

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE No.015 OF 2019
[ARISING FROM KCCA/CEN/LC/217/2018]

BETWEEN

BIRUNGI GRACECLAIMANT

VERSUS

THE MANAGEMENT COMMITTEE OF KAMPALA

QUALITY PRIMARY SCHOOLRESPONDENT

BEFORE

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

PANELISTS

1. Mr. Bwire John Abraham
2. Mr. Mavunwa Edison Han
3. Ms. Julian Nyanchwo

AWARD

Brief facts

The Claimant was an employee of Kampala Quality Primary School as a teacher on probation for 2 years by virtue of an appointment **annexure “A”** to the memorandum of claim dated 1/6/1999. She was later on confirmed and by the time of her termination from employment she was on a fixed term contract which was to elapse 11 months later. During the end of 3rd term 2017 examination she was alleged to have cheated or mishandled exams for a pupil and according to her she was terminated without proper investigations and without giving her a fair hearing.

According to the respondent, the claimant was granted a fair hearing when she attended a disciplinary meeting in January 2018.

Issues

No Joint Scheduling was done in this case and therefore no agreed issues were framed. However, the claimant in her submission framed the following issues which we agree are able to resolve the conflict.

- 1) Whether the termination of the claimant's employment was lawful and /or justified.**
- 2) What are the appropriate remedies to the parties?**

REPRESENTATIONS

The claimant was represented by Mr. Hannington Mutebli of Kwesigabo, Bamwine & Walubiri Advocates while the respondent was represented by Mr. Geoffrey Musinguzi of Musinguzi & Musinguzi Advocates & Solicitors.

Evidence adduced

The claimant adduced evidence from herself and one other witness. The respondent adduced evidence from four witnesses. In her evidence in chief the claimant informed court that while she was marking English examination scripts, she marked two of them belonging to one Ahumuza Isaac who scored 80% in one and 40% in another. In her wisdom she recorded 80% as the right mark of the pupil and forwarded it for recording only thereafter to be asked to produce the same script but on searching her office she could not find the script and she decided to hand in the one with the 40% mark. She was asked to write a brief about the missing 80%-mark script which she did only a month later to be called in a meeting to inquire into the same issue. At this meeting she asked for time to prepare a response which was denied her.

The evidence of one Tushemereirwe Leonansia was only to the effect that the claimant informed her about her termination and when she compared notes she discovered it was in the same circumstances that the respondent had earlier on terminated her. The witness seemed not to have first-hand information relating to the termination of the claimant.

The first respondent's witness one Jennifer Kasisiri testified that the claimant involved herself in examination malpractice of awarding a pupil an 80% mark instead of the deserved 40%. She testified that during the exercise of marking scripts, one script was found missing where upon the claimant said the script belonged to a pupil she knew who had scored 80%. On being tasked to produce the script she failed to deliver it.

According to her, the school administrators found out that the claimant intended that the pupil be promoted on provisional results while she purported to be searching for the script and according to her a disciplinary committee was constituted which found her culpable and summarily dismissed her.

The second respondent witness one Kitandwe Thomas in his written witness statement did not substantively differ from the first witness.

The third witness and the forth witness both corroborated evidence of the 1st and 2nd witnesses in so far as they testified that the claimant cheated an examination for a pupil.

The third witness one Turyasiima Racheal informed Court that the pupil was promoted on provisional result (of 80%) but subsequently the claimant produced an examination script bearing 40%.

SUBMISSIONS

It was argued for the claimant that premising the summary termination of the claimant on **clause 27, Teachers Professional Code of conduct, Education Service Act and Education Regulations** was illegal and unlawful. Counsel for the claimant argued that this was because these legal provisions were not mentioned anywhere in the disciplinary committee's resolution as a basis of the summary termination.

Counsel asserted that the claimant was dismissed under the Respondent's own **Teacher's Code of Conduct/ Rules Reference Number 27** which did not exist to the knowledge of the claimant.

Counsel contended that the Respondent under **Regulation 14 (2) of the Education Service (teacher's professional code of conduct, notice 2012** ought to have reported the case to the Commission.

According to counsel in failing to refer the matter to the commission and instead taking steps to terminate the services of the claimant, the disciplinary committee acted ultra vires and in accordance with the case of **Makula International Vs Cardinal Nsubuga HCB (1982)11**, such an illegality cannot stand.

He argued that terminating the claimant without notice contravened **Section 58 of the Employment Act** and having her terminated without being given a right to prepare her defence contravened the Disciplinary code under **Schedule 1 of the Employment Act paragraph 1 (10), 2(1) (b) and 3 (1)** which provides for a penalty to be imposed 15 days after the occurrences of the misconduct.

Referring to the minutes of the disciplinary hearing counsel argued that the hearing was unfair and a sham because no investigation was done, no witnesses were called and the Director of studies was the prosecutor as well as the Judge thus offending **Articles 28 (1) and 44 (C) of the Constitution**.

In reply to the above submissions, counsel for the respondent reiterated that the claimant cheated exams contrary to **Section 6 of the Education Services (Teachers Professional Code of Conduct 2012)** and **number 27 of the Teacher Rules /conduct** which were signed by all teachers save for the claimant who according to counsel refused to sign it on her renewal of contract. According to counsel, the claimant was notified and summoned to appear before the disciplinary committee and defend herself on three occasions.

In his submission, the claimant's actions justified a summary dismissal which did not warrant a fair hearing.

Decision of Court

Issue 1 – Whether the termination of the claimant's employment was lawful and /or justified.

Article 28 and 44 of the Constitution provide that before being condemned a person alleged to have committed a wrong is required to be called for a fair hearing before an impartial tribunal. In employment terms an employer must inform the employee in a language such employee understands the nature of the offence he/she is alleged to have committed, give the employee sufficient time to prepare and appear before a disciplinary

committee which after considering the accusation and the defence without any bias gives out a verdict. This process is summarised in **Section 66, 58 and 68** which provide for a fair hearing where an employee is charged with misconduct, notice before termination and proof of a reason for termination respectively.

In other words, before a termination is considered to be lawful or justified the employer must do the following.

- a) Notify the employee of the nature of the offence.
- b) Give the employee sufficient time to prepare a reply.
- c) Constitute an impartial tribunal.
- d) Give the employee sufficient time to defend the accusation which includes calling evidence.
- e) Give the employee chance to appear with a person of his choice who should be allowed to make representations.
- f) Give the employee chance to cross examine the witnesses against him or her.
- g) Prove the commission of the offense by the employee.
- h) Make a decision.

All the above steps were declared to be constituting a fair hearing in the case of **Ebiju James Vs Umeme HCCS 0133/2012**

The basis of the claim in the instant case, in our understanding, is on the following fronts:

- a) The disciplinary committee not being the Education service committee had no power to decide the conflict.
- b) The termination was contrary to schedule 1 of the disciplinary code under paragraphs 1 (b), 2 (1) (b) and 3 (1) of the Employment Act and mitigating factors prior to any termination under Section 62 of the Act.
- c) The hearing was a sham because no witnesses were called, no investigation report or findings were availed, the investigators were at the same time judges, and the claimant was not given time to prepare.

- a) **Power of Disciplinary committee as opposed to the Education service committee.**

Counsel for the claimant argued vehemently that whereas the termination letter revealed that the claimant was terminated for breaching **Teacher Professional code of conduct part IV 6J, (1), (M) and part IV 8 (a) and the Education Service Act and regulations**, these legal provisions were not anywhere in the committee's resolution to summarily terminate the claimant. In counsel's contention, the claimant was wrongly dismissed for breach of the Teachers code of conduct by an incompetent committee since under **Regulation 14 (2) of the Education Service (Teachers' Professional Code of Conduct) notice 2012**, all matters involving such breach are reported to the commission which deals with them.

A copy of Legal Notice No. 11/2012, Education Service (Teachers Professional code of conduct, provided to this court by counsel for the claimant under paragraph 14 part VII states:

"14 Enforcement of the Code

- 1) It is the duty of every teacher to observe and respect this code and report any breach of the code to the appropriate authorities.**
- 2) All matters or cases involving breach of the code shall be reported to the commission and shall be dealt with in accordance with the Education Service act, 2002 and the Education Service Commission Regulations 2012."**

On perusal of **statutory Instrument 2012 No. 51 Education Service Commission Regulations 2012, part IV** it is clear that the disciplinary process and measures relate to teachers in government services although the regulations do not expressly exclude teachers in private institutions. It follows, in our considered opinion that given that teaching is a profession the code of conduct of teachers applies across the Board to all teachers whether in private or government owned institutions. This means that a teacher employed in a private institution under specific terms of the contract is expected to apply the code of conduct in his daily routine and if he fails short, his/her employer is entitled to bring him/her to book and not necessarily to refer him or her to the Education Service Commission as counsel for the claimant seems to suggest.

In our considered opinion the appropriate authority referred to in paragraph 14 (1) of legal Notice 11/2012 included authorities employing Teachers and is not exclusively reserved for the Education service commission. Accordingly, it is our finding that the Disciplinary committee in the instant case having been a committee constituted by the employer of the claimant did not act ultra vires the **Education Service legal notice 11/2012 (Teachers professional code of conduct) or legal notice 51/2012, Educational Service Regulations** dealing with discipline of teachers.

- b) **Termination having been contrary to Schedule 1 of the Disciplinary Code and Section 62 of the Employment Act.**

Section 62 of the Employment Act provides:

“62 Disciplinary penalties

- 1) Section 62 to 64 shall apply where an employer imposes a disciplinary penalty other than dismissal, on an employee because of neglect, failure or alleged failure on the part of an employee to carry out his or duties under his or her contract of services.”**

Clearly the instant case does not follow under the above section of the law since it involved dismissal on the grounds of professional misconduct.

- c) **The hearing was a sham**

As already pointed out earlier in this Award, fair hearing is a demand of the constitution under Article 28 and 44 of the constitution.

According to counsel for the claimant, no witnesses were called, no investigation report or findings were issued out, the investigators were at the same time Judges and the claimant was not given time to prepare.

A closer look at the minutes of the disciplinary meeting discloses the fact that the meeting had been postponed from 2018 because December 2017 was very busy. In her testimony the claimant informed Court that in December 2017 she was summoned by the Director of studies to write a brief letter accounting for a misplaced paper, according to her for record proposes which she did. Her explanation as attached to her written witness statement reads:

“When we were marking internal English Scripts, I realized that Ahumuza Isaac had written two papers of the same examination.

After I had discussed with the people I was with, I withdrew the paper with 40% and left the one with 80%.

When I got all of them to go through, I couldn’t see his paper of 80%, checked and asked other teachers failed to find it and I had to put back the one with 40%.”

This explanation is dated 5/12/2017. In our understanding while she was writing the explanation on 08/01/2018, the claimant was aware of the nature of the accusation which she responded to in writing. It is noted that there is nothing else on the record to suggest that the claimant on the date of the disciplinary hearing was formally notified and formally given time to respond to the allegation. The committee took the notification to her in Dec 2017 for her to write an explanation which she did as above described, to have been sufficient for the disciplinary hearing of 8/1/2018. According to the claimant she was called on her mobile phone for the meeting and on arrival she was asked to merely narrate how it all happened which she did to the Director of studies but after 1 day she was called in the same manner only to appear before a number of members including the principle (RW1).

Director of studies, and Headmaster (RW2). She asked for time to prepare a defense which was denied and she was not allowed to ask any questions.

The authority of **DFCU Vs Donna Kamuli civil Appeal 167/2018, COURT OF APPEAL**, is of the legal proposition that a disciplinary committee hearing is not to be equated to a Court of law hearing. In other words, although the disciplinary committee is expected to follow all tenets of a fair hearing as described earlier in this Award and as spelt out in the case of **James Ebiju Vs Umeme(supra)**, the extent of compliance cannot be the same extent of compliance by the courts of law.

Was there a fair hearing?

Counsel for the respondent asserted that the claimant’s actions justified a summary dismissal which did not warrant a fair hearing

In the case of **Francis Oyet Ojera Vs Uganda Telecom Limited HCCS 161/2010 (Civil Division)**

Hon. Lady Justice Elizabeth Musoke (High Court Judge as she then was) at page 10 of the Judgment in the last paragraph stated:

“Be that as it may, it is important to note that past 2006 Employment Act position is that there is a mandatory right to be heard now reserved under Section 66 of the Act for every form of dismissal, a right not available in summary dismissal previously.”

Section 66 (4) of the Employment Act provides:

“Irrespective of whether any dismissal which a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this Section is liable to pay the employee a sum equivalent to four weeks’ net pay”

Section 66 (1), (2) and (3) are all in consonance with the requirement of fair hearing. Accordingly, the assertion of counsel for the respondent is without legal merit.

In the instant case the Claimant is on record stating that she marked two scripts of one pupil in the same subject at the same sitting where the pupil scored 40% and 80% respectively. The administration of the Respondent school suspected that she intended to cheat for the pupil by purporting that the pupil scored 80% whereas not. Having posted the 80% mark, she was tasked to produce the script that showed the 80% mark which she failed and claimed it got lost and instead she produced the 40%-mark script. Although she did not admit having cheated or intended to cheat for the pupil, in the absence of the 80%-mark script, the respondent was entitled to find the intention was to grade the pupil at 80% instead of the 40% the pupil scored. In our considered view in the absence of the two scripts it is more probable than not that a pupil at a level of primary one class could not sit for an examination and provide two answer sheets at the same sitting in the same examination. It is not probable that the same pupil would score 40% in one answer sheet and 80% in another answer sheet in the same questions unless assisted to upgrade to the 80% mark.

As pointed out earlier in this Award, the claimant as a professional teacher was bound to follow the Teacher’s Professional Code of Conduct. She was also bound to follow the

respondent's teachers Roles/Conduct of the respondent which on perusal is a subset of the Education Service (Teachers Professional Code of Conduct notice 2012. The claimant being a professional teacher did not have to sign the respondent's teacher's role/conduct in order for her to be bound. The submission that such roles/ conduct were not part of her contract, in our view, is beside the overall principle that professionals are governed by certain standards and codes of conduct for as long as they are in the practice of the profession where ever they may be.

In the instant case, it is our view that the claimant having been asked to account for the missing paper which she did earlier on in December 2017, and having done so in writing admitting that she could not find the script she allegedly marked, and the said absence of the script having been the reason of the conclusion that she intended to cheat, the respondent, her employer through the disciplinary committee did what it took to give the claimant a fair hearing.

It is an inherent fundamental obligation of a professional teacher to teach, guide, give and mark examination scripts without any form of assistance that may amount to cheating of any examination. The circumstances of the instant case show that the respondent was entitled to hold the claimant accountable for the non-existence of the 80%-mark script which the claimant herself claimed existed and yet she had in possession only the 40%-mark script. She fundamentally breached her obligation. In the circumstances given the admission of the claimant that she could not find the 80%-mark script, we have no doubt that none availability of the investigation report and the allegation that some of the investigators were at the same time Judges had no bearing on the fairness of the hearing. The process was, in our view, in accordance with standards expected of the respondent and she was properly held culpable and lawfully dismissed.

The last issue is **what are the appropriate remedies to the parties?**

The claimant having been lawfully dismissed, she is not entitled to any remedies arising from this claim although as the termination letter states, she should have been paid her January salary and if not let it be.

All in all, the claim fails and it is dismissed with no Orders as to costs.

Delivered and signed by:

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

PANELISTS

1. Mr. Bwire John Abraham
2. Mr. Mavunwa Edison Han
3. Ms. Julian Nyanchwo

Dated: 03/03/2021