

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM No.134/2014
ARISING FROM H.C.C.S No.146/2012

BABU MARIAM

..... CLAIMANT

VERSUS

BARCLAYS BANK (U) LTD

..... RESPONDENT

BEFORE:

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

PANELISTS

- 1. MR. ANTHONY WANYAMA.**
- 2. MS.JULIAN NYACHWO.**
- 3. MR. JOHN ABRAHAM BWIRE**

AWARD

BRIEF FACTS:

The Claimant was employed by the Respondents from 1/3/2005 to 19/04/2015, when she was dismissed. According to her, the dismissal was retaliation against her for raising a whistleblower complaint about her unfair treatment. She claims she was demoted

from the position of Compliance Officer to role of Archives Officer and when she declined the job she was dismissed hence this suit

The Respondent on the other hand claims that the dismissal was because of her gross misconduct and insubordination, therefore it was lawful.

ISSUES

- 1. Whether the Claimant's dismissal was unlawful?**
- 2. What remedies are available to the parties?**

The Claimant was represented by Mr. Rashid Babu of M/S Lubega, Babu and Company Advocates and the Respondent by Mr. Allan Waniala of Sebalu and Lule Advocates.

SUMMARY OF EVIDENCE

The Claimant adduced her own evidence and the respondents adduced evidence through one Bagabo Joseph the Head of Human Resources.

It was the Claimant's evidence that she had attained the role of middle manager by the time of her dismissal "CL2" and the role profiles of appointment referred to her as such. She considered herself a model employee given the number of awards she had received for good performance. She was never summoned for uttering racial abuse although she received "R2", which was an invitation for a disciplinary interview for her alleged inappropriate use of e- mail. However the hearing did not take place. She did not know "R3", which was a report of action to be taken resulting from an alleged altercation with a one Kamula and inappropriate use of e- mail.

She further testified that she had a grievance about her frequent transfers from one department to another and although she knew about the Bank transfer policy she was not familiar with business related transfers. She confirmed receipt of "R5" which was a

letter reassigning her from the Retail branch to the Branch Operations Department, which in her view was a wrong assignment. She contested it, leading to her placement in the monitoring compliance department. However her working relationship with her Supervisor, a one Kawoya Sheila was so bad that she ended up using the whistleblower policy to complain against even though she was aware of the grievance procedure, which required one to go through the head of department. The matter she reported was referred to Human Resources department to handle and it was resolved that she should go on leave. She went on a 2 weeks leave, which was extended 3 times and subsequently, without notice she was transferred to the position of Archives Officer, which was a demotion because it was meant for a diploma holder yet she was a degree holder. She refused to take up the position and refused to attend subsequent disciplinary meetings.

RW1: Mr. Bagabo

Testified that he had worked with the Claimant for 3 years before her termination and according to him her work history was littered with intrigue. He cited a number of incidences in which the Claimant was involved in bad conduct including altercations with one Kamula, and misuse of the internet/IT policy. However did not adduce any evidence to prove his assertions nor did he produce any evidence of a reprimand of the Claimant or proceedings of any grievance regarding her abuse of the IT Policy. It was his testimony that he did not have any warning letters or minutes of any disciplinary hearings or reprimands and he found none on her personal file. According to him the claimant was appointed Archives Officer, which was at a position of junior manage, with a minimum competence requirement of Diploma holder or certificate. However her refusal to take up the position was a breach of contract and it amounted to gross

insubordination and she was suspended for her refusal to take up and subsequently invited for a disciplinary hearing which she refused to attend. She was dismissed for insubordination.

SUBMISSIONS

1. Whether the Claimant's dismissal was unlawful?

Counsel contended that the claimant was frequently transferred under protest but on all occasions she was forced to assume the new role profiles. According to him the transfers were supposed to be in line with her career development and progression, but 3 weeks after she assumed the role of Compliance Manager, her Line Manager a one Sheila Kawoya started intimidating her, shut her out of the working system, gave assignments meant for her to an intern and subjected her to other forms of abuse. This prompted her to report this treatment to the head of department Mr. David Mayeku, who did not assist her and this further prompted her to invoke the whistleblower policy against this unfair treatment. Counsel contended that this lead the Claimant to being subjected to 3 weeks leave and subsequently to a demotion from the position of Compliance Officer to Archives officer. She declined the role, leading to her being summoned for a disciplinary hearing which on the advice of her lawyers, she did not attend. He argued that the particulars of the offence she was alleged to have committed were not stated in her suspension letter and the procedure was not followed therefore there was nothing to respond to.

He further argued that the claimant had a good character reference from her a one Igundura Vivian who was one of the persons who had allegedly reprimanded her. He contended that the minutes relied on by the Respondents were not authentic because

they were not recorded on the Bank's headed paper and they were not signed by anyone. He insisted that the Claimant's frequent transfers were illegal because they were not signed off by the relevant Line Managers and she was not given notice as provided under the transfer policy.

He argued that the RW1 did not prove that the claimant had abused the IT Policy and that she had any altercations with staff and the sanctions matrix and her suspension letter did not provide for an offence of refusal to take up a job He further contended therefore she could not appear to defend herself over an offence that was not disclosed. He cited **JOHN BOSCO ORWYEM VS EC & UNEB ELECTION PETITION NO. 2 OF 1998** where it was held that before any quasi-judicial body or persons arrive at a decision, it must give the other side a chance to be heard and **MARKO MATOVU VS MUHAMMED SEVRI [1974] HCB 174, CA** whose holding was to the same effect. He also cited the Section 9 (1) and (2) of the Whistle blowers protection Act 2010 which provides that; a person shall not be victimized for making a protected disclosure and according to him the demotion of the claimant is prohibited under section 9(2) of the Act. According to him a hearing which is constituted without the employee is null and void, therefore her dismissal was unlawful.

In reply Counsel for the Respondent cited Section 2 which defines dismissal, 66 (1) and (2) which requires the employer to give reasons before terminating an employee, 69(3) which empowers an employer to dismiss an employee where the employee has fundamentally broken his or her obligations arising under the contract of service and **HILDA MUSINGUZI VS STANBIC BANK SCCA NO.005/2016**, whose holding is to the effect that the employer has a right to terminate an employee as long as the procedure for termination is followed.

Counsel submitted that the Respondent transferred the claimant to the Archives department but she refused the position because it was not career building. She was then served with a letter of suspension and invited to participate in the investigations by adducing documents/witnesses, but she did not provide any assistance. After the investigations she was invited for a disciplinary interview by letter dated 12/04/2012 and in the letter she was requested to confirm availability to attend the meeting. She was also advised about her right to representation. According to Counsel all this was in compliance with Sections 63, 66 and 69 of the Employment Act (supra). The Claimant on the advice of her lawyers declined to appear which in his view denied the Respondent an opportunity to appreciate the reasons why she refused to undertake the new assignment and for her to make the Respondent appreciate the reasons. He cited **ALIPANGA BENJAMIN VS GULU UNIVERSITY LDC No.002/2016** in which this Court held that

“ ... given that the Respondent gave the Claimant the opportunity to formally appear before the appointments Board which he declined in preference of the PHD programme, we decline to be on record as saying that the claimant was condemned unheard.”

Which he compared to claimant's decline to attend the disciplinary hearing for the reasons cited in her lawyers' letter, including prosecuting a suit filed after the respondent began the disciplinary process. He argued that the Respondent went ahead and convened the hearing which recommended her dismissal for insubordination. It was his submission that due process was conducted and by refusing to undertake the new assignment the claimant had breached clause 13 of her employment contract which required her to serve the bank in such capacity and place as the Bank required from time to time. He also cited clause 3.3 of the Respondents human Resources manual to support his prayer that Court should find that the Claimant was insubordinate. He

quoted Hon. Mr. Justice Eldad Mwangusya who in **HILDA MUSINGUZI** (supra) who stated that:

“The above observation underlies the fact that while the law protects employees from unlawful termination of their employment they are accountable to their employers for acts which in the course of their duties may compromise the interests of their employers.”

Counsel argued that insubordination affects the interests of the employer because it undermines authority of a Supervisor /Manager before it's staff and in turn affects morale among other things. He insisted that the Claimant should have made an effort to attend the disciplinary hearing to justify her refusal and for her to appreciate how this role was necessary for her career development given its description by Joseph Bagabo. He asserted that the Respondent should therefore not be condemned for failing to retain an employee who had refused to avail herself to its disciplinary mechanism which was meant to address the employees concerns.

He refuted the Claimants assertion that she was dismissed because of her whistle blowing whereas not. He insisted that the reason for her dismissal was her refusal to assume her new assignment in the Archives department which amounted to insubordination. He contended that the subject of the whistleblowing was resolved by a grievance panel which found that she had failed to substantiate the complaint. It was his contention that the fact that insubordination was not included in the sanctions matrix is rebutted by the provisions of clause 13 of the contract of service and Clause 2.2 of the of the Respondent's Human Resources Manual.

He refuted the assertion that the role of the Archives Officer was a demotion, given Bagabo's testimony that the entry levels of all the Respondent's employees across the group was at diploma level and only in specialized roles is a certificate in a specialized

skill required. He insisted that in any case her letter of transfer indicated she would maintain her grade (B4).

He insisted that the Claimant was at all times transferred in accordance with the Respondent's transfer policy, therefore the argument that they were only intended to avoid the consequences of her insubordination could not hold. He prayed that Court finds that the Respondent complied with the disciplinary process prior to dismissal and that the dismissal was lawful.

DECISION OF COURT

It is an agreed fact that the Claimant was an employee of the Respondent from 1/3/2005 to 19/04/2012 when she was dismissed. After carefully perusing the evidence on the record, both Counsels submissions and the relevant law, we find that what is contested as we understand it, **is the reason for the Claimant's dismissal and the propriety of the disciplinary procedure.**

According to the Claimant's contract of service issued on the 15/07/2008, she was appointed to the position of Resource Coordinator, Retail on permanent terms. The contract stated that the commencement of her employment was 1/3/2005. It detailed her terms and conditions of service and made reference to her job profile. The position was graded B4, but the grade would take effect in April 2008. Following another interview, she was assigned a new role of Training and Monitoring officer effective 9/03/2010 at the same level B4 and then she was transferred to the Compliance department where she did not have a good working relationship with her supervisor/line manager one Sheila Kawalya. It was not disputed that she reported the matter via the whistleblowers policy and it was resolved by the Grievance Committee instead (see annexure "CL7"). The matter therefore ceased to be considered a

whistleblower complaint which is supposed to be confidential as provided under Section 9 of the Whistle blowers Protection Act, 2010 to a Grievance which was resolved by the grievance Committee. It is also not disputed that the Committee dismissed the complaints on grounds that the claimant had not substantiated it but recommended among other things that she should be redeployed ***“where you can add more value to your grade”*** (see J” on page 33 of the Claimant trial bundle). It is not disputed that after successive extensions of leave she was then transferred to the Archives department as Archives officer a position she rejected on grounds that ***“I do not feel that there is any career development in a role that is 100% filing.*** She was suspended pending investigations, invited for a disciplinary hearing which she declined to attend and subsequently dismissed.

Whereas it is her case that she was dismissed because she blew the whistle, her dismissal letter states the reason was ***“insubordination arising from the fact that you refused to take up a role offered by the Bank.”***

It is therefore our considered opinion, that the Claimant was not dismissed because of Whistleblowing but for refusing to take up a role offered by the bank, that is the role of Archives Officer.

Was the dismissal lawful?

The Claimant was suspended on 2/04/2012, pending investigations for ***“your refusal to take a role offered by the Bank.”*** According to her suspension letter, the suspension was not considered disciplinary action and it maintained that she would remain under the Respondent’s employment, bound by her terms and conditions of employment, at full pay and with all her benefits. Section 63 of the Employment Act 2006, provides that a suspension pending inquiry/ investigation is undertaken by an employer who has

reason to believe the investigation may reveal a cause for dismissal of an employee. Section 63 provides that;

“63. Suspension

(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 subsection (1) shall not exceed 4 weeks or the duration of the inquiry whichever is the shorter.”

Given this provision, the Claimant’s suspension letter notwithstanding its language amounted to a suspension within the meaning of section 63 (supra). The letter clearly stated in part as follows:

“... RE: Notification of Suspension Pending Investigation

I am writing to confirm that, as of the date of this letter, you have been suspended from work until further notice pending investigations regarding;

Your refusal to take a role offered by the bank.

...”

We therefore do not agree with the submission of Counsel for the Claimant that the Suspension letter did not state the reason for the suspension. It is clearly stated as ***“your refusal to take a role offered by the Bank.”***

The Claimant also contended that the transfer to the Archives department was not developmental and was not done in accordance with the Respondent’s transfer policy. The Guiding principles as stated under the Transfer Policy Marked “CL9,” provide that:

“The Bank will ensure

- o Wherever possible staff will be transferred to the locations of their preference*
- o Sufficient notice is given and support is provided where the individuals have to relocate*
- o Transition between transfer candidates and replacements are managed smoothly both for the benefit of the Bank and the individuals concerned.”*

And the reasons for transfer as provided under clause 2.1 provide that:

“2.1 Reasons for Transfer

There are various reasons why the Bank may require to transfer staff as follows;

- o To give employees exposure, experience and training for career development purpose*
- o To meet the staffing requirements of the Bank*
- o To provide flexibility to the business in order to meet customer and business requirements.*
- o To allow for responsiveness to individual needs in terms of location*
- o To facilitate mobility of staff based in hardship areas.”*

According to R11, the minutes of Redeployment, the claimant was considered for transfer following her grievance regarding the working relationships in the Compliance department and not for the reasons stated under Section 2.1 of the Transfer Policy (supra). The circumstances that warranted the Claimant’s transfer in our view did not fall within the ambit of the transfer policy given that they were specifically arising out of a grievance handling mechanism which was not covered by the policy. We therefore do not fault the Respondent for breaching the policy, when she transferred the Claimant to the Archives department, without making reference to it.

Even then when she was suspended, her letter stated the reason for her suspension was her refusal to take a role offered by the Bank. She was invited to participate in the investigation and subsequently invited to attend a disciplinary hearing where she had an

opportunity to give reasons why she declined the position but she refused to participate in both, on the advice of her lawyers. We do not agree with the advice of the lawyers and even if they considered that there were valid reasons against the hearing, the Claimant should have attended it and raised those reasons during the hearing. The assertion that the Respondent did not state an offence as provided in the sanctions matrix could not prevent the claimant from attending the hearing. Besides the matrix referred to is not exhaustive. The descriptions of gross misconduct are “not limited to the list provided.

This court has already resolved that an administrative hearing such as a disciplinary hearing does not conduct its hearing at the same standard as a court of law.(see **Grace Matovu vs Umeme LDC No.004/2014, Bonny Alzee Bineka Ochwo vs Kyambogo University LDR No. 302, 2015**). What is required is for the employer to notify the employee about the reason the employee is being considered for disciplinary action, termination or dismissal and for the employee to be given reasonable time to prepare to respond to the reason or reasons and an opportunity to appear before a disciplinary tribunal or committee to actually make the response.

In the instant case, the Claimant was given an opportunity to defend the reasons why she declined the job but she locked herself out, when she failed and or refused to attend the hearing. We therefore have no reason to depart from our decision in **ALIPANGA** (supra), to say that she was condemned unheard.

Did her refusal to take up the role assigned to her warrant dismissal?

It was the Respondent's case that her refusal to take up the assignment amounted to insubordination, which was detrimental to the Respondents business because it affected performance and morale of staff and it was a breach of clause 13 of her contract. He

cited the definition of insubordination as provided under the Black's law dictionary 8th edition as ***"a wilful disregard of an employer's instructions especially behavior that gives the employer cause to terminate a worker's employment and or an act of disobedience to proper authority especially a refusal to obey an order that a superior officer is authorized to give."***

A contract of service is defined under the Employment Act, to mean any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration to work for an employer is the basis of the instructions an employee must undertake while in that employment and the contract is drawn by the employer. This is fortified by Section 40 of the Employment Act which provides that an employer must provide an employee with work in accordance with the contract of service. In an employment relationship the employee and employer are never on an equal footing. The employer as the person providing employment has power over the employee and it is expected that the employee will abide by the employers lawful and reasonable orders. Where there is a dispute between the employer and the employee, there should be fair internal systems and processes for resolving such disputes before they escalate to the Courts of law. It is our considered view that in the instant case, the Respondent offered the claimant her such a fair process which she refused to take advantage of.

Therefore her refusal to take up the role offered and her deliberate refusal to participate in the investigation and the disciplinary hearing which was an opportunity for her to explain her reasons for declining the job amounted to refusal to obey a lawful and reasonable order from her employer, which if condoned could send a wrong signal to other staff. We are therefore inclined to agree with Counsel for the Respondent that her behavior amounted to insubordination, which should be viewed very seriously.

Even if she did not consider the role of Archives Officer to be within her duty description as a graduate, she had the responsibility of formally stating so and the hearing was such an opportunity which she declined to utilize. We therefore associate ourselves with the holding in **HILDA MUSINGUZI** (supra) that:

“... the fact that the law protects employees from unlawful termination of their employment, they are accountable to their employers for acts which in the course of their duties may compromise the interests of their employers.”

In the circumstances having been notified about the reason for her suspension in her suspension letter and having been invited for a disciplinary meeting which was an opportunity to explain herself which she deliberately refused to attend, we have no doubt in our minds that the Respondent had complied with sections 63, 66, and 68 of the Employment Act (supra) and they were justified to dismiss her, therefore the dismissal was lawful.

2. What remedies are available to the parties?

Having found that the dismissal was lawful we found no reason to consider the submission on remedies.

In conclusion this claim fails, it is dismissed with no order as to costs.

Delivered and signed by:

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

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2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

.....

PANELISTS

1. MR. ANTHONY WANYAMA.

.....

2.

MS.JULIAN

NYACHWO.

.....

3.

MR.

JOHN

ABRAHAM

BWIRE

.....

DATE: 28TH JUNE 2019