The **Management of GTZ**, represented by its Finance Coordinator, West Africa Program, ALLOUAN, of the City of Monrovia, Liberia APPELLANT Versus Her Honour **Comfort S. Natt**, Judge, National Labour Court, **Mr. Nathaniel S. Dickerson**, Hearing Officer, Ministry of Labour and **Messrs Joe Gborie et al.** all of the City of Monrovia, Liberia APPELLEES

LRSC 14

APPEAL

HEARD: NOVEMBER 17, 2009 DECIDED: JANUARY 22, 2010.

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

On July 13, 2007, Joe Gborlie et al., appellees, by and through their legal counsel, the Tiala Law Associates, Inc. filed a complaint with the Ministry of Labour against GTZ, appellant, alleging unfair labour practices. The appellees complained that appellant declared their positions redundant without the involvement of the Ministry of Labour and that appellant failed to pay them redundancy benefits as required by law. The appellees also complained that during their tenure of employment with appellant, they worked overtime on their rest days — Sundays and national holidays without compensation. The complaint was filed on behalf of 155 former employees.

Two notices were issued by the Hearing Officer citing the parties to a pre-trial conference on July 23, 2007 and on August 1, 2007, in an attempt to amicably settle the matter without going through regular hearing, but the appellant did not honour the citations. The appellant did not honour, also, two notices of assignment for regular hearing into the matter slated for August 9, 2007 and August 13, 2007.

However, on August 31, 2007, both parties, through their counsel, were present for the hearing of the matter. At the first hearing, Joe Gborie commenced testifying for the appellees and the hearing was suspended to resume on September 6, 2007.

When the case was called for hearing on September 6, 2007, the appellant and his legal counsel were absent without excuse. The appellees, through their counsel, prayed for default judgment which was granted.

The appellees first witness, Joe Gborie concluded his testimony and was discharged. One William Zizivly also testified for the appellees. After the testimonies of the two witnesses, the counsel for appellees submitted the case for final ruling and the matter

was suspended pending final ruling.

On the following day, September 7, 2007, Counsellor Nyenati Tuan, then representing the appellant, wrote a letter to the Hearing Officer to which he attached a medical certificate informing the Hearing Officer that he did not attend the hearing on September 6, 2007, due to "sudden illness". According to the Counsellor, the illness "overcame him unexpectedly" and after attending a clinic, he was advised by the doctor to rest for one day. Notwithstanding this letter, the Hearing Officer, on September 26, 2007, entered final ruling holding the appellant liable for unfair labour practices and awarded appellees as follows: a) One Hundred and Fifty Eight Thousand, Four Hundred and Fifty-Nine United States Dollars (US$158,459.00) representing severance pay and b) Two Hundred and Seventeen Thousand, Five Hundred and Eighty-Two United States Dollars and Twenty-Seven Cents (US$217,582.27) representing overtime pay.

On October 5, 2007, the appellant's counsel filed a motion seeking relief from judgment on the ground that his absence from the hearing on September 6, 2007 was due to illness, hence; the Hearing Officer should set aside the default judgment. The motion was resisted, heard and denied and the Hearing Officer confirmed his ruling made on September 26, 2007.

On December 17, 2007, the appellant filed a petition for judicial review with the National Labour Court essentially contending that the counsel for appellant suddenly fell ill which made it impossible for him to have attended the hearing scheduled on September 6, 2007, as such, his absence constituted an excusable neglect for which a motion for relief from judgment should have been granted that; "the judgment was a recipe for fraud", as the appellees had received severance and overtime payments; that the appellees were all employed under contracts of definite duration, therefore, they were not entitled to severance pay in keeping with law but that notwithstanding, the appellant, by its own policy, elected to pay and did pay severance as a gratuitous payment to each of the appellees at the end of each contract, therefore, the appellees' claim for severance lacked legal and factual basis. The appellant further stated in the petition for judicial review that Joe Gborie, the purported representative of the appellees, did not and could not have gotten authorization from all of the appellees, especially Messrs. Ezekiel D. Caesar, Daniel Cleyou, Yarkpazon Flomo, T. Mowooi Faisal, Musu S. D. Redd, Mulbah Clinton, and Teewon Monponwon, since these individuals named as appellees had filed individual actions against the appellant and the cases were ongoing at the Ministry of Labour. The appellant also contended that the entire minutes of the Ministry of Labour were void of evidence establishing the

number of hours worked by each of the appellees to constitute the basis of arriving at overtime payment; that the record was also void of the appellees contracts of employment indicating the dates of employment and their termination dates to serve as a basis for the calculation for the severance pay which they were awarded; that the granting of a default judgment does not entitle the complainant to relief without proof of the allegations on the record, and that a final judgment cannot be rendered on a default judgment without proof of the allegations, and therefore the judgment should be reversed since it is speculative and unsupported by the records of the trial.

On April 22, 2008, more than four months after the filing of the petition for judicial review, the Henries Law Firm, acting as new lawyers for the appellees, filed a motion for enlargement of time and simultaneously filed returns to the petition for judicial review. The returns basically stated that the default judgment was regularly granted and that the evidence adduced supported the award.

The appellant filed a resistance to the motion for enlargement of time, and a reply to the appellees' returns. The appellees filed a motion to strike appellant's reply and the appellant filed resistance thereto. The motion for enlargement of time and the motion to strike the reply were consolidated and heard. The Judge of the National Labour Court, Her Honor Comfort S. Natt, denied the motion for enlargement of time and granted the motion to strike the appellees' returns, leaving only the petition for judicial review before the National Labour Court.

On August 5, 2008, when the petition for judicial review was called for hearing, counsel for appellant made application requesting the National Labour Court to grant the petition for judicial review as a matter of law, since the returns filed by the appellees had been stricken. The Judge ruled that even though the returns to the petition for judicial review had been stricken, the appellees' counsel was permitted to present argument to refute issues raised in the petition for judicial review.

After listening to arguments on both sides, the National Labour Court Judge handed down ruling on October 29, 2008, confirming the ruling of the Hearing Officer with modification.

We quote excerpts from the ruling on the petition for judicial review:

"We are therefore, of the opinion that the respondents are not entitled to severance pay as they were employed for a definite period and they were declared redundant prior to the end of their contract for which the employer should not have terminated their

services before the end of the contract period."

"We, therefore, uphold the ruling of the Hearing Officer with modification that the respondents be given their redundancy benefits in addition to all other benefits they are entitled to."

"...the Clerk of this Court is to have a copy of this ruling forwarded to the Hearing Officer to have respondents' benefits calculated on the situation of redundancy, including any other benefits they are entitled to within two weeks as of the date of this ruling in order to have same read for final determination of this case. Case suspended pending final determination. AND IT ISHEREBY SO ORDERED."

The records show that both the appellees' counsel and the appellant's counsel excepted to the ruling and announced appeals to the Supreme Court. However, before the expiration of ten days required by law for the filling of bill of exceptions, the appellees withdrew their appeal.

On November 21, 2008, the appellees filed a motion to dismiss the appeal announced by the appellant from the ruling on the petition for judicial review made on September 6, 2007 on the ground that the appellant failed to file its bill of exceptions within statutory time. The motion was resisted, heard and denied. The Judge ruled that the ruling of September 6, 2007 was an interlocutory ruling from which no appeal should have been announced to the Supreme Court. It appears that the appellees conceded this issue, since the counsel for appellees, though excepted to the ruling of the Judge, took no step to have appellate review on this point. We will therefore not pass on the question of whether the National Labour Court's ruling made on September 6, 2007 was interlocutory.

On January 16, 2009, the National Labour Court entered final judgment based on the calculation of the Hearing Officer. The total award based on the calculation was Four Hundred and Forty-Two Thousand, Four Hundred and Sixty-Four United States Dollars and Seventy-Four Cents (US$442,464.74), representing redundancy pay and other benefits. The appellant has appealed to this Court for review of the final ruling on a four-count bill of exceptions. Counts 1, 2, 3, & 4 of the bill of exceptions which we consider relevant for the determination of this case:

"1. That the law horary with age within this jurisdiction is that employees of a contract of definite duration, as in the instant case, are not entitled to redundancy payment but Your Honor, in total disregard to the law controlling contract of definite duration,

awarded redundancy payment. In so doing, Your Honour committed reversible error."

"2. That Your Honour committed a reversible error in awarding redundancy payments as though appellees were employees of indefinite duration, whereas, the record is void of such evidence."

"3. That Your Honour committed a reversible error when Your Honour awarded other benefits such as overtime when in fact the record of the case is void of any evidence establishing the fact that appellees are entitled to any over time; in short the ruling is not supported by any evidence produced..."

"4. That Your Honour committed a reversible error by partially confirming the ruling of the Hearing Officer predicated upon a default judgment when the law requires that the respondent/complainants must prove their case by production of sufficient evidence to substantiate their claim as provided for under § 42.6, 1 LCLR, Civil Procedure Law..."

Several issues were raised and argued before us by the lawyers representing both parties, but in our opinion, the two salient issues for the determination of this case are:

1. Whether default judgment was properly granted against the appellant?

2. Whether the evidence adduced by the appellees supported the award of Four Hundred and Forty-Two Thousand, Four Hundred and Sixty-Four United States Dollars and Seventy-Four Cents (US$442,464.74)?

To address these issues, we take a cursory look at our statutes controlling default judgment. ,* 42.1, 1 LCL Revised, Civil Procedure Law provides:

"If a defendant has failed to appear, plead, or proceed to trial, or if the court orders a default for any other failure to proceed, the plaintiff may seek a default judgment against him."

§ 42.6, 1 LCL Revised, Civil Procedure Law provides:

"On application for judgment by default, the applicant shall file proof of service of the summons and complaint, and give proof of the facts constituting the claim, the default, and the amount due."

§ 8, INA Decree # 21 provides:

"If a defendant in a labour case has failed to appear, plead, or proceed to trial, or if the Hearing Officer or the Board of General Appeals orders a default for any other failure to proceed, the complainant may seek a default judgment against the defendant. On application for a default judgment, the applicant shall file proof of service of the summons and complaint and give proof of the facts constituting the claim, the default and the amount due..."

It is clear from the language of the quoted statutes that when a defendant in a labour matter fails to plead or attend upon the hearing of the matter, the plaintiff may seek default judgment against him. This Court has held that it is not the province of the Court to add or subtract from legislation, where the meaning is so plain. The International Trust Company of Liberia vs. Doumouyah et al., 36 LLR 358 (1989).

The appellant does not deny that the case was assigned for hearing on September 6, 2007 at 1.00 p.m. with full knowledge of its counsel. The appellant does not deny, also, that its counsel failed to appear at the call of the case on the scheduled date on which default was granted.

The practice in vogue is that a party who seeks postponement of a matter on account of illness must send a request for postponement together with a physician report to the court/hearing officer and the communication must be received before the scheduled time of trial /hearing. The Hearing Officer in the instant case did not receive a request for postponement from appellant's counsel until a day after the default judgment had been granted. We therefore hold that he did not abuse his discretion in granting the default judgment.

The appellant contended that its counsel's failure to appear for the hearing was due to "sudden illness", a situation of excusable neglect for which the Hearing Officer should have set aside the default judgment granted. Considering the facts and circumstances of this case, we do not agree. The certified records before us show that the appellant's counsel has a history of failing to attend hearing without excuse, even though he is duly notified. We observed that at the start of the hearing of this matter, two notices were issued by the Hearing Officer citing the parties to a pre-trial conference on July 23, 2007 and on August 1, 2007, in an attempt to amicably settle the matter without going through regular hearing, but the appellant's counsel did not honour the citations.

The appellant's counsel did not honour, also, two notices of assignment for regular

hearing into the matter slated for August 9, 2007 and August 13, 2007. No reasons were given for his failure to attend the pre-trial conferences as well as regular hearings to which he received due notices. Under the circumstance, it was reasonable for the Hearing Officer to have concluded, as he did, that the appellant's counsel, out of sheer negligence failed to attend the hearing of September 6, 2007, just as he had done in past instances cited above.

We recognize that in many jurisdictions, including ours, the concept and practice of excusable neglect is allowed, authorizing courts to permit an act to be done after the expiration of the time within which under the law, such act was required to be done. § 1.7, 1 LCL Revised Civil Procedure Law. However, in cases where excusable neglect is used to permit a party to do an act after the statutory period has expired, it must be established that the failure to act is not in consequence of the party's own carelessness or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance, or accident.

What constitutes excusable neglect varies from case to case, depending on the facts and circumstances. In the case before us, the matter was scheduled for hearing on September 6, 2007 at 1.00 p.m. The Hearing Officer did not call the case until 1.45 p.m., waiting for the appellant and/or his counsel to appear. Now, if indeed the appellant's counsel suddenly became ill on the day of the hearing, was treated and a physician report prepared the same day advising him to rest for one day, as he claimed the proper course was for the counsel to have written requesting postponement of the hearing and attach to said letter of request, a copy of the physician report. Such a letter should have been received by the Hearing Officer before the scheduled time for hearing the matter. Even if the counsel was too ill to write, he should have instructed his secretary to write or call the Hearing Officer by phone to at least inform him that the counsel was ill. We hold that the failure of the appellant's counsel to attend the hearing of his client's case or send a timely request for postponement was due to his own negligence. Under the circumstance, the doctrine of excusable neglect will not apply.

It is the duty of a lawyer to be punctual in his attendance to court, and to be prompt and faithful in answering assignments received by him, notifying the time for hearing of his client's case. It is also his duty to the public and to his profession to avoid tardiness in the performance of his professional duty. Rule 21, Code Of Moral and Professional Ethics.

The rule requiring lawyers seeking postponement of a matter on account of illness to write requesting postponement and present physician report of illness before the time

of trial/hearing is cardinal to the practice of law in this jurisdiction. To set this long standing rule aside without convincing evidence is tantamount to opening a floodgate thereby permitting lawyers who are derelict in attending matters affecting their clients to seek unfounded justification.

During argument before this Court, the appellant's counsel contended that the practice before the Ministry of Labour is that once a defendant has appeared and proceeded to trial, that defendant must fail to appear for hearing after the service of two successive notices of assignment upon him before the entry of default judgment. We are not aware of such practice. We hold that if such practice exists at the Ministry of Labour, it is not in line with the statutes controlling default judgment. Nowhere in any of our statute is provision made that a defendant in a labor case must fail to attend upon a hearing more then twice before default judgment can be entered against him. The law requires a defendant in a labour case to be present at every stage whenever the case is assigned for hearing. In the event he cannot be present, he must send a valid excuse, or his unexcused absence would be treated as abandonment of the cause.

In the case: Inter-corn Security System, Inc. vs. Biago Bormesahn et. al. 37 LLR 689 (1994), this Court held that once the case has not been completed, the counsel of record is bound to honour all assignments issued and served on him until the case is finally decided, or he will be presumed to have abandoned the case.

We address, next, whether the evidence adduced by the appellees supported the award of Four Hundred and Forty two Thousand, Four Hundred and Sixty-Seven United States dollars, Seventy-Four Cents (US$442,467.74).

We hold that the evidence adduced by the appellees did not support the award.

As indicated above, on application for judgment by default, the applicant shall file proof of service of the summons and complaint, and give proof of the facts constituting the default and the amount due. In other words, even though a default judgment is granted the plaintiff, he is under obligation to prove his case by preponderance of the evidence.

In the case: Salala Rubber Corporation v. Francis S. Y. Garlawolu, 39 LLR 609 (1999). This Court held that a default judgment is an imperfect judgment that must be made perfect by the production of sufficient evidence by the plaintiff to substantiate his claim.

This Court has also held that the granting of a default judgment does not entitle the complainant to relief without proof of the allegation set forth in the pleadings, and a final judgment cannot be rendered on a default judgment without proof of the allegations in the pleadings. The Management of Forestry Development Authority v. Moses Walters, 34 LLR, 777 (1988).

In the case before us, the evidence produced by the appellees pursuant to the entry of default judgment is grossly lacking and does not support the award given.

Let us look at the testimonies of the witnesses.

On August 31, 2007, Mr. Joe Gborie testified that he was employed by GTZ as truck conductor. When asked on the direct examination to say what he knew about the complaint of unfair labour practice he and others had filed with the Ministry of Labour against his former employer, GTZ, his answer was "we have prepared a list of the redundant employees, which contains the dates of employment, tenure of service, signatures and salaries". He identified the list prepared by them, letters written to some of them by the management of GTZ informing them that their contracts would not be renewed upon their expiry and letters of recommendation in favor of some of them written by the management of GTZ to would be employers. This is the extent of his testimony. (See sheets 2, 3, 4 & 5, minutes of hearing, Ministry of Labour, Thursday, September 6, 2007).

The second witness for the appellees, William Zizivly, testified that they were before the Ministry of Labour for redress because their former employer, GTZ, declared them redundant without any knowledge of the Ministry of Labour. He further testified that they had worked overtime without pay and that they worked on their rest days and holidays without pay. When asked on the direct examination what time he was required to be at work he said they all worked from 8:00 A.M. to 5: p.m. He also identified the list prepared by them, letters written to some of them by the management of GTZ informing them that their contracts would not be renewed upon their expiry and letters of recommendation in favor of some of them written by the management of GTZ to would be employers. (See sheets 6, 7, 8, 9, & 10, minutes of hearing, Ministry of Labour, Thursday, September 6, 2007).

Based on the foregoing testimonies, the Hearing Officer made ruling against the appellant, GTZ. We note that the appellees themselves testified to and introduced into evidence letters written to them by the appellant specifically stating that their contracts would not be renewed. This suggests that the appellees were employed on contracts of

definite duration. We note, on the other hand, that the appellees did not introduce into evidence, their own employment contracts or letters of employment. And no notice was served on the appellant management to produce the employment records of the appellees in such cases made and provided. How then, did the Hearing Officer and the National Labour Court conclude that the appellees were employees employed under contracts of indefinite duration? And what authentic records did they rely on in determining the appellees' dates of employment, wages/salaries earned and overtime worked, if any? According to the testimony of the appellees' second witness, William Zizivly, they worked from 8: a.m. to 5:00 p.m. Without clearly establishing proof of overtime, what was the basis for the overtime pay awarded? We hold that it was an error to have relied on the self-serving list prepared by the appellees themselves which was not an official record of their employment.

We further hold that under the Labour Law of this country, there is no provision that requires an employer to pay redundancy benefits to employees employed under definite contracts. Rather, the law is that when an employer dismisses an employee who is employed under a definite contract, that employee is entitled to receive full remuneration for the unexpired portion of the contract.

§ 1508(1) of the Labour Law provides:

"No employer shall dismiss any employee with whom he is bound by a contract for a definite period before the end of that period unless it is shown that the employee has been guilty of gross breach of duty or a total lack of capability to perform. "Where this has not been proven, the dismissed employee shall be entitled to claim full remuneration for the unexpired portion of the contractual period." [Emphasis supplied.]

After having correctly held in her ruling that the appellees were employed under contracts of definite period, we cannot understand why the judge of National Labour Court, Her Honour Comfort S. Natt, awarded the appellees redundancy benefits in the face of the law quoted supra. Her ruling is in clear error of the law.

Contained in the appellees' complaint is the allegation that during their tenure of employment with appellant, they worked overtime on their rest days — Sundays and national holidays without compensation.

§ 701(1) of the Labour Law provides:

1. Subject to the provisions of this Chapter, no employer shall cause or require any employee to work longer than eight hours in any one day or forty-eight hours in any one week, except to the extend that any hours worked in excess thereof shall be paid in accordance with the provisions of § 703."

§ 703 provides:

"Work in excess of the number of hours specified in § 701, Sub-section 1, shall be paid for at a rate not less than fifty percent above the normal rate."

Perhaps, the appellees have a genuine cause on account of overtime worked but not paid as they claimed. But as we said earlier, no authentic evidence was presented to establish this allegation.

In view of the foregoing, we have decided in the interest of substantial justice, to reverse and remand this case so that full investigation will be conducted between the appellant and appellees for the purpose of establishing a) whether the appellees were employed under contracts of indefinite duration and are entitled to redundancy benefits and b) whether the appellees are entitled to overtime pay. The appellees are hereby granted the option to file a new complaint or amend their original complaint filed against the appellant, whatever option they may elect, and the appellant shall be notified to fully participate in the hearing.

The Clerk of this Court is ordered to send a mandate to the National Labour Court to order the Hearing Officer, Ministry of Labour, to resume jurisdiction over this case and proceed accordingly. Cost to abide final determination. IT IS SO ORDERED.
CASE REVERSED AND REMANDED.

J. Johnny Momoh,, Albert S. Sims and Betty Lamin Blamoh for appellant. *Cooper W. Kruah* for appellees.