THE REPUBLIC OF UGANDA

IN THE INDSUTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE CLAIM No. 018 OF 2016

(ARISING FROM HCT-CS No.210 of 2014)

OGWIKO DEOGRATIOUS …….CLAIMANT

VERSUS

BRITIANIA ALLIED INDUSTRIES …….RESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

1. Mr. Bwire John Abraham
2. Mr. MavunwaEdson Han
3. Ms. Julian Nyachwo

AWARD

This Claim was filed by the Claimant against the respondent claiming (inter alia) general damages for wrongful dismissal, special damages, severance allowances, a certificate of service, interest and costs.

BRIEF FACTS

By letter of appointment dated 17th June 1997, the Claimant was employed by Britania Foods (U) Ltd. The letter did not show the capacity or title of employment. In another letter (undated) the

same employer gave a detail of employment of the claimant by mentioning that, he was employed as a store keeper and revised terms and conditions with effect from April 1, 2000.

In a letter dated 5/06/2013 this time from Britania Allied Industries Ltd, the claimant's salary was raised. According to the respondent, on 12/11/2013, goods destined for Fort Portal were loaded on a truck from the stores of the Respondent but the same truck was seen off loading at Mubende. On investigation, it was found that excess goods were being sold at Mubende. According to the respondent, an audit was conducted on 15/11/2013 and it was discovered that various items were missing in the store and there were excesses at the same time. The respondent summoned the claimant in the disciplinary meeting and having found him culpable he was terminated.

According to the claimant, the respondent alleged to have carried out an audit by doing an instant stock taking to which he was not a party and eventually suspended him. He was terminated without any hearing as he never attended any disciplinary hearing.

The Agreed issues are:

1) Whether or not the claimant's employment was unlawfully or wrongfully terminated.
2) Whether or not the claimant is entitled to the remedies prayed for.

EVIDENCE

The claimant adduced evidence from only himself and the respondent adduced evidence from 5 witnesses.

The claimant testified in chief that he was rendered redundant when he was denied to return to work after expiry of his suspension without any reason and that it was on 10/2/2014 in response to his complaint to the Labour officer that he was informed of his termination. He denied allegations of shortages, excesses and altering of documents.

The 1st respondent witness, one Thembo Dauda, denied being party to alterations of documents to do with dispatch of certain goods although in cross examination he admitted there was an error

which ought to have been corrected and insisted that one Nantume was not authorized to sign on documents in an attempt to correct them.

The 2nd respondent witness, one Satish Kanna testified that as internal auditor, he did a random stalk taking of the finished Sunsip/artificial drinks store and discovered a number of discrepancies in the various items of Sunsip and mineral water **"refresh"**. He also found a number of alterations in the returnable sales plan.
In cross examination he said that once the ERA Software system was faulty, goods would be moved to the stores manually by the goods transfer notes from production to the stores and that if the system was not updated and the goods continued moving there would be excesses.

The 3rd witness for the respondent, one Ajith Prasad told Court that he chaired a disciplinary committee meeting which interrogated the claimant in respect of excesses and shortages and alteration of documents. The committee did not believe the claimant and decided to recommend dismissal. In cross examination the witness admitted there was no written summons to the claimant to attend the meeting, and that there was no written charge and no one attended with the claimant.

The 4th witness for the respondent, one Damulira Florence told Court that the claimant was a store keeper and joined the respondent company in September 2002. According to her, the turn boy one Waiga Kasim as well as one Kansiime Rogers incriminated the store department from where excess cartons had been loaded on to the vehicle in the presence of the claimant.

The claimant was asked to make a statement and explain the incident of offloading the vehicle en route to Fort Portal at Mubende which he did.
According to the witness, the claimant was summoned for a disciplinary hearing after suspending him. Witnesses testified against him in his presence. The committee recommended dismissal but the union representative suggested a termination instead and the General Secretary of the union one Mugole Stephen started negotiations to redeploy the claimant.

Following a series of meetings, the Managing Director was about to redeploy him when he complained to the Labour Office where a number of Mediation meetings were attended. Before a solution could be reached, she received an email from N.S.S.F in which a letter purported to have been written by the Deputy
Managing Director, (terminating the claimant and seeking terminal benefits). The letter was a forgery and management decided to dismiss him.

The 5th witness for the respondent, one Motani Kapein testified that he was instructed to travel to Mubende to investigate the alleged off loading of a vehicle enroute to Fort portal. Indeed he went and confronted a person who was offloading and the said person said he was buying excess cartons and had paid 200,000/=.

EVALUATION OF EVIDENCE AND DECISION OF COURT.

In the submission of Counsel for the respondent, the claimant could not have been employed by the Respondent earlier than 25/9/2002, when the respondent Company was incorporated. Whereas this is granted, we think that it is possible for the respondent company to have metamorphosed from Britania Foods (U)Ltd to Britania Allied Industries Ltd.

This is because whereas there exists on the record letters of appointment of the claimant by Britania Foods (U) Ltd, no single letter of appointment from Britania Allied Industries Ltd has been tendered to show that in fact the claimant started employment after the incorporation of the respondent Company. The only letter regarding terms and conditions of employment from the respondent Company is dated 05/06/2013 and is about salary increment and it states that other terms and conditions of service remain the same. The only letter detailing terms and conditions is undated and on headed paper of Britania Foods (U) Ltd.

In the absence of any appointment letter from Britania Allied Industries Ltd, and given a Joint Scheduled Memorandum in which it was agreed by both Counsel that the Claimant was employed on 17/06/1997 by the respondent as a store keeper, it is not acceptable that the same respondent denies having employed the Claimant before 2002.

From the evidence adduced, the claimant was employed as a store keeper. As store keeper he was to perform duties of dispatching goods. He was to ensure that what was on the dispatch note tallied with what was on the loading truck. As store keeper he was expected to keep a reconciliation of goods received in the store as against the goods dispatched from the store.

It was the case for the respondent that the claimant was involved in a conspiracy to defraud the respondent by occasioning losses and theft in the store which he supervised. The Claimant's submission was that there was no evidence tendered to prove the allegations of causing losses or excesses on the part of the claimant.

Evidence on the record suggests that once there was a breakdown of the ERP Software system, production and stores sections would be run by a manual process. In cross examination respondent witness No.2, one Satish Kanna explained that once the system was not updated and goods continued flowing, there would be excesses. It follows that the non-updating of the system could as well cause shortages. No one in particular was pinned down in the evidence adduced as being responsible for updating the system. Both the production and stores units were in our view responsible for updating the system. Consequently the evidence was not very clear as to whether the claimant would be personally responsible for the shortages or excesses in the store.

In his submission, counsel for the respondent contended that the claimant in his statement of 18/11/2013 admitted that he had failed to update the system. On perusal of the statement of the Claimant, we do not find any such admission. He stated thus:

"……..the system in the computer could not give us the right figures but we were sure that the stock was Okay, that is why we continued to avoid delay…".

This statement in our view, reinforces our earlier conclusion that not only the claimant was responsible for updating the system. The statement in no way admits that the claimant himself was responsible for updating and failed to update the system.

We have no doubt in our minds that on 11/11/2013, a truck was loaded with Cargo from the respondent Company destined for Fort Portal. The evidence of the claimant himself is to the effect that he, as store keeper loaded Truck No. UAU 483P with various goods. The said truck off loaded some items in Mubende along the Fort Portal route. It is the case of the respondent that what was off loaded in Mubende was an excess that had been loaded on to the truck.

According to the claimant, he was not aware of the incident in Mubende although he said he cross checked things from the store and made sure that what was on the dispatch note tallied with what was on the truck. The question to be answered is : was what was off loaded excess of what was loaded onto the truck? And if so was the claimant responsible?

Although no customer complained of having been cheated by delivery of less goods than paid for, the fact that a truck loaded for Fort Portal off loaded some cargo en route to Fort portal in our view, depicts a fraudulent intention to cause loss to either the respondent or the customer. The fact that no customer complained may not be sufficient to prove that no customer was defrauded given that in Mubende some goods off the truck were sold. The conclusion to be drawn from this set of circumstances in the absence of a complaint from the Fort Portal customer is that the items sold in Mubende were excess of what was expected by the customer.

We therefore believe the evidence of the respondent that what was off loaded was an excess that was sold without authority from the respondent.

The claimant as store keeper was expected by his employer to be able to supervise the loading of the truck so that the goods loaded on to the truck corresponded to what was on the dispatch note. We are positive that by allowing excess cargo onto the truck, the claimant abdicated his duty, the ERP computer system notwithstanding. It is not acceptable to us that the claimant was not aware of the incident in Mubende when he himself supervised the loading of the truck which he very well knew was to to be off loaded in Fort Portal.

As store keeper he was the eyes of the respondent and his failure to be vigilant in supervising the loading caused the loading of excess. Evidence suggests that he left the loading process to the

turn boy who took advantage and just watched as excess cargo was being loaded on to the truck. We take the position that the claimant as store keeper fundamentally breached his duty of making sure that what was loaded onto the truck was not in excess of what was to be dispatched from the stores.

Section 69(3) of the Employment Act provides :

"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 obligations arising under the contract of service".

Just like in the case of **GRACE MATOVU VS UMEME LTD 4/2014** this court found that the claimant had failed in her duty to ensure that the combined requisition and issue vouchers(CRIVS) used for requisitioning materials from the stores were utilized and therefore gave the respondent reason to dismiss her, in the instant case we find that the failure of the claimant as store keeper to make sure that what was loaded on the truck was not in excess of what was expected to be so loaded from the stores gave the respondent reason to dismiss him.

Although the respondent denies having issued a termination notice dated 22/10/2013, It is clear in the circumstances of this case that the claimant was indeed terminated. This is clear from the letter addressed to the Labour officer dated 10/02/2014 in which the General Manager, Administration states:

"……..even due to his gross negligence and forgery, management was willing to forgive him, and it's the reason we have kept calling him back to office to have discussions with him. Management has however lost trust in him and he has tarnished the relationship that was to be rebuilt. It's on that note therefore it has decided to terminated him with notice in consideration of the number of years worked ……".

The claimant claims that plans to dismiss him had been made before the Mubende incident and that therefore the shortages and excesses pointed out by the respondent were merely an excuse. He insisted that the termination notice was issued by the respondent and that he had no hand in its issuance or forgery. On Internalization of the said termination notice we find that it refers to a restructuring process as a reason of termination and the claimant was informed that his services would not be required from 23rd Dec 2013 Culminating into 2 months notice.

Although evidence adduced in court by both claimant and respondent did not refer to any restructuring in the respondent organization, the letter by the respondent addressed to the Labour officer and effectively terminating the claimant mentioned above, stated in paragraph 4 that:-

> **"…….We also confirm that he has received the December 2013 salary and salary advance in January 2014, since plans were to reinstate him although we were only waiting for a vacancy to fall through because of the restructuring process which is ongoing in our Company and of which he is well aware….."**

In the absence of any other letter terminating the services of the claimant, and given that no evidence was adduced to exculpate the respondent from the termination notice mentioned above apart from mere denial of having issued the same, the only logical conclusion is that the termination notice originated from the respondent. This is because both the notice and the letter to the Labour officer refer to a restructuring process.

There is credibility in the assertion of the claimant that the respondent had earlier on decided to terminate him. It is only logical to conclude that in the restructuring process, the respondent decided to terminate the claimant and wrote the termination notice but did not issue it out to the claimant until the Mubende incident. It is our view that the Mubende incident accelerated the decision already taken by management 9 days earlier when the termination notice was written. Therefore the respondent after the Mubende incident, decided to abandon termination as a result of restructuring in preference to termination as a result of misconduct.

The claimant denied ever being summoned, later on attending any disciplinary meeting, although the respondent insisted that he did so. The only evidence on the record pertaining to such a meeting is a record of minutes of a meeting held on 26/11/2013**.** Some witnesses for the respondent testified that they attended the same meeting.

Section 66 of the Employment Act provides

> **(1) Notwithstanding any other provisions of this part, an employer shall, before reaching a decision to dismiss an employee, on the 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 choice present during this explanation.

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

The demand **of section 66 of the Employment Act** cited above is a fair hearing of an employee before being terminated. A fair hearing simply put means that an employee is informed of the infractions he allegedly committed, he/she is given time to prepare for a response, he/she is given time to physically appear before an impartial tribunal to present his/her response, he or she is given time to adduce any other evidence if any, and the tribunal finally makes a decision. The disciplinary committee need not conform strictly to matters of procedure as if it were a court of law**, (Ref. GRACE MATOVU VS UMEME supra**)

In the instant case there is no evidence that the claimant was informed of any pending charges before he finally appeared before the disciplinary committee. Respondent witness No.3, one Ajik confirmed that there was no written summons to the claimant to attend the disciplinary meeting. The same was confirmed by one Damulira, another witness for the respondent. The evidence is clear that the claimant was never informed of the alleged instructions and was never given time to prepare for his defense. The minutes do not show the claimant as one of the attendees of the meeting and his explanation in the minutes is in reported speech. It is not clear who took the minutes as they are not signed by anybody. We do not subscribe to the contention of counsel for the respondent that the claimant having been a member of the Uganda Hotels, Foods, Tourism and Allied Workers Union (UHFTAWU) presupposed that any member of the union attending a disciplinary meeting would be attending as if chosen by the claimant in accordance with **section 66(2) of the Employment Act**. We think the section is clear in its wording that the person must be chosen by the claimant. Evidence does not show any person attending the disciplinary meeting in that capacity. Therefore we reject the submission that the union secretary and the

union representative attended having been chosen by the claimant in accordance with section 66(2) of the Employment Act.

Given that the minutes were not signed, the claimant was not formally invited/summoned to attend the meeting, no person of the claimant's choice attended the meeting and the claimant himself is not recorded as attendee of the meeting, it is safer to believe the testimony of the claimant that he did not attend the hearing.
Consequently we agree with the submission of Counsel for the claimant that the principles regarding a fair hearing as enunciated in the cases **of EBIJU JAMES VS UMEME LTD C.S. 133/2012 and OBWOLO VS BARCLAYS BANK OF UGANDA LTD (1992-1993) HCB 179** were not complied with. The claimant was not afforded a fair hearing. What then is the effect of this on the case and in the circumstances?

We have already stated our position on the duties of the claimant as store Keeper and his fundamental obligation to the respondent. In his own statement written on 18/11/2013 he admitted having loaded truck No. UAG 483P with various goods destined for Fort Portal. He stated that the turn man was personally supervising the loading as he himself was at his table counting. Eventually the said vehicle off loaded some excess and the turn man sold it at Mubende. As already pointed out, it is our position that by releasing the vehicle from his stores with excess goods, the claimant breached his duty as the one responsible for reconciliation of goods in the store and goods dispatched to the customers. We are not convinced by the submission of counsel for the claimant that lack of a customer complaint of being cheated amounts to the innocence of the claimant.

We subscribe to the submission of Counsel for the respondent that the claimant abdicated his responsibility to the turn man when he simply watched him load the vehicle with what transpired to be an excess of what was expected to be loaded.
We form the opinion that the failure of the claimant to supervise the loading of the truck with the right quantities of the goods constituted a fundamental breach of his obligations **within section 69(3) of the Employment Act,** earlier cited in this award. As already stated, this fundamental breach precipitated and accelerated the speed at which the claimant was terminated, having been

listed to be terminated as a result of restructuring of the organization. We are convinced that termination notice issued by the respondent in a restructuring process notwithstanding, the fundamental breach of the obligations of the claimant was sufficient to warrant a dismissal in accordance with section 69(3) of the Employment Act. Accordingly, the dismissal of the claimant was not unlawful.

However, section 66(4) of the Employment Act provides:-

"Irrespective of whether any dismissal which is a summary dismissal is justified or whether the dismissal of the employer is fair, an employer who fail to comply with this section is liable to pay the employee a sum equivalent to four weeks Net pay." since as we have found, the respondent did not accord the claimant a fair hearing in accordance with section 66, the claimant shall be entitled to a net pay of four weeks".

The next question is whether the claimant was entitled to the remedies sought.

Since we have found that the respondent was justified in dismissing the claimant it follows that he will not be entitled to the remedies sought save that he shall be paid four weeks for failure to accord him a fair hearing as above said. He shall also be entitled to a certificate of service as provided under the Employment Act.

All in all and in conclusion, it is the finding of this Court that the claimant failed to prove that the respondent unlawfully terminated or dismissed him and the claim is therefore dismissed.

No order as to costs is made.

Signed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye ……..
2. Hon. Lady Justice Linda Tumusiime Mugisha ……..

Panelists

1. Mr. Bwire John Abraham ……..
2. Mr. MavunwaEdson Han ……..
3. Ms. Julian Nyachwo ……..

Dated: 12TH JAN 2018