

THE REPUBLIC OF UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 169 OF 2015
(Arising from Labour Dispute MGLSD No. 312 Of 2015)

KATINDE JAMES..... CLAIMANT

VERSUS

NNHP ENTERPRISES..... RESPONDENT

BEFORE

1. The Hon. Chief Judge, Asaph Ruhinda Ntengye
2. The Hon. Judge, Linda Lillian Tumusiime Mugisha

Panelists

1. Mr. Ebyau Fidel
2. Ms. Harriet Mugambwa
3. Mr. Micheal Matovu

AWARD

This award arises from a claim against the respondent for unlawful dismissal. According to the memorandum of claim the claimant was by oral contract engaged by the respondent as a machine operator at a monthly salary of Ugx. 600,000/= . It was alleged in the memorandum of claim that the claimant fell sick and despite informing the respondent he was suspended for absconding and eventually dismissed without any hearing.

This court was satisfied that the respondent was served with all the court process but no reply or attendance by the respondent was registered and so the court proceeded exparte.

The claimant adduced evidence from only himself and in his written testimony he informed court that he was engaged on oral contract on 1/1/2007 and that on 6th June he fell sick and informed his employer after which he went to Mulago Hospital where he was treated and advised to avoid hard work. On return to work his employer, contrary to this advice, forced him to do this work leading to his sickness and missing a day's work upon which he was suspended on 12/8/2014 and asked to apologize. After the suspension he went back with the apology, but he was denied access to the premises and instead his suspension was extended and eventually he was dismissed. In her submission counsel for the claimant contended that not only the suspension was unlawful, the dismissal was unlawful as well. She argued that since there was no inquiry being conducted, **Section 63(1) of the Employment Act** that authorizes suspension of an employee could not be applicable in the circumstances. she also argued that the suspension of the claimant was contrary to **Section 55(1) and (2)(a) of the Employment Act** which allows an employee to be off work for 1 month as a result of injury or sickness.

She argued strongly that in the absence of a fair hearing and in absence of any reason given to the employee, the dismissal was unlawful. She relied on the authority of **FLORENCE MUFUMBA VS UGANDA DEVELOPMENT BANK L,D.R 138/2014**

She submitted that the respondent was not entitled to summarily dismiss the claimant since there was no evidence of the claimant fundamentally breaking his obligations under his contract, and since the claimant could not have absconded from work when he had a reason of sickness for not attending to work.

The issues for determination are:

- (1) Whether the claimants suspension was lawful**
- (2) Whether the claimant's dismissal was lawful.**

Section 63 of the Employment Act provides;

- (1) "Whenever an employer is conducting an inquiry which he or she has reason to believe may reveal a cause for dismissal of an employee, the employer may suspend the employee with half pay."**
- (2) Any suspension under Sub-section (1) shall not exceed four weeks or the duration of the inquiry whichever is shorter.**

It seems to be the view of counsel for the claimant that unless there is evidence of an inquiry being conducted, the employer has no right to suspend the employee. If this view was correct, it would mean that before any suspension the employer has to constitute an investigation team and actually show that an investigation is in progress.

With due respect to counsel we do not subscribe to this view. Whether there is an inquiry in a given case will always depend on the circumstances.

The contents of the suspension letter in our view will lead to a conclusion whether the said suspension was pending an inquiry in the matter. What is important in our view is the expression by the employer that the suspension is in the interim pending finding out whether or not the employee should be responsible for the allegation mentioned in the suspension letter. It is not necessary that at the time of suspension the employer should have appointed an investigation team and that the investigation should have commenced.

In the instant case the suspension letter provides that the claimant was suspended for being negligent and absconding from work and also for not respecting his supervisors. The two weeks suspension therefore was meant to allow management investigate these alleged acts.

Section 64 of the Employment Act provides for the procedure of lodging a complaint to the Labour Officer relating to suspension. In our considered opinion the question whether or not the suspension was illegal or improper or unfair can only be determined in reference to this section of the law and **Section 64(7)** provides:

"The minister may by regulations provide that this section shall apply to only the disciplinary fines in excess of a specified sum, to periods of suspension in excess of a specified period."

Given that the claimant did not reveal to the court that the above section was operationalized by the minister, and given that the disciplinary action in the instant case had nothing to do with a fine, the question whether or not the act of suspending the claimant was illegal, improper or unfair could not arise. consequently the first issue is answered in the affirmative.

The next issue is whether the dismissal was lawful.

From the evidence adduced, and also from the letter of dismissal, the claimant had in November 2013 absconded from duty but on his admission to the mistake he was pardoned and allowed to work.

Section 62(5) of the Employment Act provides:

“Except in exceptional circumstances an employer who fails to impose a disciplinary penalty within fifteen days from the time he or she became aware of the occurrence giving rise to disciplinary action, shall be deemed to have waived the right to do so”.

Accordingly the respondent could not impose any disciplinary action arising from the claimant’s absconding from duty in 2013. But according to the termination letter there are other alleged offences that the claimant allegedly committed in 2014 which includes absconding and which led to the summary dismissal of the claimant.

We agree with the submission of counsel for the claimant that in absence of a fair hearing or a reason and in the absence of evidence that any employee has fundamentally breached the terms of his/her employment, any termination of employment is necessarily illegal. This is the essence of **Section 66, 68 and 69 of the Employment Act.**

Interestingly the claimant is alleged to have on 12/8/2014 neglected his duties by leaving the machine without any operator, yet it is on the same date that he was suspended.

At the same time in his evidence the claimant stated that indeed he was off his work schedule beginning 6th June 2014 when he fell sick for 3 days. On his return to work, contrary to medical advice, he was assigned heavy duty schedules leading him to be sick once again in August, when he did not go to work causing his suspension. He was asked to write an apology which he did but despite this he was terminated.

It is not clear what apology the claimant wrote because no apology was tendered in evidence. Generally an apology is a means of admitting to doing wrong or failing to do as expected or directed.

When the medical form is critically examined it does not reveal that the claimant was admitted. The form reveals a prescription of malaria drugs, the claimant having been diagnosed with malaria. Although the medical form of Huda Medical Centre shows the treatment date as 6/06/2014, the medical form of Mulago Hospital is not clear about the date when the claimant was treated.

Given that the claimant himself in his written statement stated that in August he fell sick and missed work, and given that the letter of dismissal suggests that he on 12/8/2014 neglected duty and without permission left the machine without an operator, it is safer to conclude that in fact he was suspended on the same date that he left his station of work in his sickness. This is because although the claimant admits having been off duty in August, he does not reveal the date when he was sick. We will not therefore accept his evidence in paragraph 12 of his written witness statement **“that on 12th August, 2014 as claimed by the respondent that I negligently left the machine unattended to, I was serving suspension and there is no way I could have operated the machine”.**

He was therefore suspended on the date he was found not to be on duty. The question is: **was he justified not to be on duty?**

Section 175 of the Employment Act provides

“The following shall not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty _

- a. ...
- b. ...

- c. ...
- d. ...
- e. ...
- f. ...
- g. ...
- h. ..
- i. **An employee’s temporary absence from work for any period up to three months on reliable goods, including illness or injury.**

By this section once a person is absent as a result of illness, he/she is exonerated from disciplinary action. But we must add that in order to benefit under this section, evidence must be adduced to prove that in fact such a person was sick. The evidence adduced by the claimant is a medical form from Huda Medical Centre which is dated 6/06/2014.

Unfortunately for the claimant, this sickness that was treated in June 2014 was not the immediate cause of the termination of his services. As he stated, he continued working until August 2014 when he left the station. The evidence of the sickness of the claimant on 12/08/2014 is very scanty. The only allusion to this is the Mulago out patient’s Medical form on which the date of issue is not clear. The other allusion to the fact of sickness in August 2014 is the evidence of the claimant filed on 18/7/2017 when in paragraph 8 he says

“That in August I got sick again and I again missed work and when I came back, the respondent suspended me for one week and asked me to write an apology letter”.

We do not think there exists sufficient evidence to suggest that the claimant was sick in August when he was found not at his work station. There was need, in our view, for the claimant to provide more evidence to make his case convincing. There was therefore no justification for him not to be on duty in August 2014. **Was the respondent justified in terminating his services?**
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Already pointed out, an employee is always entitled to a fair hearing process before he is terminated for misconduct. An employee’s failure to be on duty without reason is in our view misconduct and since this is the fundamental reason in the termination letter, the claimant, all factors being constant, should have been subjected to a disciplinary hearing.

However, the claimant is on record having written an apology. The case of **KABOJJA INTERNATIONAL SCHOOL VS GODFREY OYESIGYE (Labour Dispute Appeal 003/2015)** is authority for the legal proposition that an admission by an employee of a wrong related to his employment and to the cause of his termination, is good enough to exonerate the employer from constituting disciplinary proceedings against such employee before terminating him or her. An employer has no obligation to accept the apology and let the employee continue in employment.

Although the apology was not tendered in evidence, all indications point to the fact that the said apology was in respect to the claimant having not been at his station of work. We have already discounted sickness as a reason for his absence from duty. In our considered opinion, being absent from the duty for which an employee is contracted to do, and being so without sufficient reason, constitutes a fundamental breach of the contract of employment on the part of the employee and consequently under **Section 69 of the Employment Act**, the employer is entitled to summarily terminate such employee. On the evidence available, this is what happened in the instant case.

It is therefore our finding that the claimant was not unlawfully terminated.

Since the termination was a direct consequence of the claimant's apology, we do not consider him entitled to any reliefs. No order as to costs 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. Ms. Harriet Mugambwa
- 3. Mr. Micheal Matovu

Dated: 17/01/2017