THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 0045 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

ROSE MARY NALWADDA :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA AIDS COMMISSION ::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application for judicial review was brought under Rules 3 – 10 of the Judicature (Judicial Review) Rules 2009 (S.I No. 11 of 2009), Section 98 of the Civil Procedure Act, Sections 14, 33 and 36 (c) of the Judicature Act and O.51 r.6 and O.52 rr (1), (3) and (6) of the Civil Procedure Rules. The applicant is seeking the prerogative order of Certiorari by way of judicial review in respect of the decision taken against her by the respondent whereby she was dismissed from employment on grounds of insubordination and absence from duty without excuse.

At the conferencing, the parties agreed that:

1. The applicant was an employee of the respondent.
2. Her services were terminated.
3. The contract of employment is based on Human Resources Policy Manual of 2007.

There are ***two*** issues for determination:

1. Whether the termination of the applicant by the respondent was lawful.
2. Whether the applicant is entitled to the reliefs sought.

Issue No.1: Whether the termination of the applicant by the respondent was lawful.

It is trite law that a master may terminate the contract with his servant any time and for any reason or for none at all: ***Okori vs UEB [1981] HCB 52.***

However, before an employer can terminate the contract of employment, he must follow what he agreed with the employee in the contract of service and in the rules and regulations governing the employment. What amounts to unlawful dismissal was considered and determined in ***Jabi vs Mbale Municipal Council [1975] HCB 191.*** It was held in that case that it is generally accepted that a dismissal is wrongful if it is made without justifiable cause and without reasonable notice. The notice required might be determined from the contract of service itself or custom or any written regulations governing the employment of which the plaintiff was a party. In the instant case, the contract of employment between the applicant and the respondent is governed by the Human Resources Policy Manual, 2007.

From the pleadings, the facts that led to the dispute herein are not complex. The applicant was an employee of the respondent in a senior management position of Director of Planning and Monitoring. In September 2009, she applied for leave which according to the leave application Form that she personally signed indicated that the leave was to run from 21st September, 2009 to 22nd December, 2009. She was to report back for duty on 23rd December, 2009 but she didn't do so. The respondent's Director General, Dr. Kihumuro Apuuli, interdicted her on 14/01/2010 for alleged abscondment and insubordination. She was later dismissed. Hence this case.

From the pleadings, it was a requirement that prior to proceeding on leave, the employee concerned had to ensure that he/she handed over office to the officer appointed/assigned to take over his/her duties in his/her absence or to the supervisor. She did neither of the above. She claims in paragraph 8 of her affidavit that she prepared a handover report on 4/08/2009 with a view of handing it over to a one Rose Rujumba Kabugo who was reporting to her and, in paragraph 11 thereof, that when she informed the Director

General (DG) about her intention, to do so, he objected and promised to communicate to her in writing the person to hand over the report to but never did so. This is of course her word against that of the DG. From her own evidence, however, she chose who to handover to when the regulations required her to hand over to the officer appointed/assigned to take over her duties or to the supervisor. She has not said that she took the handover report to the DG and he declined to receive it. From the evidence on record, she left office without handing over to anybody in contravention of the Human Resources Policy Manual.

She has also argued that the Leave Form was filled in by another person, one Nabanja. This has not been confirmed to court as Nabanja did not swear any affidavit. Even then the applicant signed the same as her own thereby authenticating it. I do not think that Nabanja, if at all she filled the details therein, dreamt of the dates as to when the applicant's leave would start and end. The presumption is that she acted on the instructions of the applicant. She claims that the proper time when her accumulated leave would end was 22nd January 2010. If there was any such oversight on her part, she did not bring it to the attention of her employer to seek extension thereof.

She claims in paragraph 19 of her affidavit that while still on leave she was called by the Human Resource Manager of the respondent on 14/01/2010 inquiring from her as to why she had not reported for duty and she explained to her that her leave was still running up to 22nd January 2010.

From the pleadings, this assertion on her part is unverified. Even then the fact remains that her extension of leave was unauthorized by the respondent. Under the Manual, unauthorized absence from duty/absence from duty without genuine cause amounts to a minor misconduct (under Section 14, N.1.2.1).

This reason alone coupled with the applicant's failure to make a formal handover before going on leave in my view entitled the respondent to subject the applicant to disciplinary proceedings. There was reasonable cause for the respondent to do so.

The applicant has averred in paragraph 28 of her affidavit that before her interdiction she was never given an opportunity by the respondent to defend herself against the allegations.

Under Section 14, N.14.3.2 of the Manual governing interdictions/suspensions, where an employee is suspected of having committed a serious offence or against whom criminal proceedings have been instituted, a report shall be made by his/her head of Department to the Director General who shall ask the officer to make a representation within a specified time.

I have already indicated that under the Manual unauthorized absence from duty amounts to minor misconduct whereas insubordination amounts to serious misconduct. She faced both categories of misconduct. From the pleadings, the responsible officer, the DG, considered that the public interest required that the applicant ceases to perform the functions of her office and proceeded to interdict her. Her complaint is that she was not heard before she was interdicted. I do not think that this complaint is sustainable. An interdiction is merely an interim measure taken against an officer pending a further determination of the complaint against him/her by the appropriate authority. It is not a final decision.

See: His Worship Aggrey Bwire vs A. G & Anor CACA No. 09 of 2009.

This now takes me to the events that led to her dismissal.

From the affidavit of the DG, the respondent does not have a Disciplinary committee. However, matters of termination and/or dismissal are handled by Finance & Administration Committee, FINAC, on behalf of the Board. He has attached a copy of the Board Working Paper, No. I/BRB/09 to support his claim.

The applicant has feigned ignorance of it and says she was not aware of the Board Working Paper. Whether she was aware of it or not, she appeared before a Committee on 21/01/2010 and challenged its power to handle the case against her. Although the usual procedure is for the interdicting authority to issue a letter of interdiction and follow it

with charges indicating the law or the regulation which was allegedly infringed, no charges were framed in the instant case. When she appeared before FINAC she raised a number of concerns. She pointed out to the Committee that the Board members she was appearing before had never been introduced to the staff of the respondent; she had doubts whether FINAC was legally constituted; wanted to know its membership and in what capacity some members were in attendance for, etc. She concluded that the Committee she was appearing before was Not FINAC and requested that her case be forwarded to the full Board for hearing and determination.

From the pleadings, I do not think that seeking clarification on the above points was entirely out of order or evidence of arrogance. From the composition of FINAC as per the Board Working Paper, only two of out of the three members were present. However, there were other people in attendance. They were strangers to her and she was entitled to know in what capacity they were in attendance.

Article 28 (1) of the Constitution provides that in the determination of civil rights and obligations, or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an ***independent and impartial court or tribunal*** established by law (emphasis mine).

Dr. Kihumuro Apuuli had preferred charges against her. His presence on the Committee was unnecessary. In ***Cooper vs Wilson & Others [1937] 2 K. B. 309*** the court observed that the presence of the Chief Constable, whose mind was made up in advance and who was in effect the respondent to the appeal, was fatal to the validity of Watch Committee's decision. Scott L. J could not have put it better when he said (at p. 344).

> ***"…….The risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such possibility is sufficient to deprive the decision of judicial force, and to render it a nullity."***

The same Dr. Kihumuro; the Chairperson of the Committee, Ms Annette Biryetega; Dr. Jesse Kagimba and Ms Abbie Hope Kyoya, participated in the Board decision that terminated the applicant's services. Surely a person who previously chaired or participated in an investigation in which the aggrieved party was condemned, would obviously be perceived as biased in a hearing or trial of the same victim to justify the result of the investigation.

See: Eng. John R. Ssenfuma vs The Engineers Registration Board HCT-00-CV-CA-0026-2009 (unreported).

The other two people in attendance, Dr. Jesse Kagimba and Ms Abbie Hope Kyoya (Board Member and Manager, HR & A (Minute recorder) do not appear on the Board's Working Paper as members of FINAC. In these circumstances, court cannot fault the applicant's expression of her legitimate concerns as to the legitimacy of the Committee that had been convened to determine her fate. It had in my view been improperly constituted.

The committee nonetheless granted the applicant's request and forwarded the matter to the full Board.

This was FINAC's conclusion:

> ***"The meeting noted that Ms Nalwadda was simply derailing as there were other items on the agenda to be discussed. The meeting further noted with concern that Ms Nalwadda completely defied the FINAC and totally failed to recognize and disregarded the members present.***
>
> ***The meeting noted with much concern that this situation was very unfortunate and the Commission cannot continue working with such type of staff.***
>
> ***Staff discipline has to be addressed seriously by management."***

From the above conclusion, clearly the meeting took the view that the applicant had deliberately snubbed them and recommended stern action against her. I do not think that having upheld her objection and forwarded the matter to the Board without a decision they were entitled to make such negative comments about her. They did so to influence the full Board decision.

From the pleadings also the Board sat on 27/01/2010 and noted that FINAC acted properly and their recommendations be upheld, that is, having the services of the applicant terminated as per the terms and conditions governing employment in the Uganda Aids Commission.

I have already indicated that the right to a hearing before being condemned is enshrined in Article 28 (1) of the Constitution. A fair trial, or a fair hearing, under this Article of the Constitution means that a party should be afforded opportunity to, inter alia, hear the witnesses of the other side testify openly; that he should, if he chooses, challenge those witnesses by way of cross-examination; that he should be given opportunity to give his own evidence, if he chooses, in his defence; that he should, if he so wishes, call witnesses to support his case: ***Charles H. Twagira vs Uganda Criminal Appeal (S.C) No. 27/2003.***

The Board considered her case, it would appear, not as a Disciplinary Committee. They took an administrative decision to terminate her services. They were of the view that her communication with the Donors requesting them to recall their money was unacceptable; that she was supposed to report back for duty on 23/12/2009 but didn't; that she had exhibited lack of management ethics and that her conduct amounted to gross misconduct. They decided that her services be terminated henceforth and so it was.

As I understand it, the legal position is that the respondent was under no duty to give reasons for dismissing the applicant. It was sufficient if the Board thought that the applicant was guilty of gross misbehaviour amounting to misconduct justifying dismissal under the staff regulations. However, since the Board saw it fit to give reasons for termination of her services, as per the letter of dismissal dated 3/3/2010, it is clear that the

Board considered the accusations against her proved and yet she had not had the opportunity to defend herself before any properly constituted FINAC.

The implication is that she was condemned unheard, without her matter being heard by an independent and impartial court or tribunal established by law.

It cannot be disputed that according to the Manual, Section 14, N.14.3.5 thereof, the respondent had the power to terminate her services. It provides:

> ***"No provision in these disciplinary rules and regulations shall be deemed to preclude the UAC from terminating/dismissing the employee in the interest of the Commission, after due inquiries have been made, instead of administering any disciplinary measures prescribed under the preceding paragraphs of these regulations."***

In most circumstances, at common law and even under the Employment Act 2006, an employer is entitled to bring an end to the employment relationship it has with the employee. The regulation in the respondent's Manual perhaps re-states the position at common law. However, to bring an end to the employment relationship, the employer must do so lawfully. In order to end the employment relationship lawfully, there are a number of potential factors the employer must recognize and deal with and a number of things the employer must provide to the dismissed employee upon termination. Central to these factors is the concept of reasonable notice. Most employers fail to understand their obligations at law and therefore fail, as herein, to provide reasonable notice to the employee. And this brings me to the concept of wrongful dismissal.

To my mind a wrongful dismissal occurs when the employer terminates the employment relationship with the employee in a manner that fails to provide to the employee what the law requires in the circumstances. Each employment termination, and the factors that make that termination either rightful or wrongful, is determined on the facts of that particular termination. In the instant case, for instance, whereas the applicant was a senior employee of the respondent, her employment was terminated without notice or

payment in lieu thereof. She was merely told that she was not entitled to any termination benefits.

Thus in ***Jabi vs Mbale Municipal Council***, supra it was held that it is a fundamental requirement of natural justice that a person properly employed was entitled to a fair hearing before being dismissed on charges involving a breach of a disciplinary regulations or misconduct. The court further held that it was perhaps a different case if the employee was on temporary terms, but an employee on permanent terms is entitled to know the charges against him and to be given an opportunity to give any grounds on which he relied to exculpate himself. Where that was not done, it could properly be said that the dismissal was wrongful.

I have addressed my mind to the arguments of both counsel on this point. It is not necessary to reproduce them here as they are in writing and therefore form part of the record herein. Suffice it to say that learned counsel for the respondent appears to have found much solace in the said general powers of the Board, especially the one that allows the respondent to terminate/dismiss an employee in the interest of the Commission without going through the disciplinary proceedings process. I am of the view that learned counsel has read too much into it. The regulation in the Manual must be read together with the Constitutional safeguard as to fair trial or hearing.

In ***Ridge vs Baldwin & Others [1964] A.C 40***, one of the leading authorities on termination of employment relationships, it was held, and I agree, that even if the respondents had power of dismissal without complying with the regulations, they were bound to observe the principles of natural justice. It was held in that case that a decision reached in violation of the principles of natural justice, especially the one relating to the right to be heard, is void and unlawful.

In ***Eng. Pascal R. Gakyaro vs Civil Aviation Authority CACA No. 60/2006***, Court of Appeal observed that the appellant was being deprived of an office of a public character with the attendant statutory benefits. That the principles of natural justice demanded that he be given an opportunity to be heard in his defence for whatever worth it might be.

That the overall effect of a denial of natural justice to an aggrieved party renders the decision taken void and of no effect.

Relating the same principles to the instant case, in view of the uncontrovested evidence that without hearing the applicant FINAC made a recommendation that the Commission could not continue working with the applicant and the Commission went ahead to implement the said recommendation without hearing the applicant, it is in my view immaterial that the respondent thought that the applicant was guilty of gross misbehaviour amounting to misconduct justifying dismissal under the Staff Manual. She was condemned unheard.

In these circumstances, I have come to the conclusion that in the case before me the decision of the Board to terminate the applicant's services was null and void. Accordingly, the answer to the first issue is in the negative.

Issue No. 2: Whether the applicant is entitled to the reliefs sought.

This case is of course one of the many in this Division where it is becoming fashionable these days to seek judicial review orders even in the clearest of cases where alternative procedures, like filing an ordinary suit on the plaint for recovery of damages for wrongful termination would be more convenient. I say so because time and again courts have held that the right of the employer to terminate the contract of service, whether by giving notice or incurring a penalty of paying compensation in lieu of notice for the duration stipulated or implied by the contract cannot be fettered by the courts. If any authority were required for this, ***Barclays Bank of Uganda vs Godfrey Mubiru SCCA No. 1 of 1998*** would do.

In the instant case, the applicant has made only two prayers:

1. An order of certiorari to call and quash the decision of the respondent dismissing the applicant.
2. The costs of this application be in the cause.

It is trite that judicial review can be granted on three grounds, namely:

Illegality; irrationality and procedural impropriety – <u>Council of Civil Service Unions vs Minister for the Civil Service [1985] 1 A.C 374</u>

The first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it aims at the decision-making process rather than the content of the decision itself. In view of what I have stated above, it is plain that all the afore mentioned grounds are applicable to the proceedings and/or the decision of the respondent. I would allow them. In other words the respondent's decision must be quashed as rules of natural justice were flouted. It is void ab initio even if the Board would have come to the same decision had the rules of natural justice been complied with.

I would therefore answer issue No. 2 in the affirmative and stop there in order not to prejudice any further action either party may wish to take against the other after this judicial review.

Orders accordingly.

Yorokamu Bamwine
JUDGE
25/08/2010

25/08/2010
Mr. Ham Mugenyi for the respondent
Mr. David Okot for the applicant on brief for Mr. Muganwa
Applicant present
Ms Hope Kyoya, respondent's representative, present

Court:

Ruling delivered.

Yorokamu Bamwine

JUDGE

25/08/2010