ZFE ADVISORY NOTE 3 TO EMPLOYERS:

APPLICATION SCOPE OF LEGAL PROVISIONS ON REDUNDANCY

The current economic challenges Zambia is facing have led to the deeply regrettable necessity to reduce workforce numbers. For any employer contemplating this, please leave it as the very last resort. Cut all other costs first. Then, if possible, use the sum of the 'savings' you would make from *reducing numbers* to instead agree with employees on equivalent and equitable *reduced wages and benefits*[1]. Alternatively (in the absence of express contractual provisions), agree on a 'lay-off' (not 'termination') plan where employees take their paid leave to reduce the employer's book liabilities. Since the statutory entitlement is for leave on full pay, try agreeing on leave on basic pay. For those who do not have accrued leave days, agree on, say, leave at half of basic pay (to differentiate from those who do have leave days). Dialogue. Be open to suggestions from employees on how to reduce costs without reducing numbers. Find the best combination of measures that assist both parties. Whatever the terms of the mitigatory measures, there should be full and informed consent by the employees in writing[2]. Where however reducing the workforce is simply inescapable, kindly bear in mind the following in relation to 'redundancy'.

Employment law, as with the general law of contract, has its roots in the common law. The common law developed through centuries of decisions in the superior courts of the United Kingdom. As with most former British colonies and protectorates, Zambia applies British common law. In the 'hierarchy of laws', the common law is overridden by statutory law. Statutory law, in turn, is overridden by the Constitution (in countries that have a written Constitution).

The common law of contract does not provide for 'redundancy' as such. Its closest 'relation' is the doctrine of 'frustration'. That doctrine entails that the contract is rendered impossible to perform by the happening of an event that could not have been reasonably foreseen or provided for. 'Frustration' is nonetheless a very difficult concept to apply to any type of contract because of its many technicalities. Applying the doctrine to an employment contract also produces another difficulty: since true 'frustration' terminates the contract and absolves the parties from any further obligations, an individual would not have access to many of the protections offered to them had they continued to have the legal status of 'employee'. For instance, if only the common law on frustration applied to an employee who became too incapacitated to complete their employment contract, they would not have access to sick leave pay, workers' compensation benefits, or medical discharge pay.

Statute law therefore intervened to protect employees by creating the concept of 'redundancy'. Under Zambian law, 'redundancy' currently appears under two pieces of legislation: the Employment Act Cap 268 and the Minimum Wages and Conditions of Employment Act Cap 276 – specifically the Orders issued thereunder. The latter only provides a formula for redundancy pay. Conversely, the full provisions on circumstances warranting 'redundancy' and the procedure for it to be carried out are under section 26B of the Employment Act.

Now, section 26B falls under Part IV of the Act. As the title of this Part and its 'application' section 16 unequivocally state, the provisions under Part IV apply only to oral contracts of employment.

[1] 'Surviving load-shedding as a business' – *The Zambian Employer*, Issue 9, Jan. – June 2015

[2] ZFE Advisory note on unilateral variation of employment contracts – July 2015

Under the Employment Act, any employment contract longer than six (6) months or for foreign service must be in writing. Contracts of shorter duration can of course also be in writing. Collective agreements for unionised employees are definitely in writing. Therefore, where the conditions of service are in writing, section 26B technically does not apply.

This interpretation of section 26B has been upheld several times by the Supreme Court of Zambia in, most notably, the following judgments:

- ***Barclays Bank v Zambia Union of Financial Institutions and Allied Workers (2007); and***
- ***Chilanga Cement Plc. v Kasote Singogo (2009).***

The Supreme Court stated as follows in the ***Chilanga Cement Plc. v Kasote Singogo*** case:

> *S. 26 B of the Employment Act, dealing with termination of employment by way of redundancy, does not apply to written contracts. In enacting this provision, Parliament intended to safeguard the interests of employees who are employed on oral contracts of service, which by nature would not have any provision for termination by way of redundancy.*

The Court went on to hold that due to the inapplicability of section 26B to the employee in question (who had written conditions of service), the only authority for the correct procedure to follow was the employee's written conditions of service. As it happened, the conditions of service did not provide for 'redundancy' at all. Section 26B and 'redundancy' as a whole were therefore found inapplicable under the circumstances.

However, be extremely mindful that this is a general rule; and as with all general rules, it has exceptions. One exception is the express or implicit inclusion of section 26B / its contents into the written conditions of service. Express inclusion is by stating that the section will apply or by copying and pasting its contents. Implicit inclusion is by using the provision on other employees. This is because all employees have the right to equal treatment unless there are reasonable grounds for differentiation. Other ways in which the provisions of section 26B may be imputed into a written contract will depend on the circumstances. In any event, written contracts may have their own tailored provisions on redundancy that were structured independently of the contents of section 26B.

This all means that as the law now stands and subject to the rule of non-discrimination outlined above, employers are at liberty to structure 'redundancy' in any way convenient in their written conditions of service, or to even omit it completely. In the latter case, however, it is important to bear in mind a warning the Supreme Court gave in the ***Chilanga Cement*** case. That is, that termination of employment under circumstances akin to 'redundancy' (even when 'redundancy' is not provided for in the contracts) is a planned event. Employers should therefore take care to cushion the termination even if it is done through the ordinary notice provisions of the contract. This is because -

> *Instant loss of a job should be relegated to the realm of instant dismissal for erring employees, or those who have misconducted themselves. Even then the* [disciplinary] *code is invoked, and usually the employee is put on notice through the* [disciplinary] *procedure.*

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