THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE 067/2014

ARISING FROM HCCS 107/2014

ANGELLA BIRUNGI …….. CLAIMANT

VERSUS

NLS WASTE SERVICES …..……... RESPONDENT

BEFORE:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR. EBYAU FIDEL

2. MR. BAGUMA FILBERT

3. MS. JULIAN NYACHWO

AWARD

BRIEF FACTS

This claim was brought for a declaration that the respondent breached the contract

Of employment, recovery of special damages of Ugx. 7,261,307/=, General damages of 30,000,000/=, punitive damages of 20,000,000/=, exemplary damages of 20,000,000/- interest at 25% per annum of the total amount, and costs of the suit.

The Claimant was employed by the Respondents as a client's relations manager from the 1/07/2012 on a fixed term contract of 3 years earning Ugx. 266,470/-per month. She was entitled to NSSF allowance, medical coverage and annual leave and other leave as set out in the Respondents human Resources Manual. According to her she efficiently and effectively executed her duties. According to her she applied for and was granted maternity leave of 90 working days from the 30/08/2013 to 30/11/2013. While on maternity leave, on the 2/09/2013 the Respondents Business development Manager informed her via e- mail that she had been terminated with effect from 19/08/2013. Counsel for the claimant proposed arbitration in accordance with the contract of employment which was ignored by the respondents hence this suit. She claims she was neither given reasons for her dismissal nor a hearing.

The respondents on the other had state that the claimant was dismissed in accordance with her contract of employment and the employment Act 2006. That at all times the claimant was in total breach of her contract of service, a habitual late comer and absentee from work and disrespectful of the respondent's clients she was entrusted to handle, among others. She was duly paid 1 month in lieu of notice. Therefore the dismissal was lawful and she was not entitled to any of the remedies sought.

ISSUES

1. **Whether the claimant was granted maternity leave by the respondent.**
2. **Whether the claimant was lawfully terminated by the respondent.**
3. **Whether the claimant was entitled to the remedies sought.**

SUBMISSIONS

Before submitting on this issue Counsel for the claimant set out both legislative and case law governing dismissal and termination. It was submitted for the claimant that she had applied for and was granted maternity leave by her line manager, the general manager at the time, a one Gladys Namakula, from 23/08/2013 to 27/08/2013. According to Counsel the claimant was entitled to 60 days of maternity leave, yet she was terminated before the leave period had ended.

According to him the termination letter dated 19th August which had been issued to her on the 18/09/2013 alleged that the claimant had been disrespectful to respondents customers, she was insubordinate and always absent from work without permission. He asserted that the claimant had not been given a hearing before a disciplinary committee thus contravening the principles of natural justice and equity and the payment in lieu of notice had been made on the 13/09/2013 as opposed to the 19/08/2013 when it fell due.

He insisted that the claimant was serving under a fixed term contract which could only be terminated if it expired and was not renewed within one week from the date of its expiry. He opined that in the instant case the claimants contract was terminated without a hearing therefore it was unlawful.

In reply Counsel for the respondent argued that according to the respondents Director Naiga Lydia, the claimant was a perpetual absentee from work without permission, a habitual late comer and was disrespectful of both her supervisors and the respondent's clients. Counsel cited 4 instances in the "cloak in and out book" when the claimant reported late to work ,at 9.45am on the 3/08/2013, at 9.00 am on the 8/8/2013, at 9.16am on the 9/08/2013 and at 8.29 am on the 14/08/2013. He also submitted that although the claimant had tried to deny it, she had always been warned about her conduct, by Naiga Lydia via e- mail. It was his submission that these warnings amounted to an explanation as was required by Section 66 of the employment Act 2006. He insisted that the trail of e- mails was sufficient and did not require the respondent to institute a hearing. In his opinion the claimant had been given sufficient time to respond to the infractions levied against her which she did not therefore she could not claim she was not heard.

He asserted that the claimant had obtained maternity leave illegally because she had not followed the proper channels to ensure that her leave form was signed by both the General Manager Gladys and the Director Niaga as per Policy. It was his submission that by obtaining maternity leave illegally the claimant had breached her contract of employment.

RESOLUTION OF ISSUES

After carefully perusing the record and considering both submissions and the law, we hereby resolve as follows:

1. **Whether the claimant was granted maternity leave by the respondent.**

Section 56 of the employment Act provides that;

Section 56. Maternity leave

(1) A female employee shall as a consequence of pregnancy, have the right to, a period of sixty working days leave from work on full wages hereafter referred to as "maternity leave" of which at least four weeks shall follow the child birth or miscarriage.

(2) A female employee who becomes pregnant shall have the right to return, to the job which she held immediately before her maternity leave or to a reasonably suitable alternative job on terms and conditions not less favorable than those which would have applied had she not been absent on maternity.

(3) In event of sickness arising out of pregnancy or confinement, affecting either the mother or the baby and making the mothers return to work inadvisable the right to return mentioned in subsection (2) shall be available within eight weeks after the date of childbirth or miscarriage.

(4) A female employee is entitled to the rights in subsection (1) and (2) and (3) if she gives not less than 7 days' notice in advance or a shorter period as may be reasonable in the circumstances, of her intention to return to work

(5) The notices referred to I subsection 4 shall be in writing if the employer so request…."

It is not disputed that the claimant applied for leave. what is in dispute was that her leave application form was not signed by her supervisor. The record shows that the she applied for leave on the 30/07/2017 and it was approved by the General Manager. This was not controverted by the General Manager Gladys. The director's (Naiga) e-mail to staff, dated 2/04/2013, (Supra) stated that all staff intending to take leave had to fill a leave form which had to be signed by their various supervisors and approved by the General Manager. The assertion that the leave was illegal because the supervisor had not signed the leave form in our

opinion does not hold water because the leave form on the record indicates that the General Manager approved it notwithstanding that the supervisor had not signed it.

In her testimony in cross examination, CW3 Gladys Namakula, stated that she was the General Manager at the time the claimant applied for maternity leave. She said she had signed the leave form as the general manager. She further testified that by the time the claimant was terminated she had ceased to be the General Manager. RW1, one Naiga Lydia in her testimony confirmed that CW3 had been demoted because she was not following procedure. We believe that the General Manager correctly and legally signed the leave form even if the supervisor had not signed it. We believe that it was authentic. It is an afterthought for the respondents to deny that the leave had not been approved simply because the supervisor did not sign.

We are satisfied that the claimant fufilled the requirement to apply for maternity leave as provided for under section 56 of the Employment Act, 2006 and in line with the Directors warning to staff about the procedure for applying for leave. Even if she had applied for the leave and it was not granted to her, she was entitled to take the leave any way. She was pregnant and as nature dictates at some point she had to deliver her baby and in order for her to do so she had to take leave. Section 75 of the employment Act 2006, provides for situations that do not constitute fair reasons for termination/dismissal of an employee such as,

Section75:

"… (a) a female employee's pregnancy or any reason connected with her pregnancy,

(b) the fact that an employee took, or proposed to take leave to which he or she was entitled to take under the law or a contract..."

The law entitled the claimant to maternity leave whether it had been granted to her or not. In this case she actually followed the required procedure before taking the leave. In the premises we hold therefore that the respondent lawfully granted the claimant maternity leave as prescribed under section 56 of the Employment Act, 2006.

2. **Whether the claimant was lawfully terminated by the respondent.**

The claimant's contract was a fixed term contract of employment with a provision for termination by way of notice or payment in lieu of notice before the expiry of the contract. A fixed term contract can only be terminated on the date agreed upon by both parties, unless there is a material breach or repudiation of contract. The rationale is that the parties must commit to and honour their commitment under the contract. see **UGANDA REVENUE AUTHORITY VS WANUME DAVID KITAMIRIKE (CIVIL APPEAL NO 43 OF 2010) [2012] UGCA 3, GULLANHAI USHILLINGI VS KAMPALA PHARMACUETICALS LTD, SCCA No. 7 OF 2004 BARCLAYS BANK VS GODREY MUBIRU CA No. 1 OF 1998.**

Clause 1.1.4 of the claimant's contract provided that;

"… the contract can be terminated by giving three (3) months' notice by NLS or the employee and in addition to the above, NLS may terminate the contract without notice in case of gross misconduct.

Clause 1.1.7 of the claimant's contract of employment provided that;

"NLS may at any time terminate the employees' contract, on giving the employee three months (3) notice or one month's pay in lieu of notice. The employee may at any time terminate this contract on giving NLS one months' notice in writing."

The respondent asserted that they had terminated the claimant because she had breached her contract, according to them the breach was as a result of the claimant being disrespectful to their customers, coming perpetually late to work and for taking maternity leave illegally. These reasons in our opinion amount to misconduct and poor performance on the part of the claimant. The procedure for terminating an employee on grounds of misconduct and or poor performance are well laid out under section 66 of the Employment Act 2006. Section 66 provides;

> ***(1) Notwithstanding any other provision of this part, an employer shall, before reaching a decision to dismiss an employee, on grounds of misconduct or poor performance, explain to the employee, in a***

language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.

(2) Notwithstanding any other provision of this part an employer shall, before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance and the person , if any is chosen by the employee under subsections (1) may make.

(3) The employer shall give the employee and the person, if any chosen under subsection (1) a reasonable time within which to prepare the representations referred to in subsection (2)…"

We found no evidence to show that the infractions levied against the claimant had been brought to her attention or that she had been given an opportunity to respond to them. The respondents through RW1s testimony asserted that the claimant had been informed via email. The emails on the record were to the entire staff and were worded in general terms. For instance the e- mail from Naiga Lydia dated 2/04/2013 addressed to gnamakula and copied to other staff including the claimant stated as follows;

Subject: JOB DESCRITPTIONS AND ABSENTISM FROM WORK

Good afternoon,

This is a warning to all of us we should read our job descriptions and given to us by the General Manager as it has come to my notice that so many clients are complaining about our service and in the end we are going to begin losing one client by one, this goes back to our attitude towards work.

This is a warning to all of us and we should read through our contracts about working times and days anyone who is going to be absent from work on

designated working days should fill a leave form which has to be signed by the different people we all report to and approved by the general manager…."

The e- mail is addressed to ***"all of us…."***

RW1 Naiga Lydia testified that the claimant was perpetual late comer and adduced a "clock in out book" that showed that the claimant had reported late to work which in her opinion was evidence that she was aware she had breached her contract by so doing. We think that the e-mails and mere presentation of the "clock in Book" was not sufficient to qualify as a hearing. Even if the claimant had acknowledged the warning e- mail, the acknowledgement did not amount to an admission or proof that she had fundamentally breached her contract her response stated as follows;

"Thank you for the e-mail about the warning and personally I appreciate the company's existence and I will always do my best of the company's goal and achievements. In reference to the warning above, I have filled the leave form and the hard copy has been presented as well as the permission seeking letter and the institute circular. Hoping my permission will be granted. Thank you and GBU."

Her subsequent e-mail dated 4/04/2013 was seeking confirmation of permission and the one of 29/04/2013 was a request for permission for leave of absence for a few days to enable her complete exams. It is our considered opinion that the e- mails and "clock in and out book" were not sufficient to warrant termination of the claimant without being subjected to the rigours of a disciplinary hearing.

A disciplinary hearing requires that the employer notifies the employee of the charges or allegations against the employee. The employee should then be given reasonable time within which to prepare a response. A hearing before an impartial committee/tribunal should be constituted, and a date set to enable the employee respond to the allegations or charges and thereafter a decision is taken based on the findings of the committee/Tribunal. The respondent in this case did not prove the reasons for terminating the claimant. In **QUEENVELLE**

ATIENO VS CENTRE FOR CORPORATE GOVERNANCE (industrial court of Kenya cause 81/2012) cited with approval in **DONNA KAMULI VS DFCU BANK LD 002/2015,** the Court held that:

*"… **It was not sufficient that that the respondent had various discussions with the claimant. It was immaterial that the claimant even at one time was appraised and found her wanting by Dr. Okumbe. Appraisals and discussions held between employees and their employers, touching an employer's work performance do not add up to a disciplinary hearing, and can only be evidence in support of good or poor performance at a disciplinary hearing. Whatever records the respondent held against the claimant were to be subjected to the rigours of a disciplinary process before a decision could be made. Termination was lacking in substantive validity and procedural fairness…"***

RW 1, Naiga Lydia a director at the respondent company in her testimony stated that she had not conducted a disciplinary hearing but she had communicated the termination to the claimant via e- mail. This in our opinion was a violation of section 66(supra) and therefore the claimant's termination was unlawful.

3. Whether the claimant was entitled to the remedies sought.

Having found that the claimant was unlawfully terminated the claimant is entitled to remedies for unlawful termination.

1. General damages

General damages are awarded at the discretion of court. They are intended to return a claimant to as good a position so far as money can do it, as if the wrong done to him or her had not occurred. In other words general damages are the direct probable consequence of the act complained of. They are therefore compensatory and not a punishment. We believe the claimant deserves general damages for being terminated without a hearing and for the loss of income she suffered as a result.

The case of **GULLABHAI USHILLINGI VS KAMPALA PHARMACUETICALS LED SCCA No.6 OF 1999,** which counsel for the claimant relied on, provides for the payment of damages equivalent to the period of notice in cases of fixed contracts terminable by notice. We think that this decision was arrived at because of the common law position pertaining at the time, where an employer could terminate an employee with or without a reason or a hearing, a position that has since been changed by the enactment of the Employment Act 2006. The Act **under Section 68,** explicitly provides that an employer must prove the reason for terminating an employee before terminating him or her. In the instant case the reason for terminating the claimant was not proved to her nor was she given a hearing, the termination was done during her maternity leave. She prayed for general damages of Ugx.30, 000,000/. She however did not show that she had endeavored to mitigate her loss by getting another job yet she was young and highly qualified with a degree which she acquired while working with the respondent. In the circumstances we think Ugx. 15,000,000/= is sufficient at in interest rate of 20 % per annum from the date of judgment till full and final payment.

2. Special damages

It is trite law that special damages have to be pleaded and proved. See **UGANDA COMMERCIAL BANK VS DEO KIGOZI [2002] 1 EA 293.** The claimant claimed Ugx. 7, 261,307/= for,

a) Salary for the 23 month remaining on the contract -Ugx. 6, 128,810/=
b) NSSF deductions for completed period of service -Ugx. 1,132,497/=

We find that the claimant is entitled to the amounts claimed for salary for the remaining part of the contract. See, **AHMED TERMEWY VS HASSAN AWADI & 3 OTHERS HCCS NO 95 OF 2012, FLORENCE MUFUMBO VS UGANDA DEVELOPMENT BANK LTD LDC 138/2014,(supra),** We however found no basis to award NSSF because the claimant had not proved the same.

3. Punitive damages

Punitive damages are intended to appease the claimant and express the displeasure of the court for the manner in which the respondent treated the claimant. They are not compensatory in nature. We believe the respondent had been callous, inhumane and devoid of compassion when they terminated the claimant during maternity leave and more over on allegations which they had not proved against her. In the premises she deserves punitive damages of UGX. 5,000,000/-.

In conclusion an award is entered in favour of the claimant in the following terms:

a) A declaration that her Maternity leave was lawful.
b) A declaration that her termination was unlawfully.
c) An award for payment general damages of Ugx 15,000,000/=
c) Special damages of Ugx. 6, 128,810/=
d) Punitive damages of Ugx. 5,000,000/- till full and final payment.
e) Interest of 20% per annum on c to d till full and final payment
f) No order as to costs is made.

Delivered and signed by;

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE ……..

2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA .. ……..

PANELISTS

1. MR. EBYAU FIDEL ……

2. MR. BAGUMA FILBERT ……..

3. MS. JULIAN NYACHWO

……..

DATE; 11/APRIL/2017