

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

2004/HP/0417

BETWEEN:

RICHARD MUNYATI MULEYA

PLAINTIFF

AND

TANZANIA ZAMBIA RAILWAY AUTHORITY

DEFENDANT

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN OPEN COURT ON
THE 25TH DAY OF APRIL, 2014**

For the Plaintiff:

N L J Mushota (Mrs) Messrs Mushota & Associates

For the Defendant:

M Mwitumwa, Messrs ML Mukande & Company

J U D G M E N T

The Plaintiff Richard Munyati Muleya commenced proceedings herein by way of a Writ of Summons accompanied by a Statement of Claim against Tanzania Zambia Railway Authority, the Defendant on the 6th day of May 2004.

Both the Writ of Summons and the Statement of Claim were subsequently amended by an Order of the Court on the 1st day of August 2008.

The Plaintiff is according to the Writ of Summons claiming the following reliefs:

- 1. K19,948,032 being lumpsum benefits due to the Plaintiff from the Defendant upon early retirement from employment on***

medical grounds on 1st September 2003 and in terms of Rule 5 (c) and (d) of the Defendants Pension Scheme applicable to the Plaintiff as read with the provisions of the Employment Act of the Laws of Zambia and as per amended Statement of Claim.

2. Further or other relief

3. Costs.

According to the Statement of Claim, the Plaintiff was at all material times an employee of the Defendant between the 1st day of September 1977 to the 1st day of September 2003 when he was retired on medical grounds. Whilst the Defendant is a Statutory Company incorporated in both Zambia and Tanzania under the **Tanzania Zambia Railways Act, Chapter 454 of The Laws of Zambia.**

The Plaintiff avers that upon his retirement on medical grounds, he received his pension benefits but the same were underpaid as the formula used was incorrect and wrong.

According to the Plaintiff, he was not paid any terminal benefits in accordance with the Trust Deed and Rules under the Tazara Pension Scheme and Tazara Collective Agreement.

The Plaintiff then goes on to particularize the Claim as follows:

(a) Pension Benefit: K831,168 x 12

x 26 x 11.81 = K60,169,379.25

50.9

Underpaid by K4,485,354.67

(b) Lump Sum: K831,168 x 12 x 2

= K19,948,032

according to Rule 6a, 5c and 5d of The Trust Deed and Rules. A pension in addition to the Pension payable under Rule 5c.

- (c) **Pension Contribution**: according to **Rule 5a of the Trust Deed and Rules ie** in addition to the Pension benefit, a further pension as secured by his and the employers additional contributions. The Plaintiff has provided a tabulation of this claim from September 1977 to June 2003 totaling K7,831,500.64 inclusive of the employers contribution.
- (d) **Golden handshake**: According to Tazara Collective Agreement of 1st July 2003 - 30th June 2005 Clause 15.4 being 35 pieces gauge 30 of 3 Metres corrugated iron sheets or K2,500,000 in lieu.
- (e) **Free Passes**: Two free passes per annum x 5 years according to TAZARA Collective Agreement of 1st July 2003 - 30th June 2005 per Clause 23.5.

The Plaintiff according to the Statement of Claim has suffered loss and damage arising out of the Defendants refusal and/or failure to settle the claims.

In the Statement of Claim, the reliefs being claimed are stated as follows:

- 1. A lump sum under the various heads as shown above**
- 2. Damages occasioned to the Plaintiff by reason of the breach of Contract, inclusive of special damages**
- 3. Interest on the sums the Court will find to be due to the Plaintiff**
- 4. Further or other reliefs**
- 5. Costs.**

In the Defence and Counter Claim settled by the Defendant, the Defendant in its defence denies that the Plaintiff was underpaid and avers that in fact he was over paid. According to the Defendant, the Plaintiff has been paid all his benefits in accordance with the Defendants Trust Deed and Rules and his Conditions of Service.

It is the Defendants further averment that under paragraph 5 (a) of the Statement of Claim the reducing factor as regards pension benefits has been left out in the pension benefits used in the calculation. While under (b) as regards the lump sum, the Plaintiff having retired on medical grounds under Rule 6 (a), he did not qualify for 24 months lump sum as it is only applicable to retirement upon attainment of 55 years of age.

That under (c), as regards the Pension contribution, the Plaintiff was paid 100 per centum pension, therefore he does not qualify for a monthly pension nor is there a provision in the pension scheme rules for contribution refund under medical retirement. That under (d) as regards the golden handshake, the Plaintiff having retired on medical grounds, did not qualify under Clause 15.4 of TAZARA Collective agreement of 1st July 2003 to 30th June 2005 as this relates and applies to retirement at 55 years of age.

That under (e) as regards free passes, the Plaintiff having retired on medical grounds did not qualify under Clause 23.5 of the Collective agreement as this relates and applies to retirement at 55 years of age.

In respect to the Counter Claim the Defendant avers that when making the payment to the Plaintiff the formula which was used was wrong, hence resulting in an overpayment of K15,553,665.67.

According to the Defendant, the Plaintiff having retired on medical grounds was supposed to be paid a 100 per centum cash pension benefit of K40,130,359.03 as computed by Zambia State Insurance Corporation (ZSIC) and therefore the Plaintiff was wrongly paid the sum of K55,684,025 which was based on the formula on the normal retirement age. It is on that basis that the Defendant is Counter Claiming the sum of K15,553,665.97 together with interest and costs.

At the trial which finally commenced on the 2nd day of May 2013 the Plaintiff (PW) adduced evidence in support of his Claim and did not call any other

witness. PW, testified that he was employed by the Defendant as an Artisan on the 1st day of September 1977.

Amongst the Conditions of Service, was membership to a contributory retirement benefits scheme to which he was contributing 7.5 per centum of his basic salary.

According to PW, in 1999, he became sick and was operated on in 2000 and 2001. That in 2003, he was taken to The University Teaching Hospital (UTH) Medical Board who certified that he be retired on medical grounds. Upon the Defendant's approval, PW was retired on the 1st day of September 2003. PW referred the Court to the letter of appointment appearing on page 11 of The Plaintiffs Bundle of Documents dated 22nd day of October 2003.

According to PW, following the retirement, the Defendant did not pay him all the benefits according to the Trust Deed for the TAZARA Pension Scheme, which deed appears on page 88 of the Plaintiffs Bundle of Documents. PW drew the attention of the Court in particular to page 89,95,96,97 and 98 of the Deed. PW also drew the attention of the Court to page 104, Rule 6 (a) and Rule 13 on page 107.

PW, further testified that his claim is under Rule 6 (a) and that the benefits relating to that are worked out in Rule 5 (a).

PW, further referred the Court to the letter on page 11 of the same Bundle and testified that it indicates the number of years he served. That however the divisive number should have been 50.9 as the age at the time of retirement and not 55 which was used as he had not reached that age. It was PW's testimony that, that resulted in an underpayment of K4,485,354.67.

Further, according to PW, under Rule 5 (a) he is also claiming pension contributions which the Defendant did not pay him, which totals up to K7,831,500.64.

That he is also claiming a lump sum payment according to Rule 6 (a), 5 (c) and 5 (d) of The Trust Deed. That Rule 5 (c) and (d) are inseparable and therefore should be read together. That this amounts to K19,948,032.

PW also drew the attention of the Court to Statutory Instruments No. 12 of 1992.

In his further testimony, PW stated that he is also claiming a Golden Handshake under the collective agreement which appears on page 39 of the Bundle and in particular Clause 23.5 on page 76. That he is also claiming interest and costs and also for hardship which he has undergone in the process of trying to get his benefits.

In cross examination, PW asserted that his claim on pension benefits is as particularized on page 3 of The Plaintiffs Bundle of Pleadings and is based on Rule 6 (a). That the actuarial reduction is shown as 50.9.

According to PW, the actuarial reduction is the age of someone at the time of retirement. When referred to the letter on page 111 of the Plaintiffs Bundle of Documents, PW asserted that it relates to Michael Muyauluka who was paid under normal retirement.

On the part of the Defendant, two witnesses were called. **Godwin Mudenda Simachila (DW1), the District Human Resources Officer** in the employ of the Defendant who testified that the Plaintiff is a former employee of the Defendant. According to DW1's testimony, employees who retire on normal retirement are paid full benefits such as golden handshake, which involves 35 pieces of Iron sheets, lump sum, three free passes for the employee and spouse from Kapiri mposhi to Dar es salaam and leave benefits.

An example of this was Michael Muyauluka as it appears on **page 111** of the Plaintiffs Bundle of Documents. As for those who retire on medical grounds, it was his evidence that they are paid their terminal benefits and leave days. Attention of the Court was drawn to the Plaintiffs letter of

appointment which appears on page 11 of the Plaintiffs Bundle of Documents.

As regards the Pension, it was DW1's evidence that an employee contributes 7.5 per centum of his basic salary and the employer 15 per centum of the same, bringing the total to 22.5 per centum.

That this is according to the Trust Deed appearing on page 1 of the Defendants Consolidated Bundle of Documents.

Further that, apart from the aforesaid contributions, there were additional contributions which were supposed to be made under Rule 4 (b) (iii) upon each actuarial review.

According to DW1, there was no under payment made to the Plaintiff as the formula the Defendant used to pay, there was no actuarial reduction factor and the factorial used was 55. As a result, it was later discovered that the Plaintiff was overpaid by K15,500,000. The witness to that effect drew the attention of the Court to the letter of retirement, which appears on page 74 of The Plaintiffs Bundle of Documents relating to Clause 6 (a) of The Trust Deed.

As regards the claim for the lump sum as endorsed under paragraph 5 (c) of the Amended Statement of Claim, DW1 testified that the Plaintiff is not entitled as he was only being referred to Rule 5 (a) for the determination of the basis for payment of his pension. That according to Rule 6 (a), the Plaintiff is supposed to be paid under Rule 5 (a) which also states that the pension may be paid under Rule 5 (c). Further that, Rule 5 (d) is not referred to under Rule 6 (a) meaning that the Rule has excluded the Plaintiff from benefitting from the lump sum payment owing to the nature of his retirement.

As regards the claim under paragraph 5 (c) of the Amended Statement of Claim, it was DW1's evidence that this claim should not arise because

according to Rule 4 (b)(iii) those payments could only have arisen if there were additional contributions paid by the Defendant at the yearly actuarial review. That there were no actuarial reviews made since the fund came into effect. DW1 further asserted that the total contributions were 22.5 per centum and there were no other contributions by either the Plaintiff or the Defendant.

On the Claim for a Golden handshake under paragraph 5 (d) of The Amended Statement of Claim, DW1 testified that the Plaintiff was not entitled as he did not retire under the normal retirement age, but on medical grounds. As such he did not reach the age of 55 years. That the current practice for those who retire on medical grounds is to treat them in the same manner as the Plaintiff was treated.

On the claim under paragraph 5 (e) of The Amended Statement of Claim as regards Free passes, that equally the Plaintiff was not entitled as he retired on medical grounds.

According to DW1, the Defendant's understanding is that all those who retire under medical grounds, they did not qualify for the benefits under normal retirement since they had not reached the normal retirement age.

In cross examination, DW1 when referred to the letter to Michael Muyauluka on page 111 of the Plaintiffs Bundle of Documents asserted that, he was retired at 55 years and it shows 55 years as a denominator as the normal retirement age.

When referred to the letter to the Plaintiff on page 11 of the same Bundle, DW1 asserted that the Pension was calculated on the same basis as Muyauluka and that as such it was an error which was only realized after they were informed by ZSIC, their Fund Managers, who later gave them a proper formula for all those who separate on medical grounds.

DW1 when referred to Rule 6 (a) on page 104 of the Plaintiffs Bundle of Documents, he asserted that it is talking about any other retirement and further about the substitution of the age. According to DW1, his understanding is that they were supposed to substitute the early retirement age with 55 years. When referred to Rule 5 (c), he asserted that it refers to normal retirement age and Rule 6 (a) also refers to Rule 5 (a) under medical grounds.

DW1 further asserted that the Plaintiff was only paid one lump sum and that he is not entitled to a further lump sum.

That as regards Rule 5 (d), it is an addition to those who retire on normal retirement and not medical.

DW1 asserted that the golden handshake and the free passes, those are found in the collective agreement and relates to those who retire under normal retirement age.

DW2, Captain Phiri, Manager ZSIC Life, formerly ZSIC testified that he is responsible for the administration of Pension Scheme which entails the day to day calculations of members contributions, computation of benefits for members leaving the schemes as well as meeting the Scheme Trustees and employers and updating them on the developments on their Funds.

Further, that he is also responsible for compliance of the scheme with the regulatory bodies such as the Pensions and Insurance Authority and Zambia Revenue Authority.

It was DW2's further testimony that ZSIC Life has been the Administrator and Fund Manager for the Defendant's Pension Scheme from its inception. The Scheme is managed as a deferred benefit scheme plan, meaning that it is a contributory scheme.

The employer and the employees contribute towards the securing of the benefits. The main objective of the scheme being payment of benefits at the normal retirement age of the employee which is 55 years and the benefits are arrived at by way of a pre determined formula enshrined in the Trust Deed Scheme Rules.

According to DW2, the employee may however leave or be separated from the Scheme earlier than the normal retirement age and in that case there are other benefits available as stipulated in the Scheme Rules.

It was DW2's evidence that if an employee is separated on account of Medical discharge, certified by an approved medical practitioner, the benefits shall be computed as if such a member has attained the normal retirement age of 55 years, but the approved benefit which is the annual pension shall be actuarially reduced to the age which he is certified unfit by the Medical Doctor. That the reduced annual pension is the one that will then be used to pay the member the commuted pension or the cash lump sum which can be 100 per centum of the approved pension depending on the set statutory limits.

DW2 further testified that, if a member was making additional voluntary contributions other than the ones specified in the scheme Rules, then the member will be entitled to a further pension purchased by the same additional contributions. The actual payment, if the approved pension is above the statutory allowable commutation limit, then such a member shall be entitled to a monthly pension guaranteed for 10 years in the case of the Defendant or for life if a member survives the guaranteed period.

If it is within the Statutory allowable commutation, then 100 per centum of the accrued pension is paid and the member is not entitled to a further pension.

According to DW2 as regards the Plaintiff, they were notified by the employer that he had been discharged on medical grounds and as such they were asked to compute his entitled benefits, which they did in line with the Scheme Rules. That however as Fund Managers they could not effect payment from the Scheme because the Fund did not have sufficient monies (assets). As such the computed benefits were passed on to the Defendant.

When referred to page 67 of the Defendants consolidated Bundle of Documents, DW2 confirmed that, that was the computation by the Fund Manager. That according to the records that were given to them the Fund had been lacking in terms of the contributions. The Plaintiff was in the scheme for 26 years and according to the data they were supplied at the time of his discharge, he was 50 years of age. In this case, this being a defined benefits scheme plan, the benefits are by way of a pre determined formula enshrined in the Scheme Rules and were calculated on the ground that he was separated on medical grounds.

DW2 further testified that after calculating the pension payable at the normal retirement age of 55 years, as the Plaintiff had not attained the age of 55 years, the pension payable had to be reduced to the age at which he was medically discharged using the actuarial factors that had been agreed with the consulting Actuarial under the Scheme, the employer and the Fund Manager which at age 50 years is 0.658 and based on the reduced pension, 100 per centum cash lump sum was arrived at amounting to K40,130,359.03 which was advised to the Defendant.

DW2's further testimony was that according to the records in their possession and those supplied by the Defendant they did not see any additional voluntary contributions made by either the Plaintiff or the Defendant which would have been used to compute a further pension entitlement for the Plaintiff as provided in the Scheme Rules.

When the witness was referred to page 103 of the Plaintiffs Bundle of Documents, he acknowledged seeing Rule 5 (a) and stated that the additional Pension mentioned there would only have applied if the member was making additional voluntary contributions other than the ones specified in the Scheme Rules.

DW2 further testified that the kind of Pension which the Defendant had put in place is a defined benefit scheme plan where benefits at retirement or medical discharge look at factors such as the last drawn salary, the pensionable service and the pension factor to arrive at the benefits. The contributions made by both the employer and the employee do not come into the picture when computing such benefits except in circumstances where there are additional contributions made other than the ones specified in the Scheme Rules as well as in circumstances where a member is separated earlier than the age of 55 years or under medical discharge. That is where contributions made by both the employer and the member will come into the picture because the benefits payable is a refund of the contributions that were made for the purpose of securing a pension at 55 years, now that a member has been separated not on account of normal retirement age but on medical discharge.

In cross examination DW2 asserted that a pension is the amount or benefits paid to a member who was contributing to a pension scheme in line with the provisions of a particular pension scheme. That it is necessary in our set up to mitigate the economic hardships of a contributing member in his post retirement period.

That according to the record, the Plaintiff left employment in 2003, but the Defendant made the last contribution in mid 1995. DW2 asserted that during the period of non remittance there were negotiations to ensure that all the contributions the employer was deducting from the employees were

remitted to the scheme. That in 2007, some of the contributions for the period 2003 to 2005 were paid for.

DW2 further asserted that the scheme was not suspended during the period of non remittance of the contributions. The relationship continued.

When shown the letter on page 2 of the Plaintiffs Bundle of Documents, DW2 stated that, this was a letter from the Defendant to all the employees which was written during the period of non contribution. That the Defendant had continued to deduct contributions from the employees until 2004, when they stopped but later continued.

According to DW2, during that period, they were still Fund Managers. However after noticing that the assets of the Fund were dwindling, the Fund Manager saw it fit to suspend payment of benefits from the Fund and requested that the benefits for the retiring employees be paid by the Defendant from its own coffers.

That further, each time an employee separated from the Defendant, the Defendant would make consultations or would request the Fund Manager for quotations on the benefit payments.

When referred to page 67 of the Defendants Consolidated Bundle of documents, DW2 acknowledged that, as the quotation which was made in respect of the Plaintiff by the Fund Manager, although he could not recall when it was made as it is not dated. That the computation was based on the provisions of the Scheme as provided under the Trust Deed.

When referred to Rule 5 (a) of the Trust Deed, DW2 asserted that additional refers to those contributions that are made. That the word voluntary is not there. When referred to Rule 5 (c) and Rule 6 (a), he asserted that medical retirement is not the same as normal retirement as in the case of medical retirement, there is a reduction.

At the end of the trial both parties indicated that they would file written submissions. Counsel for the Plaintiff filed submissions on the 6th day of March 2014.

After summarizing the facts and giving a brief background to the matter, restating the Plaintiffs claim, Counsel went on to restate the relevant Rules from the Trust Deed as Rule 6 (a) and 5 (a) and then went on to submit that the Plaintiffs interpretation of Rule 6 (a) is that early retirement if on medical grounds is normal retirement, the only condition is that the normal retirement age of 55 years must be actuarially reduced by the retirees number of years before the retirement date. Counsel then went on to cite Rule 5 (c) and then contended that the Plaintiff was not paid in accordance with the Rules.

Counsel thereafter proceeded to evaluate the evidence of DW1 and DW2 and ended up by concluding that DW2 was not a credible witness as he kept back tracking and was therefore not helpful to the Court.

On the collective agreement, Counsel placed reliance on Clause 15.4 and 23.5 and submitted that there are no conditions attached to those Clauses as they simply refer to a retired employee.

Counsel concluded the submissions by referring to The Minimum Wages and Conditions of Employment Act which I do not find relevant as the Plaintiff was under contract, by virtue of his letter of appointment and the collective agreement and further in terms of the pension was governed by the Trust Deed which documents have been acceded to by Counsel.

Equally I do not see the relevance of the issue of amendment, which has been raised in the submissions. In any case the issue was not pleaded.

Counsel for the Defendant filed submissions on the 3rd day of March 2014 to which was attached earlier submissions which had been filed by Messrs Nhari

Mushemi and Associates who were then Advocates for the Defendant on the 29th day of April 2009.

After restating the reliefs being sought by the Plaintiff as well as Rule 5 (a) and 6 (a) of The Trust Deed and placing reliance on the evidence of DW2, Counsel submitted that the claim for underpayment of the pension benefit in the sum of K4,485,354. 67 must fail as the Plaintiff has come up with his own formula and figures which are wrong and mere fabrications.

As regards the issue of the lump sum in line with Rule 6 (a), 5 (c) and 5 (d) of The Trust Deed as an additional payment, Counsel submitted that Rule 5 (d) does not apply to the Plaintiff as it is not covered by Rule 6 (a).

As regards a refund of contributions in accordance with Rule 5 (a) of The Trust Deed, Counsel again placed reliance on the evidence of DW2 and submitted that, it is clear that the Plaintiff never made any additional contributions and is therefore not entitled to any further pension.

On the issue of Golden handshake and free passes, it was submitted that retirement age under the collective agreement and under the Rules of the Pension Scheme and Authority means 55 years for one to qualify for the aforestated benefits.

Counsel in the submissions reiterated the Counter Claim and submitted that the Plaintiff was fully paid and that he suffered no quantifiable monetary loss.

I have carefully taken into consideration the pleadings and documents before this Court as well as the evidence of the Plaintiff and DW1 and DW2 on the part of the Defendant and the written submissions by both Counsel.

In my view, the reliefs being sought by the Plaintiff are calling upon this Court an interpretation of the relevant provisions of the following documents, namely:

**1. The Trust Deed and Rules for the Tazara Pension Fund and
2. The Tazara Collective Agreement for the Period 1st July 2003 to
30th June 2005.**

In doing so, I have taken into recognizance the fact that it is not at all in dispute and it is in fact agreed by the parties, that the Plaintiff is a former employee of the Defendant who was retired in September 2003 on medical grounds. It is further not in dispute that both the Trust Deed and Rules for the Tazara Pension Fund and the Tazara Collective Agreement aforesated are applicable to the Plaintiff.

The Trust Deed and Rules for the Tazara Pension Fund appears on page 88 to 110 of the Plaintiffs Bundle of Documents. Of relevance and interest to both parties are Rule 5 and 6 of the Rules.

Rule 5 states as follows:

“5. PENSION BENEFIT - RETIREMENT ON THE NORMAL RETIREMENT DATE

- (a) A member on his retirement from the permanent service of the employer on the normal retirement date shall be entitled to a yearly pension equal to one fifty fifth (1/55th) of the members final pensionable salary multiplied by his pensionable service or period of membership as the case may be. In addition the member shall also be entitled to a further pension of such amount as is secured by his and the Employers additional contributions applied towards the purchase of such pension benefits in respect of each such member.
- (b) Not relevant and/or applicable to this matter**
- (c) The pension due to a member shall be paid to him monthly in advance, each monthly payment being equal to one twelfth (1/12th) of the pension and the first payment being made

immediately after his normal retirement date. Payment shall be made until and including the monthly payment due immediately prior to the death of a pensioner. Provided however, that should the pensioner die soon after retirement, pension payments shall continue until 120 monthly installments have been made. Any of such 120 monthly payment falling due after the death of the pensioner shall be paid to his dependants.

(d) Lump sum payments

In addition to the pension payable under Rule 5 (c) the member shall on retirement be paid a lump sum equivalent to twice the annual salary drawn by him at the time of retirement.

(e) Not relevant

(6) EARLY RETIREMENT

(a) ON GROUNDS OF HEALTH

A member may retire from Employer's permanent service at any time before his fifty-fifth birthday if such retirement is on account of any infirmity of body or mind certified as such by a medical doctor approved by the employer, then he shall be entitled to an immediate pension determined on the basis worked out in Rule 5 (a) and actuarially reduced according to the number of years before the normal retirement date. The pension shall be payable in accordance with Rule 5 (c) substituting the early retirement date for the normal retirement date. The amount of actuarial reduction will be determined by the actuary to the insurance corporation and agreed upon with the employer.

(b) Not relevant.

My able interpretation and understanding of Rule 6 (a) is that the Plaintiff having retired early on medical grounds, his benefit entitlement was to be determined on the basis of Rule 5 (a) and actuarially reduced accordingly to the number of years before the normal retirement date.

In the case in **Casu**, the Plaintiff at the date of early retirement was fifty years that being the last celebrated age. Further that the mode of payment was to be in accordance with the modality laid down in Rule 5 (c) and nothing more. Rule 6 (a) which caters for the Plaintiff makes no mention of Rule 6 (d) and in that respect therefore Rule 5 (d) is inapplicable to the Plaintiff. I am therefore in total agreement with the evidence of DW2 that Rule 5 (d) is only applicable to those who retire on normal retirement date as opposed to those on early retirement.

As regards the additional further pension under Rule 5 (a), it is clear that such can only be made if the Plaintiff or the Defendant had made additional contributions towards the purchase of such benefits. As the matter stands, no evidence has been adduced and laid before this Court that either party made such additional contributions outside the 22.5 per centum of the Plaintiffs salary as provided for. Again here, I am inclined to agree with the evidence of DW2 as well as that of DW1.

In the view that I have taken, the Plaintiffs claims under paragraphs 5 (a) (b) and (c) of the Statement of Claim have no merits and are therefore accordingly dismissed forthwith.

The Tazara Collective Agreement earlier alluded to appears on page 39 of the Plaintiffs Bundle of Documents and runs up to page 87.

I note that under the Definitions, the interpretation and understanding of retirement is not provided for. However, under Clause 22.1 of the agreement, this is what it states:

“22.1 RETIREMENT AGE

Retirement age for all permanent employees shall be as provided under the Rules of the Pension Scheme of the Authority, which is fifty five (55) years of age provided further that either party shall give six (6) months notice of intention to retire”.

The import of that Clause is that only normal retirement at the age of 55 years is catered for under the agreement and not any other retirement such as early retirement, regardless of how unfair or discriminatory that sounds. In that respect I agree with the evidence of DW1 that Clause 15.4 and 23.5 relating to a golden handshake and free passes does not apply to employees who retire on early retirement such as the Plaintiff.

Therefore, the practice attaining of not giving entitlement to a golden handshake and free passes for those who leave employment on early retirement is in order.

The claims under paragraph 5 (d) and (c) of the Statement of Claim equally have no merits and fails. Also the attendant claims for damages and interest are accordingly dismissed as the Plaintiff has failed to prove his claim on a balance of probability.

Let me now turn to the Counter Claim by the Defendant. The Defendant according to the letter of 22nd October 2003 which contains the pension benefit calculation, calculated the benefits as if the Plaintiff had reached the normal retirement date as can be seen from the denominator of 55 and as such arrived at the sum of **K55,684,025**: meaning that there was no actuarial reduction taken into consideration given the fact that the Plaintiff retired early on medical grounds at the age of fifty (50) as earlier alluded to. Page 67 of the Defendants Consolidated Bundle of Document contains the retirement calculation sheet which was done by ZSIC, the Fund Managers. It can clearly be seen from the said calculation that it was done in accordance with Rule 6 (a) of the Rules of the Pension Fund as it encompassed the

reduced pension using the early retirement factor of 0.658 at the age of 50 as provided by Hymans Roberston Consulting Actuari on pages 72 and 73 of the said Consolidated Bundle of Documents giving the amount due as **K40,130,359.03.**

As was brought to light during the cross examination of DW2, the retirement calculation sheet on page 67 is undated and as can be deduced from the evidence of DW1, it only came to the attention of the Defendant after they had done their own calculation and paid the Plaintiff. Having taken the two calculations into consideration, I am in total agreement that the Plaintiff was overpaid by the sum of **K15,553,665.97.**

In the view that I have taken, the Defendant has proved its Counter Claim on a balance of probability and is therefore entitled to a refund of **K15,553.67** with interest at the average Bank deposit rate as determined by Bank of Zambia from time to time from the 14th day of September 2005 being the date of the Counter Claim to the date of this Judgment and thereafter at the current Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgment debt.

The Plaintiffs claims having failed and the Defendant having succeeded on its Counter Claim, I shall award costs of these proceedings to the Defendant. Same to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered at Lusaka this 25th day of April 2014.

**JUSTIN CHASHI
HIGH COURT JUDGE**

