20.

5.302 Then at page 62 of the said bundle of documents, is the Prudential Member Transfer Value Certificate, which shows that Harold Mushakabantu joined the scheme on 2<sup>nd</sup> September, 2015. In the explanatory notes, it states that the retirement benefits would be paid in accordance with the Fund Rules.

5.303 There is no evidence on record to show whether Harold Mushakabantu could access his accrued pension benefits on being discharged on medical grounds, as he did not retire. What is clear is that page 62, states that the funds were accessible in accordance with the Fund Rules. As such, Harold Mushakabantu would have to interrogate the Fund Rules to establish whether he can currently access his accrued pension fund.

5.304 Therefore, in absence of evidence to show that Harold Mushakabantu can access his accrued pension benefits as he was retired on medical grounds, I cannot Order payment of the same.

5.305 As for the claim relating to the salary increment that the Government gave in 2022, as rightly argued by FQM Trident Limited, Harold Mushakabantu was employed on a contract of employment, which among other things, provided for his

salary compensation. Further, as a unionized employee, the Union and management negotiated his conditions of service. He cannot claim payment of a salary increment that the Government awarded to its' workers, as he was not a Government employee.

5.306 That argument consequently fails.

## 6. CONCLUSION

- 6.1 Harold Mushakabantu has succeeded on the claim for payment of damages for unfair medical discharge at Six (6) months' pay. This amount shall carry interest at the average short-term deposit rate, from the date of issue of the Writ of Summons until Judgment, and thereafter at the Bank of Zambia lending rate until payment.
- 6.2 Having succeeded on that claim, Harold Mushakabantu is awarded costs, which shall be taxed in default of agreement. Leave to appeal is granted.

**DATED AT LUSAKA THE 26<sup>th</sup> DAY OF NOVEMBER, 2024**

*S. Kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**

