

**THE REPUBLIC OF UGANDA**  
**THE INDUSTRIAL COURT OF UGANDA HOLDEN AT FORTPORTAL**  
LABOUR DISPUTE REFERENCE NO. 138/2016  
(Arising from Labour Dispute No. 067/2015)

**BETWEEN**

CLOVICE KALENGUTSA TEMBO..... **CLAIMANT**

**AND**

BUGOYE HYDRO LTD..... **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. F. X. Mubuuke
3. Ms. Harriet Nganzi Mugambwa

**AWARD**

**Brief Facts**

The claimant was employed by the respondent as a plant operator from 1<sup>st</sup>September 2002 up to 12/11/2015. On 25/10/2015 according to the respondent, the claimant drove M/V Reg. No. UAS 757N without authorization and outside the operation area and got involved in an accident. According to the respondent, contrary to regulations governing the respondent, the claimant failed to report the accident and one Losio Lemuresuk, the Manager merely issued him a warning.

On review the respondent found the action of the claimant gross and terminated him.

According to the claimant, it was not possible to get permission as no supervisor was available and he drove the vehicle only to pick his supper and the vehicle did not get involved in any accident. He was later on forced to fill a form indicating that an accident had happened. He was not subjected to a fair hearing and was terminated.

The agreed issues were:

- 1) **Whether the claimant's summary dismissal was lawful.**
- 2) **Whether the claimant was entitled to the remedies sought.**

It was the claimant's case that he had not fundamentally broken his obligation under the contract of service for the employer to be able to summarily terminate his services under section 69(3). He argued that picking his supper from home could not by any standards be a fundamental breach of his contract when the respondent did not provide meals.

According to him, the respondent reprimanded him by a warning letter and thereafter prematurely dismissed him before six months which was the maximum period given for him not

to commit any other mistake before dismissal. The claimant termed the dismissal as exposing the claimant to double jeopardy, since by issuing a warning the respondent had chosen the path of progressive discipline as expounded in the employee handbook. According to him the hearing was unfair since the claimant was not afforded a reasonable time to get a person of his choice and neither was he given sufficient time to prepare for his defense nor given chance to cross-examine witnesses.

According to the claimant there was nothing prohibitory for the claimant to use the car.

The respondent's case as we understand it, is that the claimant fundamentally breached his contract when he drove vehicle Reg. No. UAS 757 without permission and got involved in an accident which he did not report immediately as required by regulations of the respondent.

It was their case that the manager at the station was not mandated to grant a warning to the claimant on what they termed as gross conduct and that the respondent was mandated to review the decision of the manager and dismiss the claimant. According to them they constituted a hearing to which the claimant was invited and informed of the infractions which he denied but the respondent found him culpable and lawfully dismissed him. According to them, the disciplinary procedure of the administrative tribunal need not be as strict as if the tribunal were a court of law. They therefore were within the law to find the claimant culpable and terminated his services.

We now turn to the issues:

### **Whether the claimant's summary dismissal was lawful.**

Section 69 of the Employment Act provides:

- (1) Summary termination shall take place where an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.**
- (2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.**
- (3) An employer is entitled to dismiss summarily and the dismissal shall be termed justified where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligation arising under the contract of service."**

In our understanding the section provides the employer a right to terminate the service of the employee without giving such employee any notice once it is established that such employee has fundamentally breached his/her obligation under the contract of service. Whether or not a certain conduct constitutes fundamental breach will always depend on the circumstances of a particular case.

The evidence on the record suggests that the claimant drove away a motor vehicle belonging to the respondent without permission. The claimant does not deny having driven away the vehicle although he claims he was going to pick his food for dinner and no superior was at the station to grant him permission. An investigation carried out by the respondent at Kasese revealed that while he drove the vehicle, the claimant was involved in an accident which he did not report contrary to regulations and the operations manager at the station decided to reprimand the claimant by issuing a warning to him in the following words.

**"On the night of 28<sup>th</sup> October while on duty you**

- 1. Left the plant without permission from your supervisor.**

2. **You drove a company vehicle outside the Area of operation without permission and you damaged in the process.**
3. **You took with you an armed guard outside his area of operation and exposing him to risks.**
4. **You did not immediately report the incident to your immediate supervisor as per company incident/accident report procedure.**

**You are thereby served with a written warning and you should also rectify the damage on the vehicle at your own cost. Be informed that a repeat of the above within a period of six months will lead to your termination from the company services.”**

This letter of warning was delivered to the claimant on 3/11/2015 but on 5/11/2015m the claimant was called by the top management of the respondent for a disciplinary hearing and by letter dated 12/11/2015, he was dismissed.

The questions to be asked and answered in this award are:

- 1) **Was the claimant in fundamental breach?**
- 2) **If he was, was the Operations Manager right to take the decision he did?**
- 3) **Was it in the top management’s power to reverse the decision of the Operations Manager?**

As intimated earlier in this award, the question whether an employee is in fundamental breach will always depend on the given circumstances of each case.

In the matter before us, the claimant was employed as a plant manager and his main tasks were to:

- **Constantly strive for reduction output by preventing less of water and keeping the plant at the best efficiency possible.**
- **Monitor the HPP to prevent incidents**
- **If incidents take place, maximize efforts to reduce consequences to people and assets**
- **Do inspection and material readings according to the defined checklist**
- **Keep the control room and the powerhouse clean and tidy.**
- **Report shift activities and incidents in the logbooks**
- **Call for help if problems cannot be solved**
- **Report to UETCL the day’s expected production.**
- **Other tasks the operations manager finds necessary.**

The above being the main tasks in the job description of the claimant, ordinarily it would be any conduct in breach of the said tasks that would tantamount to fundamental breach.

The employee handbook exhibited as RI in respect to company property states:

**You may not use any company property for personal purposes or remove any company property from the premises without prior written permission from the supervisor.**

There appears cogent evidence on the record to the effect that the claimant without permission took out a motor vehicle of the respondent. Although he claimed that he did not go outside the operation area but only to his home to pick his meals, it is our finding that the claimant went outside the operation area. This is because in his own evidence he testified that after finding no food at Ibanda and Bugoye, he drove 5 kilometers away from the plant to Mobuku. We do not believe that this was within the operation area of the plant. Unless otherwise explained we take the position that the operation are of the respondent covered the area of the plant where the claimant worked and this could not possibly be extended to 5 kilometers. We believe that the operation areas would be an area where the main activities/tasks of the respondent were to be

carried out and it could not possibly extend to Mobuku since the tasks are clearly to be done within the precincts of the plant.

It is not disputed that the claimant did not seek permission from his supervisor in order to drive the vehicle outside the operation area. According to the claimant, no supervisor was on site to grant permission to him and yet he had to get his supper. Nonetheless he radio called his co-worker one Sarah Namujuzi and informed her that he was driving to Mubuku to pick food. There is no evidence to suggest that the claimant was not able to radio call his supervisor to inform him of this predicament as to how he could get his supper. This way he would have been able to secure permission to drive the vehicle outside the operation area. It is our view that the same means he used to inform his co-worker would have been the same means to secure permission. It was therefore wrong of him to have driven the vehicle without or at least informing his superior in accordance with the Employee Handbook (Supra).

Although the claimant denied that there was an accident/incident that happened as he drove to Mobuku, it is our finding that an incident occurred. Nonetheless we do not believe that the incident resulted in an overturn of the vehicle driven by the claimant. This is because the accident investigation report reveals that the vehicle almost overturned despite the two guards in their statements having called it an overturn initially and later on both statements having an inscription that this was not true. **(See exhibit K14 and K13, claimant's trial bundle)**. In the claimant's own statement **(page 26 respondent's trial bundle)** he states that the slippery surface caused the vehicle to swerve towards the driver's side but he brought it back to the road.

It seems to us that the vehicle indeed swerved at possibly 360 degrees and faced the opposite direction which the guards initially called overturning.

We do not accept the contention of the claimant that he was forced or in any way put under pressure to state that this incident occurred. He filed and signed the incident/accident form and also made a separate statement which he signed (see page 26 respondent's trial bundle) describing the incident. No evidence whatsoever was led by the claimant to show that he was under pressure or under influence as he put pen to paper and affixed his signature thereon. He was being dishonest by denying any incident/accident whatsoever.

The respondent counsel argued strongly that the claimant's failure to report the incident/accident having driven the vehicle without permission, and having taken the security guards out of the operation area constituted fundamental breach of the contract. The accident investigation report showed that the vehicle had a dent which according to counsel for the respondent was the more reason that the claimant should have promptly report the incident.

It is our considered opinion that the fact that the claimant was dishonest in alleging that he was forced to file the incident/accident report points to the fact that there was something being hidden which we believe was the dent on the car.

The Employee handbook at page 7 provides:

**“Notify your supervisor if any equipment or machines appear to be damaged, defective or in need of repair. This prompt reporting could prevent equipment 's deterioration and could also help prevent injury to you or others.....”**

Although the incident happened on 25<sup>th</sup> October 2015, the claimant reported the incident by filing the accident/incident form on 30/10/2015 and all evidence suggests that he did this because information had reached authorities that such incident/accident had occurred. Otherwise the incident would have passed without being noticed.

We do not subscribe to the submission of counsel for the claimant that the Employee handbook in using the words

**‘you may not use any company property .....without prior written permission from the supervising manager’**

as opposed "**you shall not use.....**" were not prohibitive and therefore gave a lee way to the claimant to drive the vehicle outside the operation area without permission. We think that the intention of the regulation was to protect the company’s property from abuse and the question of the use of words “**may not**” and “**shall not**” do not make a difference in the intention of the regulation. This would ordinarily be different if this court was to interpret the same words in the context of rules and regulations made under an Act of Parliament. This is because the context would be of rules and regulations affecting every person in Uganda as opposed to those affecting a small section of society like that of the respondent and the applicant. We are not in doubt therefore that the regulation in the Employee handbook was prohibitive and the claimant therefore breached the same.

In the circumstance, we agree with the respondent that the fact of taking the guards outside the operation area to the home of the claimant, the fact of driving the vehicle of the respondent outside the operation area, and the failure to report the incident that caused a dent on the said vehicle all compromised the security of the respondent and therefore amounted to fundamental breach of the contract of service of the claimant.

**Was the operations manager right to take the decision he did?**

In the submission for counsel for the claimant, the Operations Manager, on behalf of the respondent chose progressive discipline by punishing the claimant with a warning letter. We are in agreement with this submission. The operations manager was a direct appraiser of the claimant and the claimant reported to him. In his own judgment, he believed that a warning letter would suffice for the discipline of the claimant.

In his position, in the hierarchy of the respondent, we think it was within his power to discipline the claimant the way he did and inform the top management, which he did. We do not find any evidence to suggest that the operations manager would have taken a different stance if he had not been influenced. We do not find anything to suggest that he was influenced by any factor apart from the accident investigation report to take the decision that he did.

**Was the top management endowed with powers to reverse the decision of the operations manager?**

Evidence on record suggests that the top management conducted a hearing and found the claimant culpable and dismissed him. Top management did not approve of the sanction constituting a warning against the claimant.

According to counsel for the claimant, for the respondent to dismiss the claimant after choosing progressive discipline by issuing a warning letter amounted to double jeopardy and was illegal.

The principle of double jeopardy, normally used in criminal law, is a principal that abhors a person being tried twice on the same issue, or being subjected to more than one punishment for the same offence.

In the instant case, top management decided to punish the claimant differently from the punishment issued by the operations manager at the work place of the claimant. In effect it was a review of the punishment meted out against the claimant by the operations manager. The punishment of “**dismissal**” was much harsher than the punishment of a warning. Both punishments did not run at the same time. “**Dismissal**” displaced “**warning**”. It is our

considered opinion that it is within the powers of top management to review, reverse or agree with whatever decision made by management at a lower level as long as it is done within the confines of the law and such review, reversal or agreement cannot be construed to amount to double jeopardy if the same does not run concurrently with an existing decision to the detriment of the culprit. The decision to dismiss the claimant having replaced the decision to give a warning therefore did not constitute double jeopardy.

**The question for this court is whether the top management followed the right procedure?**

According to the respondent, an impartial hearing was conducted and after finding the claimant culpable he was dismissed.

The basic principles of a fair hearing as envisaged under Article 44(c) of the Constitution are:

- (1) That the accused (or defendant) is informed of the infractions alleged against him.**
- (2) That the accused (or defendant) is given sufficient time within which to respond to the infractions.**
- (3) That the accused (or defendant) appears before an impartial tribunal.**
- (4) That the impartial tribunal after considering both sides grants a remedy.**

**The Employment Act, section 66** provides that the employee is entitled to have another person of his choice at the hearing and that this person is entitled to make representations on behalf of the employee which should be taken into account.

In the instant case the claimant was informed in the evening of 4<sup>th</sup> November 2015 that a disciplinary hearing was to be on 5<sup>th</sup> November 2015. We do not think that this was sufficient time to enable the claimant prepare for defending whatever infractions had been alleged against him. It is also noted that the claimant was only given some minutes to access a witness of his choice and that was when he was already on trial. We agree with counsel for the claimant that this was irregular and affected the fairness of the hearing.

The record seems to suggest that the decision to dismiss the claimant the result of which was a reversal of the warning given by the operations manager, was based on the documents already on file other than oral evidence incriminating the claimant.

In the submission of counsel for the respondent, despite the flows of the hearing process, the claimant had committed a fundamental breach of his duty and therefore the respondent was entitled to dismiss him. Earlier on in this award we agreed with the submission that the conduct of the claimant amounted to fundamental breach. We at the same time agree that the disciplinary hearing did not constitute a fair hearing.

Section 66(4) provides

**“Irrespective of whether any dismissal which is a summary dismissal is justified or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks net pay”.**

The whole of section 66 envisages a fair hearing. It is our considered opinion that where an employee fundamentally breached his obligation to an employer, the employer is entitled to terminate his services, albeit after a fair hearing, short of which section 66(4) above comes into play as a penalty for failure to accord the employee the requisite fair hearing.

Accordingly since the claimant fundamentally breached his obligations in accordance with the contract and the Employees handbook, the respondent was entitled to take action that she took. But since the disciplinary hearing fell short of section 66(4) of the Employment Act, the claimant shall be entitled to four weeks net pay.

**The last question is whether the claimant was entitled to the reliefs sought.**

We have in the award not faulted the respondent for dismissing the claimant and this being the case, the claimant is not entitled to any reliefs claimed in the memorandum of claim. An award is entered against the claimant in the following terms:

- 1) **The claimant's summary dismissal was lawful since the claimant fundamentally breached his obligations.**
- 2) **The disciplinary hearing did not comply with section 66 of the Employment Act and therefore the claimant is entitled to 4 weeks net pay.**
- 3) **The claimant, as provided in his dismissal letter is entitled to salary for the month of November 2015.**
- 4) **No order as to costs is made.**

**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. F. X. Mubuuke .....
3. Ms. Harriet Nganzi Mugambwa .....

**Dated: 17/12/2017**