

(Published 30th July, 2010)

Act

No. 27 of 2010

I assent

PROF. BINGU WA MUTHARIKA
PRESIDENT

29TH JULY, 2010

ARRANGEMENT OF SECTIONS

SECTION

1. Short title and commencement
2. Amendment of s. 35 of Cap. 55:01
3. Insertion of a new s. 35A into the principal Act
4. Replacement of s. 53 of the principal Act
5. Transitional
6. Replacement of First Schedule to the principal Act

An Act to amend the Employment Act

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Employment (Amendment) Act, 2010, and shall come into operation on such date as the Minister shall appoint by notice published in the *Gazette*.

Short title and
commence-
ment

2. Section 35 of the Employment Act (hereinafter referred to as the "principal Act") is amended—

Amendment
of s. 35 of
Cap. 55:01

(a) by deleting subsection (1) and substituting therefor the following new subsection as subsection (1)—

"(1) On the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstance, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with Part I of the First Schedule.";

- (b) by deleting subsection (7);
- (c) by renumbering subsections (2), (3), (4), (5), (6) and (8) as subsections (3), (4), (5), (6), (7) and (8), respectively; and
- (d) by inserting immediately after subsection (1), the following new subsection as subsection (2)—

“(2)—(a) Notwithstanding the definition of “wage” in section 3, for purposes of calculation of severance allowance under subsection (1), “wage” means—

- (i) basic salary;
- (ii) housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;
- (iii) car allowance or provision of a car, except to the extent that the car is provided to enable the employee to work;
- (iv) any cash payments made to an employee, except those listed as exclusions in this section;
- (iv) transport allowance to enable the employee to travel to and from work; and
- (v) any other payment in kind received by an employee, except those listed as exclusions in terms of this section.

(b) for the purposes of this section, the car allowance shall be determined as the taxable value of the car calculated in accordance with the provisions of the Taxation Act;

(c) notwithstanding the definition of “wage” in section 3, for purposes of calculation of severance allowance under subsection (1), “wage” does not include the following, unless a contract of employment or collective agreement expressly provides otherwise—

- (i) any cash payment or payment in kind provided to enable the employee to work, including an equipment, tool or similar allowance;
- (ii) a relocation allowance;
- (iii) tips received from customers and gifts from the employer;
- (iv) share incentive schemes;
- (v) discretionary payments not related to an employee's hours of work or performance, including a discretionary profit-sharing scheme;

(vi) employer's contributions to medical aid, pension, provident fund or similar schemes;

(vii) employer's contributions to funeral or death benefit schemes;

(viii) an entertainment allowance; or

(ix) an education or schooling allowance;

(d) the value of payments in kind shall be determined as follows—

(i) a value agreed to in either a contract of employment or collective agreement, provided that the agreed value shall not be less than the cost to the employer of providing the payment in kind; or

(ii) the cost to the employer of providing the payment in kind;

(e) by deleting subsection 3 as renumbered, and substituting it with the following new subsection as subsection (3)—

“(3) The Minister may, in consultation with organizations of employers and organizations of employees, by notice published in the *Gazette*, amend Part I of the First Schedule.”.

3. The principal Act is amended by inserting, immediately after section 35, the following new section as section 35A—

Insertion of
new s. 35A
into the
principal Act

“Gratuity
Act No. . . . of
2010

35A.—(1) Where, pursuant to the Pension Act, 2010, an employer has been exempted from providing pension benefits to employees, the employer shall, on the retirement, termination of employment or death of an employee, pay the employee gratuity in accordance with Part II of the First Schedule.

(2) An employee shall qualify for payment of gratuity if that employee has been employed by that employer for a minimum continuous period of three months in any given year.

(3) The Minister may, by notice published in the *Gazette*, amend Part II of the First Schedule.”.

4. Section 53 of the principal Act is repealed and replaced as follows—

Replacement
of s. 53 of the
principal Act

"Payment of remuneration on termination of employment"

53. Wages and other remuneration due to an employee on the termination or completion of his contract of employment shall be paid within seven (7) days after the termination or completion of such contract of employment."

Transitional

5.—(1) Every employer shall recognize as part of an employee's pension dues, each employee's severance due entitlement accrued from the date of employment of that employee to the date of commencement of this Act.

(2) For employers not providing pension or gratuity prior to the date of commencement of this Act, the severance entitlement referred to in subsection (1) shall be calculated according to the severance formula provided in the First Schedule to the Act in force immediately prior to the date of commencement of this Act.

(3) For employers providing pension or gratuity prior to the date of commencement of this Act, the severance entitlement referred to in subsection (1) shall be equal to the value of the severance entitlement calculated according to the severance formula provided in the First Schedule to the Act in force immediately prior to the date of commencement of this Act, less the sum of the accumulated employer pension contributions made or gratuity paid to the employee prior to the date of commencement of this Act and any growth on such contribution:

Provided that—

(a) the severance entitlement referred to in subsection (1) shall be greater than the sum of the accumulated employer pension contributions made or gratuity paid to the employee prior to the date of commencement of this Act and any growth on such contributions; or

(b) if the severance entitlement is equal to or less than the sum of the accumulated employer pension contributions made prior to the date of commencement of this Act and any growth on such contributions, the severance entitlement shall not be recognized as pension.

(4) The value of the severance due entitlement calculated under subsections (2) and (3) shall be escalated each year from the date of commencement of this Act at the rate of the average annual Consumer Price Index as published by the National Statistical Office from time to time.

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2010

(5) Where, pursuant to the Pension Act, 2010, the employer is exempted from providing pension benefits to employees, the employer shall recognize the severance entitlement under subsection (1) as gratuity due to the employees.

(6) For the purposes of this section, "gratuity" means contractual gratuity as stipulated in an employment contract.

6. The First Schedule to the principal Act is revoked and replaced with the following new Schedule—

Replacement
of First
Schedule
to the
principal Act

"FIRST SCHEDULE

PART I

(s. 35 (1))

SEVERANCE ALLOWANCE

<i>Length of Service</i>	<i>Severance Allowance</i>
Not less than one year, but not exceeding five years 	Two weeks' wages for each completed year of service up to and including the fifth year.
Exceeding five years, but not exceeding ten years 	Two weeks' wages for each completed year of service for the first five years, <i>plus</i> three weeks' wages for each completed year of service from the sixth year up to and including the tenth year.
Exceeding ten years 	Two weeks' wages for each completed year of service for the first five years, <i>plus</i> three weeks' wages for each completed year of service from the sixth year up to and including the tenth year, <i>plus</i> four weeks' wages for each completed year of service from the eleventh year onwards.

In this Schedule, "wages" refers to the current wage of the employee."

PART II

(s. 35A)

SALARY THRESHOLD

1. Where an employer has been exempted under the Pension Act, that employer shall arrange to pay to the employees, on retirement, termination of employment, or death, a gratuity equal to five per cent (5%) of the monthly salary of the employee for each completed month of service.

2. For the purposes of this Part of the Schedule, a gratuity shall be calculated based on the final month's salary received by the employee, multiplied by the number of months served.
3. An employer whose employee's monthly salary is below ten thousand Kwacha (K10,000) may be exempted from complying with the provisions of the Pension Act, 2010."

Passed in Parliament this twenty ninth day of June, two thousand and ten.

M. M. KATOPOLA
Clerk of Parliament