

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE NO.241/2018

ARISING FROM MGLSD/LD/ O28/2018

FRANCIS ODORA & 49 ORS

.....CLAIMANTS

VERSUS

BROOKSIDE LIMITED

..... RESPONDENT

BEFORE:

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

PANELISTS

- 1.MR. BWIRE ABRAHAM**
- 2. MS. ROSE GIDONGO**
- 3. ANTHONY WANYAMA**

AWARD

BREIF FACTS

The Claimants were former employees of the Respondent in various Departments. By letters dated 31/01/2018 they were terminated from employment. According to them, the Respondent delivered the notice of termination to the Secretary General of Uganda Beverages and Tobacco Allied Union on 1/02/2018, the day the Claimants termination was effected. The Commissioner labour was notified on the 31/1/2018 a day before the termination occurred. They lodged a complaint before the labour officer on 7/03/2018, but it was later referred to the Ministry of Gender and adjudicated by another labour officer Mr. Buyego Ismail Kalanda , who also it to this court for reasons inter alia that,

a substantial question of law arising out of the proceedings disenabled him from resolving it.

The Respondent contends that due to technical and financial reasons, it lawfully laid off the Claimants in compliance with Section 81(b) of the Employment Act, which provides for collective termination and therefore their termination was justified.

The matter was brought before this court for interpretation of Section 81 based on the following issue:

- 1. Whether the Respondents complied with the notice of 4 weeks provided for under Section 81(a) of the Employment Act 2006, while collectively terminating the Claimants?**
- 2. Whether the non- unionization, excused the Respondent from complying with the requirement of the law regarding notice under the employment Act?**
- 3. Whether it was reasonably practicable for the Respondent to comply with such time limit, having regard to reasons the termination was contemplated?**
- 4. Whether the Claimants are entitled to any remedies and if so what remedies?**

REPRESENTATION

Mr. Tugumisisre Innocent of M/s Mukatiri-Natweta &Co. Advocates was for the Claimants and Mr. Kajubu Bian for the Respondent of M/s Ntwah & Co Advocates.

RESOLUTION OF ISSUES

1. Whether the Respondents complied with the notice of 4 weeks under Section 81(a) of the employment Act 2006 while collectively terminating the Claimants?

Counsel submitted that on the 31/01/2018, the Claimants were issued with termination letters. The reason stated therein, was that the termination was due to redundancy which is statutorily provided for under section 81 of the Employment Act. According to Counsel the adherence to the section required procedural fairness which the Respondent

was obliged to comply with. He did not dispute the circumstances under which collective termination could occur, but only laid emphasis on the requirement to follow the procedure as laid down under section 81. He cited section 81 as follows: Section 81 of the Act provides that:

“81. Collective Terminations

Where an employer contemplates termination of not less than 10 employees over a period of not more than 3 months for reasons of an economic, technological, structural or similar nature, he or she shall;

(a) Provide the representatives of the labour union, if any, that represent the employees in the undertaking, with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect , except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated ,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a) shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;

(b) Notify the commissioner in writing of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out

(2) An employer who acts in breach of this section commits an offence.”

According to him the termination envisaged under this section is contemplated termination and according to Black’s law dictionary 2nd edition “**contemplation**” is defined to mean; consider, to plan, to think carefully about doing something and a consideration of an act or series of acts, with the intention of doing or adopting them.

He also cited **Atena Life Ins. Co. vs Florida 69f 932 No. 624 of 1895**, for the same definition.

It was also his submission that in the instant case, the Respondent contemplated the termination of 73 workers which was over the threshold provided for under section 81. His major contention however, was that the Claimants were not given the requisite notice as provided in the Section. According to him, whereas the letter of termination took effect on 1/02/2018, the General Secretary Uganda Beverage Tobacco and Allied Union was notified on 29/01/2018 and the Commissioner Labour was notified on 31/01/2018. He argued that Section 81(1) (a) provides that the terminations should only be effected after the relevant information has been re-laid to the union, at least 4 weeks before the first termination. In the instant case the terminations and notifications took place concurrently contrary to the law. He cited **Charles Abigaba Lwanga vs Bank of Uganda LDC Claim No. 14/2014**, in which this Court's holding was to the effect that, even if an employer choose to terminate 1 employee in accordance with Section 81 of the Employment Act, for the same reasons envisaged under the section, the employer must follow the laid down procedure. The employee must be informed at least 4 weeks before and all the factors named under Section 81 must be complied with.

He insisted that notice under this section was mandatory and although it did not explicitly provide for consultation between the employer and the workers, the requirement for consultation is implied in the Employment Act. According to Counsel, the ILO Convention No.158 and Article 13 of Recommendation 166 of Convention No.158, provides for consultation and given that Uganda is signatory to the ILO it is bound by the Convention. He also cited the Kenyan case of **Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 Others (2014)** for the same legal proposition. In his view *the form and substance of the notices issued by the Respondent were incapable of delivering legislative purpose*, because the procedure was flouted as already submitted above. He asserted that there was no time to undertake any consultations or to find alternative measures for the Claimants. He argued that the

Respondents did not contemplate the termination of the Claimants, but rather unlawfully terminated them. This was a violation of Section 81 therefore the termination was unlawful.

In reply Counsel for the Respondents argued issues 1,2 and 3 concurrently and stated that this was a criminal matter which should not be before this Court as a labour claim. In his view the Claimants were claiming double benefits arising out of the penal sanction and other remedies under the Employment Act.

He argued that section 81 provided for exceptional circumstances that would not warrant the issuance of notice as provided under the section and insisted that the Respondent actually invoked these exceptional circumstances. According to him the failure to notify the labour officer cannot be the determining factor of the employees' rights. What matters is reasonable notice to intended victims of termination and that is the employees. The big question in his view was whether they received such notification and their benefits? If so then they have no case.

He asserted that their right and benefits were computed paid on termination. According to him a critical examination of Section 81(a) presents 3 scenarios as follows:

- a) The employer contemplates termination of employees
- b) The employer notifies relevant authorities and employer opts to dispense with the requirement in (b) with justifiable reasons.

In his view the 3rd scenario allows for a deviation from the set procedure of notifying the labour officer and at this stage the contractual rights of the employees have already been determined with no need to go through with all the formalities.

It was his submission that the Respondent opted to use the 3rd scenario because

- a) Milk is a sensitive product in which you cannot afford to have a workforce in an atmosphere of job insecurity and therefore the need to lay off staff in the shortest notice possible.*

- b) The financial burden that comes with the retention of staff on the payroll*
- c) The factory is operating at a very minimal production making the above staff idle and therefore the need to release them in the shortest notice possible.*

He further submitted that in any case non observance of section 81 would attract a criminal penalty, although the section does not prescribe the actual penalty. In his opinion given this lacuna, the Court should rely of section 96 of the Employment Act which provides for circumstances in which no penalty is expressly provided. According to section 96, where such a situation arises a person on conviction is liable to fine not exceeding 24 currency points, and on a second or subsequent conviction for the same offence, is liable to a fine not exceeding 48 currency points or to a term of imprisonment, not exceeding 2 years or both.

He argued that the provision creates a criminal claim which cannot be prosecuted in this court, therefore any prayer for remedies outside this provision is an abuse of court process.

He however stated that the anomaly in this case could be cured by the Commissioner labour and not in accordance with the claimants contracts which required notice and a reason before termination.

He reiterated the uniqueness of this kind of termination and asserted that once terminated under section 81, the employees could only make a claim if their requisite benefits were not paid to them and in the employer cannot be held at ransom for failing to sustain the employees because of failure in business.

He insisted that the violation of section 81 was a criminal offence only triable by a Criminal Court.

RESOLUTION

1. Whether the Respondents complied with the notice of 4 weeks provided for under Section 81(a) of the Employment Act 2006, while collectively terminating the Claimants?

It is trite that before terminating an employee, the employer must give the employee a reason for terminating him or her and if it is because of poor performance or misconduct the employee must be given an opportunity to respond to the reason or to defend him or herself. The employer can also terminate an employee for other reasons other the poor performance or misconduct such as expiry of contract, retirement and or restructuring and in this case the employee in this case must be given notice and the reason for the termination. (see section 2, 66 and 68 of the Employment Act). Section 81(supra) on the other hand provides for the procedure to be followed during collective termination due to technological, economic or structural reasons or for business failure. Our interpretation of this section as stated in **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha LD Appeal no. 035/2018**, is that;

“... that for a termination to amount to Collective termination it must be due to economic, technological structural or reasons of a similar nature, and not less than 10 employees should be contemplated for termination. The section makes it mandatory for the employees contemplated for termination to be informed through their representatives (unions) and in our view where they are not unionized or represented, to be informed individually, at least 1 month before the terminations takes effect.

Secondly the Commissioner labour must be notified in writing of the reasons for the terminations, the number and categories likely to be affected and the period over which the terminations will take place.

It is clear therefore, that a collective termination can never be a summary termination and it cannot be done without a justifiable reason. Although the

Employer is at liberty to restructure his or her business or organization, he or she is expected to think through the process, because by so doing some of his or her employees are likely to lose their jobs. Therefore, the employer has to prepare the employees for any eventuality and the choice of those to be affected must be justifiable.

In **Charles Abigaba Lwanga vs Bank of Uganda LDC Claim No. 14/2014**, court holding was to the effect that, even if one person was contemplated for termination, the employer must satisfy court that the termination was due to economic, technological structural or reasons of a similar nature, and all the other requirements as provided under section 81 were complied with. For emphasis the employer may restructure or abolish some positions or simply retain the same structure but opt to reduce the number of staff for technological, economic or other similar reasons.

We respectfully disagree with the Respondent's argument that, the employer would only be obliged to grant notice to only unionized workers. This court already decided that every employee whether represented or not, unionized or not is entitled to be notified about the impending collective termination.

A close reading of section 81(1)(a) states that:

... Provide the representatives of the labour union, if any , that represent the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect , except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated ,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a) shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;

(a) Notify the commissioner in writing of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out

Therefore, whether the termination contemplated is due to technological, economic or structural reasons, notice about the impending termination must be communicated to workers in issue or their representatives where they are unionized, 4 weeks before the first terminations occur. Given that the terminations are already contemplated, there is no reason why they should not be notified. Even if the section does not elaborate or define contemplation, we believe that the drafters of the law envisaged a situation where the employer had to consider who to terminate to enable him or her address the technological, economic or structural circumstances pertaining at that particular time for the survival of his or her organization.

Therefore, the employees contemplated for termination in the instant case, had be informed about the likelihood of being terminated and the reasons why they were contemplated for termination, that is for either economic, technological, structural or reasons of a similar nature, 4 weeks before the termination takes place. This in our view was intended to prepare the employees to find alternative means of employment, among others.

It was also mandatory for the Commissioner labour and the representatives of the unions if any, to be notified about the contemplated terminations, to ensure that the employees in issue are not taken advantage of and to ensure that their benefits are paid before termination or to assist them find alternative employment.

Nothing in the law precludes non-unionized staff from being given the same treatment as unionized staff. They are equally entitled to the same rights under section 81(supra). Therefore, as already stated above, all employees who are likely to be affected by such a collective termination, whether represented or not, unionized or not, shall be given 4 weeks' notice, before their terminations take effect. In the circumstances, all non-

unionized staff in the instant case, were entitled to 4 weeks' notice just like their unionized colleagues.

2. Whether it was reasonably practicable for the respondent to comply with such time limit having regard to reasons termination was contemplated?

Counsel for the Claimant argued that, the exception created by section 81(a) was not intended to discard the notice but to take into consideration circumstances in which notice period can be reduced or dispensed with, because the section requires employers contemplating redundancy to give reasonable notice to employees and their unions of at least 4 weeks. Therefore, the exceptions and limitations in statutes are expected to be construed narrowly. He cited **Charles Onyango Obbo vs Attorney General Constitutional Appeal No. 2 of 2002**, to support his argument. It was his submission that similarly in considering justifications for considering exceptions to following the procedure laid out under section 81, regard must be given to the following; the reason for the contemplated termination, the number and categories of persons contemplated for termination and the period over which the termination shall be carried out.

From the record it is clear that, the Respondent did not give the employees contemplated for termination the requisite 4 weeks' notice as provided for under section 81(1)(a) and although they argue that it was impracticable for them to give the said notice, they did not show how impracticable it was.

The section clearly states that “... ***Provide the representatives of the labour union, if any, that represent the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect, except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated, (emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a...)”***

The information required in our view was information about a contemplated redundancy exercise in which some of the employees would lose their jobs, the reason for the redundancy, and notice the particular employees to be terminated. We did not find the Respondent's arguments about; the sensitivity of the product, financial burden of retaining staff on the payroll and the fact that the staff was operating at a minimum, plausible, because the law makes it mandatory for the Employer to ensure procedural fairness, before declaring any employee redundant. The Employer must therefore justify the need to invoke the exception to ensuring procedural fairness.

In our considered opinion the reasons stated for the respondent not following the correct procedure should have formed part of the reasons in the notification to the commissioner labour and the General Secretary of the Union as reasons for invoking the exception clause under section 81. Although the Commissioner Labour in his letter marked "A2" on the Respondents submissions, indicated that the Respondent complied, we respectfully do not agree with the Commissioner because the employees were only given 1 days' notice as opposed to the 4 weeks provided for under the law.

In the circumstances, we find that the termination on account of redundancy was substantively justified, given the undisputed economic circumstances of the organisation,. However the Respondent flouted procedure as laid down under Section 81 of the Employment Act, when it failed to give the requisite notice about the redundancy exercise before terminating the employees contemplated for termination under the exercise, thus creating procedural unfairness, which rendered the termination unfair.

We respectfully disagree with Counsel for the Respondent insistence on the argument that this claim was a violation of section 81 which is a criminal offence punishable by a criminal court and not this Court. This matter before us is a labour dispute and the offence is created by the Employment Act and it is an offence arising out of an employment relationship and not the penal Code Act. In our view that is the reason the legislators provided for section 96, which provides for penalties where non have been

prescribed. Section 81 is such a scenario. This court therefore has jurisdiction to order the penalties provided under section 96 and any other as prescribed by any other labour legislation.

4. Whether the claimants are entitled to any remedies and if so what remedies?

Therefore having found that the termination of the Claimant on account of redundancy was substantively justified, but the Respondent was faulted for failing to give the employee notice, we shall award each Claimant 1 month's salary as compensation for the Respondent's failure to follow the set procedure and given that Counsel for the Claimant submitted that what the Respondent claimed was payment in lieu notice, was actually salary for the month of January 2018, we shall award 1 month's salary in lieu of notice to each of them.

It should be noted that termination under section 81, does not attract the same remedies as those granted under other forms of termination, because the termination is occasioned by technological, economic and structural reasons, which renders the employee incapable of maintaining the same number of employees.

We are therefore inclined to agree with Counsel for the Respondent that, to award any other remedies given the reasons for the termination, would not only be double enrichment for the Claimant's but unjust to the Respondent who was unable to maintain them in first place. For this reason, given that it was not disputed that all the other benefits accruing to them at the time of the redundancy, were paid to them, we have no basis to award them any other remedies.

However for the Respondent's failure to issue them with the 4 weeks requisite notice we award them 1 month's salary each and 1 month's salary each as payment in lieu of notice.

In conclusion this claim partially succeeds as follows:

1. The termination was procedurally unfair

2. An award of 1 month's salary each of the claimant's as compensation for the procedural unfairness
3. I month's salary each as payment in lieu of notice.
4. No other remedies as than those that accrued on the collective termination.

No order as to costs.

Delivered and signed by

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MR. BWIRE ABRAHAM

2. MS. ROSE GIDONGO

3. ANTHONY WANYAMA

DATE: 24TH FEBRUARY 2020

