THE REPUBLIC OF UGANDA

IN THE INDSUTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE APPEAL No. 026 OF 2016

(ARISING FROM LABOUR DISPUTE No. 023 of 2016

UGANDALOCAL GOV'T ASSOCIATION………………………………….CLAIMANT

VERSUS

KIBIRA VINCENT AND 4 OTHERS…………………………………….RESPONDENT

BEFORE

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

PANELISTS

1. Mr. Ebyau Fidel
2. Mr. F. X. Mubuuke
3. Ms. Harriet NganziMugambwa

AWARD

This is an appeal from the decision of a Labour Officer sitting at Kampala central in KCCA/RUB/LC/023/2016.

The background of the appeal is that Kibira Vincent and four others were employees of the appellan at contractual terms which were subject to renewal and were in fact renewed at various times. Consequently as a result of restructuring the respondents employment was terminated.

They complained to the Labour officer that the termination was not in accordance with the restructuring package contained in the staff Regulations (termination grant) and the Human Resources Manual and prayed for various remedies. The Labour Officer decreed that:

1. **The Respondent unfairly terminated the contracts of the 2nd, 3rd and 5th complainants while the 4th complainant's contract was fairly terminated.**
2. **The Respondent is hereby ordered to pay Ugx. 57,447,483/= as gratuity to the complainants.**
3. **The complainants are not entitled to payment for eliminated posts downsizing and that claim is dismissed.**
4. **The 1st, 2nd, 3rd and 4th complaints are entitled to termination grant and the Respondent should pay them sum of Ugx. 137,746,950/= as termination grant.**
5. **The Respondent should pay Ugx. 1,400,000/= as repatriation costs to 1st, 2nd and 3rd complainants and transport allowance of Ugx. 600,000/= to the 4th and 5th complainants.**
6. **The Claim of NSSF remittance by the Respondent should be addressed to N.S.S.F and the same is dismissed in Labour office.**
7. **The claim by the 3rd and 5th complainant for untaken leave is hereby dismissed and the claim by the 1st, 2nd and 4th complainants is allowed and the respondent should pay Ugx. 5,767,827/= in accordance with section 54(5) of the Employment Act 2006.**
8. **The claim by the 2nd respondent for acting allowance is allowed partially and the respondent is ordered to pay Ugx. 4,088,268/= as outstanding acting allowance.**
9. **The respondent should pay severance allowance in the sum of Ugx. 42,721,300/= to the 2nd, 3rd and 5th complainants. The claim for severance allowance by the 4th complainant is dismissed as he was fairly terminated.**
10. **The respondent should pay Ugx. 6,020,718/= as payment in lieu of notice to the 2nd, 3rd and 5th complainants. The claim by the 4th complainant is hereby dismissed as he was given adequate notice.**
11. **The respondent should pay Ugx. 9,420,375/= to the 2nd, 3rd and 5th complainants as damages for unfair termination. The 4th complainant's claim is dismissed as he was fairly terminated.**

12. **The question of salary loan repayment due to the DFCU Bank that cannot be handled by this Labour Office and it is accordingly referred to the industrial court for the 2nd and 3rd complainants only.**
13. **The respondent is hereby ordered to prepare appropriate certificates of service and file them in this office for the complainant's collection within 5 days from date of the award.**
14. **No order is made with regard to interest and costs.**

The total award given amounts to Ugx. 265,212,923/= (Uganda shillings two hundred sixty five million two hundred twelve thousand nine hundred twenty three only).

The appellants were not satisfied with this decision and hence the appeal.

The memorandum of appeal contained the following grounds of appeal:

1. **That the Labour Officer erred in law when he held that the 2nd, 3rd and 4th Complaints/Respondents were wrongfully terminated from employment by the Appellant awarding damages thereof.**

2. **That the Labour Officer erred in law when he awarded UGX 57,447,483/= as gratuity to the Complainants/Respondents.**

3. **That the Labour Officer erred in law when he awarded a termination grant in the sum of UGX 137,746,950/= to the 1st, 2nd, 3rd, the 4th and 5th Complaints/Respondents.**

4. **That the Labour Officer erred in law when he awarded repatriation costs in the sum of UGX 1,400,000/= to the 1st, 2nd and 3rd Complainants/ Respondents and transport allowance in the sum of 600,000/= to the 4th and 5th Complaints/Respondents.**

5. **That the Labour Officer erred in law when he awarded UGX 5,767, 826/= to the 1st, 2nd and 4th Complainant/Respondent as untaken leave against the Appellant.**

6. **That the Labour Officer erred in law when he awarded UGX 42,721,300/= to the 2nd, 3rd and 5th Complaint/respondents as severance allo**wance.

7. **That the Labour officer erred in law when he awarded UGX 6,020,718/= as payment in lieu of notice to the 2nd, 3rd and 5th complainants.**

The respondent filed a cross appeal which contained the following grounds:

1. **The labour officer erred in law when he failed to evaluated evidence on record regarding payment for eliminated posts/downsizing in respect of 2nd, 3rd and 4th cross appellant**.
2. **The labour officer erred in law when he failed to refer the question damages due to the 2ndand 3rdcomplainants to the Industrial court and instead awarded compensatory orders.**
3. **The labour officer erred in law when he failed to award interest on gratuity due to the cross appellant**.

On ground No.1 of the appeal mentioned above, counsel for the appellant argued that the termination of the respondent was fair and lawful. He referred to the contract of the 1st respondent and argued that a renewal of the same constituted a whole new contract independent of the former and that therefore a notice of 3 months was sufficient since the contract started to run from the latest renewal and therefore the termination was lawful.

Referring to the contract of the said respondent, counsel argued that, the contract commencing on 20/05/2015 did not attract gratuity as confirmed by a letter on page 126 of the record of Appeal and this made the contract independent of all the previous contracts involving the second respondent and therefore 1 months' notice was sufficient making termination lawful.

For the third respondent, counsel argued that the contract was for less than 1 year and therefore one month's notice was sufficient making the termination lawful.

According to counsel for the appellants, the 4th respondent's contract was effected on 20/2/2015 and termination was on 29/4/2016 subject to 2 months' notice that was issued on 01/3/2016 and acknowledged by the 4th respondent in examination in chief.

According to counsel, the fifth respondent's contract was not renewed and as such there was no unfair termination. He relied on section 2 of the Employment Act and **Joseph Kibuuka & others Vs Bank of Uganda L.D.C 184/2014.**

In reply counsel for the respondents argued that the first, fourth and fifth respondents were not subject to arguments in ground No.1 since the said ground never envisaged these respondents and the Labour officer never held that they were lawfully terminated.

Fortunately in rejoinder counsel for the appellant agreed with this submission. On perusal of the proceedings we find that indeed the labor officer never held that the 1st respondent was unfairly terminated.

The decree against which the appeal lies in paragraph 1 states that the 2nd, 3rd and 5th complainants were unfairly terminated while the 4th complainant was fairly terminated.

We therefore agree that the submissions in ground 1 regarding 1st, and 4th respondents are not applicable and therefore we shall not dwell on them.

As to the 5th respondent, the appellant in his rejoinder did not reply to the contention that the memorandum of appeal in the 1st ground did no allege that the said 5th respondent had been held to have been unlawfully terminated and that therefore counsel was precluded from submitting on the same point.

On perusal of the contract of the 5th respondent we find that her contract of 14th March 2013 ran from 7th Jan 2012 to 7th Jan 2014 and her contract of 8th Jan 2014 was up to 8th Jan 2016. Surprisingly there appears to be an addendum to the contract of 8th Jan 2014 that attempts to reduce the duration of the contract by announcing its commencement date to be 20th October 2013 reducing the contract of I4th March 2012 by one year. Although both parties singed this addendum, we do not think it is enforceable for it is illegal in the sense that it purports to at the same time amend the previous contract which had ended.

Consequently both the addendum and the letter purporting to reject renewal of the contract have no legal basis. Her contract was to end in Jan 2016 and the Labour officer was right in

holding that the respondent's letter requiring her to handover by 31/12/2015 amounted to a termination of employment.

It was argued on behalf of the appellants that the 2nd respondent's contracts were different and could not be construed to constitute a continuous employment period to which the respondent disagreed by stating that there existed continuous employment for over 10 years in respect to the 2nd respondent.

On perusal of the contracts of the 2nd respondent it is clear that she had a succession of contracts executed after a specific period mentioned in the said contracts before renewal by signing successive contracts.

Section 58 of the Employment Act provides for compulsory issuance of a notice period before termination of employment. Although each of the contracts were from the same employers, it is our opinion that each of the contracts had specific terms and conditions.

We agree with the submission of counsel for the appellant that upon expiry each of the contracts would be complete and renewal implied a new contract of employment with different terms.

However, we are positive that continuous service under **section 83 of the Employment Act** has very little, if at all, to do with notice periods under section 58 of the same Act.

Section 58 (1) provides

"A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except

a) …………………………………….

b) ……………………………………..

Section 58(3) provides:

The notice required to be given by an employer or employee under this section shall be

a) …………………………………….

b) ……………………………………..

c) ……………………………………..

d) Not less than 3 months where the service is ten years or more.

Section 82(1) provides:

Subject to the provisions of this section “continuous service” means an employee’s period of uninterrupted service with the same employer”.

Section 83(2) provides:

“There shall be a rebuttable presumption that the service of an employee with an employer shall be continuous, whether or not the employee remains in the same job.

We do not subscribe to the view that notices specified in section 58 of the Employment Act have a bearing to the continuity of service as prescribed in section 82 and 83 of the same Act. This is because section 58 specifically deals with “**contract of service”** and therefore the notice period provided there under relates to a “**contract of service**”.

On the other hand, section 82 and 83 deal with a period of uninterrupted “**service in the employment of the same employer”.**

Our understanding of section 82 & 83 is that the legislature intended to clarify not only categories of employees entitled to certain benefits such as gratuity, severance allowance, pension and any other schemes but also the basis of calculating the same benefits once they arose.

Consequently it is our opinion that section 58 applies to specific contracts as opposed to sections 82 and 83 which apply to the whole period of employment.

In the instant case, as already intimated each of the successive contracts was distinct from the other with specific terms and conditions. The terms of a previous contract could therefore not be imported into the subsequent contract. Therefore the notice period under each of the contracts was as provided for under section 58 as per the said contract. Therefore the last contract having been on 17/02/2015 for 3 years, in accordance with section 58, he was entitled to not less than 1 month of notice. The appellant was therefore justified to grant the 2nd respondent 1 months’ notice.

The Labour officer in our view erred in law when he failed to separate the contracts and instead held that the 2nd respondent had served for 10 years and 11 months and therefore entitled to 3 months' notice. This finding is hereby set aside.

The same applies to the 3rd respondent where the Labour officer failed to separate contracts and like in respect to the 2nd respondent construed the contract to constitute the whole period of service.

The third ground of appeal was that the Labour officer erred in awarding Ugx. 57,447,483/= as gratuity to the respondents. It was the submission of the appellant that the appellant could not pay gratuity and termination grant separately since the two were one and the same in accordance with **regulation 34 of the staff regulations (page 44).** He strongly argued that the 2nd and 4th respondent's contracts did not provide for gratuity (**pages 126 and 245 of the record of appeal).**

In reply, counsel for the respondent argued that **regulation No. 35.2** provided clearly for termination grant and that this was distinct from gratuity.

Regulation 35.2 of the staff regulations provides:

"On leaving the service of the ULGA, a termination grant calculated at 15% of the annual gross salary times the number of years in the service of the association as follows:

For staff who have been confirmed (inviting) and hold such contracts the grant is based on the total full months/years of service.

For staff on probation, the probation period is disregarded. Gratuity eligibility begins with the full month of service after probation".

While considering the issue as to whether the claimants were entitled to termination grant, the Labour officer considered, rightly in our view, the pleadings of both the claimants and the respondent and observed, rightly, that there was a contradiction in the evidence and pleadings of the respondent as to whether termination grant was due after or before an employee was confirmed in service. He properly evaluated the evidence as to whether the claimants were entitled to termination grant under the above regulation and came to a right conclusion that they were so entitled.

Although at first one’s impression might be that the termination grant is (and was meant to be) gratuity, on internalizing the above provision together with the various contracts engaging the respondents, one wonders as to why provision relating to gratuity in the contracts are not in tandem with the regulation 35 above sited.

For example, contrary to regulation 35, the contract of respondent No. 3, Hailen Jagimere Opoya of 01/08/2005 provides that the employer shall pay gratuity of 15% of annual basic salary for each year of service on annual basis except when she was dismissed.

Unlike under regulation 35, where termination grant is calculated taking into consideration the total number of years the employee has been in service, gratuity of respondent No.3, is to be payable per year worked. In our considered opinion, the framers of both provisions intended that they operate separately to honor those serving the appellant twice – for long service and also for service not less than 1 year. As one peruses all the contracts, gratuity is due per year for all of the respondents.

Accordingly, we do not accept the submission of the appellant that termination grant and gratuity were one and the same. Termination grant was almost the equivalent of severance allowance provided for **under section 87 of the Employment Act** which is payable separately from gratuity except that severance will only be payable in certain circumstances which are different from those provided for under regulation 35 above sited. We form the opinion that the failure of the appellant to harmonize provisions relating to gratuity in the various contracts with regulation 35, meant that the respondent intended that both provisions operate separately.

We have looked at regulation 34 which the appellant in submission claimed that it uses the term “**gratuity”** and **“grant”** interchangeably. The regulation deals with appeals and nowhere in the regulation are these words used at all.

For the above reasons, the third ground fails.

The second ground was that the Labour officer erred to have awarded Ugx. 54,447,483/= as gratuity.

The appellant did not dispute the fact that the respondents are entitled to gratuity (except 2nd and 4th respondents). The only issue related to the calculation of the same. He argued that payments to the respondents had varied overtime and that therefore the calculations made by the Labour officer were wrong in law and should be revised.

In reply, counsel for the respondent argued that the Labour officer having discussed the **quantum** payable to the respondents, the appellants did not in any way provide reasons to justify the variation. We have perused the record at pages 442 -447 detailing evidence evaluation of the Labour officer on which quantum each of the respondents was entitled. The appellants do not seem to offer alternative methods of calculating the quantum and in submission, counsel for the appellant merely stated that the appellants were entitled to the amounts as the legal officer had filed in reply to the complaint before the Labour officer. It was this very reply together with the complaint that the Labour officer discussed and came to a conclusion that he did. In the absence of a submission that the Labour officer should have reached a different decision, this court has no reason not to uphold the decision of the Labour officer. Merely stating that this court should take the reply to the complaint relating to gratuity and ignore the complaint as it was filed, without any justification is not acceptable.

In paragraph 6 of the reply to the complaint, the appellant claimed that each of the responds were entitled to certain amounts and attached records. In assessing the evidence, the Labour officer looked at these records and made conclusions.

We are not convinced by the submission of counsel that the Labour Officer's assessment of the records was wrong.

Although counsel for the appellant submitted that that the 2nd and 4th respondents were not entitled to gratuity, he at the same time stated that Ugx. 19,788,879/= and Ugx. 8,505,000/= was due respectively. This from counsel for the appellant, got us in a state of uncertainty as to what the appellant exactly meant. Accordingly for the above reasons, ground No. 2 fails.

Ground No. 4 related to repatriation costs. Counsel for the appellant argued that the addresses of the respondents showed Kampala and the appellant officers were in Kampala. This being the case, according to counsel, the respondents were not entitled to repatriation.

In reply counsel for the respondent submitted that whereas while working for the appellant the respondents were residing in Kampala, their respective residences were outside Kampala.

Section 39(1)(c) of the Employment Act states:

"An employee recruited for employment at a place which is more than 100km from his or her home shall have the right to be repatriated at the expense of the employer…………………….."

We shall look at each of the claimants' circumstances before determining whether any of them was entitled to repatriation.

When the Labour officer was considering this ground of appeal he stated:

"I have considered section 39 of the employment Act with regard to repatriation. Section 39(3) of the Employment Act places an obligation on the respondent to repatriate the 1st , 2nd and 3rd complainants because they had served the respondent for 10 years and above………".

The implication of the above statement, in our understanding, is that the obligation of the employer to repatriate the employee arises only when the employee has worked for the employer for 10 years and above.

Section 39(3) provides

"Where an employee has been in employment for at least 10 years he or she shall be repatriated at the expense of the employer irrespective of his or her place of recruitment."

Our understanding of the above section is that in the case of an employee who has served 10 years or more unlike his/her contemporaries who served less than 10 years, the distance between his/her home residence and the place of work would not matter in determining whether or not repatriation was applicable to him. Those that served less than 10 years would have to prove that their home residences were within more than 100kms before being granted repatriation.

We take cognizance of the fact that although employees in Kampala may be resident in Kampala, their home areas may not be located in Kampala. Most employees in Kampala or in other major towns live in rented premises having moved from their homes to towns for employment opportunities. Nonetheless there are still employees whose homes are in the very towns where they are employed in which case before an employee is declared a beneficiary

under **section 39 of the Employment Act,** it is important that the court is satisfied that unless he/she has served for 10 years and above, his/her home is over 100kms from the place of work.

The only evidence that the Labour officer relied upon to grant repatriation was the labour complaint that showed the home of 1st , 2nd and 3rd respondents as Sembabule, Busia and Kanungu respectively. We have perused the record and we find that all the respondents' addresses show that they were based in Kampala. There is no evidence whatsoever to show that any one of the respondents had a home outside Kampala, except one Ainomujuni Godwine, 4th respondent, whose address on appointment was shown to be Bushenyi District Local Government.

This being the case, unless one had worked for at least 10 years, except the 4th respondent, none of the respondent was entitled to repatriation.

In our considered opinion the forth respondent will be paid Ugx. 500,000/=. The orders relating to payment of repatriation in respect to the rest of the respondents are hereby set aside, except those who had served for at least 10 years who will be paid Ugx. 100,000/= since they are all Kampala based.

The 5th ground relates to grant of leave allowance to 1st, 2nd, 4th respondents. We agree with the submission of counsel for the appellant that as was held in **OTHIENO VS UBC CS 07/2013**, for a claim of compensation to be upheld the employee must prove that she or he requested for leave and was asked not to take it.

As this court held in **KANGAHO SILVER VS ATTONEY GENERAL** in **D.L.C.276/2014**, whereas going on leave is an employee's right, such right can only be exercised by application to the employer who may approve it or postpone the same to a given date. It is only when the employer refuses to grant the same that the employee is entitled to payment in lieu of leave.

In the instant case evidence is lacking to show that any of the respondents applied and was denied leave. This ground of appeal succeeds and the orders of the Labour officer are set aside.

The 6th ground relates to grant of severance allowance.

The unlawful termination allegations in this case were hinged on the fact that the respondents were given insufficient notice. We have already held that the notices given for the respondents was sufficient in accordance with their running contracts.

Under section 87 of the Employment Act, severance allowance is only awardable under circumstances provided for there under. One of the circumstances is unfair dismissal. The services of the respondent were terminated as a result of restructuring which is not a factor considered under section 87.

As far as the 5th respondent was concerned, we have held that her contract was to end on 7th Jan 2016 and that the letter requiring her to hand over by 31/12/2015 amounted to a termination of employment.

As we have already indicated, severance allowance under section 87 above mentioned is almost equivalent to the termination grant under the staff regulations of the appellant. The grant just like severance, is meant to cater for the inconvenience suffered by the employee as a result of the employer severing the employee-employer relationship.

The 5th respondent has already benefited under the staff regulations. Her contract was only less than 6 days remaining. In the circumstances we decline to grant an order for severance allowance.

Consequently since the basis of unlawful dismissal did not exist in the case of 1st, 2nd and 3rd respondents, and the 5th respondent had only 6 days to complete her contract, no severance allowance was due. This ground of appeal succeeds and the orders of Labour officer are hereby set aside.

The 7th ground relates to payment in lieu of notice.

Since we have already held that the notice given to the respondents was sufficient, automatically this ground succeeds as there was no basis for the Labour officer to award it. The orders for payment in lieu of notice are set aside.

In the cross appeal, the first ground was that the Labour officer erred in law when he failed to evaluate evidence on record regarding payment for eliminated posts/downsizing in respect of the 2nd, 3rd, 4th cross appellants.

There is no doubt in our minds that the termination of employment of the respondents was as a result of restructuring that was taking place within the respondent organization. Both

counsel agreed on this fact. The only contention is the application of paragraph 4.9(c) of the Human Resource Manual which according to counsel for the cross appellant provides:

"In the event of staffing reduction, ULGA shall for staff on contract pay 25% of the contract sum and for temporary staff; they shall receive three month's pay in lieu of notice."

With due respect to whoever drafted the contracts of the respondents, whoever drafted the human Resource Manual and whoever drafted the staff regulations, we form the opinion that they ought to have harmonized each of the provisions therein relating to terms and contentions of service of the respondents. Earlier on in this award we pointed out the effect of non-harmonization of the provision relating to gratuity in the contracts of the respondent with the provision relating to termination grant in the staff regulations. Given these two provisions, the question is: what was the purpose of **paragraph 4.9(c) sited above in the Human Resource Manual?** What is the purpose of providing payment in lieu of notice in the Human Resource Manual when it is already provided for in the contract? We agree with submission of counsel for cross respondent that employers are at liberty to restructure the organizations in a bid to cope with modern methods of running the same organizations. We are not convinced that the framers of **paragraphs 4.9(c) of the Human Resource manual** intended that even when the staff was reduced as a result of a non-contestable restructuring process, the respondent would be liable to pay under the said paragraph. In reference to the same point, the only witness for the cross appellant stated as counsel for the appellant quoted him

> **"Yes I am trained as a lawyer. True, the posts were not eliminated. Letter dated 1st march 2014 is read by the witness. "That eliminated the post you have been holding as a procurement officer". No, post was eliminated. After restructuring the staff reduced."**

It seems to us that the above testimony is so contradicting that one may not be sure if the staff reduced after restructuring or if they kept the same number but with duo responsibilities. This is because the witness says that the posts were not eliminated but at the same time he says that the post of Procurement Officer held by one of the respondents was eliminated. That is the reason the Labour officer (as quoted by counsel for the cross appellant said:

"2nd, 3rd and 4th complainants

The respondent argued that there was no staff downsizing but instead the number of staff recruited increased in number though there was no evidence ever adduced to support this allegation. Counsel argued that the staff downsizing is different from restructuring. I do not agree with the above reasoning. Downsizing is a form of restructuring. I have looked at the termination letter of this complainants and they clearly state that the posts that the complainants were holding were eliminated. However it is not clear from the pleadings and evidence available on record whether there was staff reduction. This evidence can be furnished by the respondent. In the absence of such evidence this officer disallows the claim. The complainants are not entitled to payment for eliminated posts/downsizing."

There were other provisions catering for the interests of the respondents (as already discussed in this award). For the above reasons, this ground fails.

The second ground of appeal in the cross appeal was that the Labour officer erred in law when he failed to refer the question of damages due to the 2nd and 3rd complainants to the Industrial Court and instead awarded minimal compensatory orders.

In his submission, the cross appellant prayed to the Labour officer to refer the matter to this court on the basis that the cross appellants had received less notice than they required and therefore deserved more compensation than the Labour officer could legally award.

As already discussed earlier in this award, the notice given was sufficient, although the Labour officer found it was insufficient. Therefore, failure to refer the matter to this court did not cause any injustice to the cross appellants. This ground fails.

The last ground in the cross appeal was that the Labour officer erred in law when he did not award interest on gratuity.

The award of interest or even costs has always been a matter of discretion by the presiding judicial officer although such discretion has to be exercised judiciously. Nothing in the Employment Act or in any other law privy to us gives power to a Labour officer to award interest. We find no reason to fault the labour officer for declining to grant this prayer. This ground therefore fails.

Signed by:

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

PANELISTS

1. Mr. Ebyau Fidel …………………………………….
2. Mr. F. X. Mubuuke …………………………………….
3. Ms. Harriet NganziMugambwa …………………………………….

Dated: 12TH JAN 2018