

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE No.253 OF 2015
[ARISING FROM KCCA/CEN/LC/142/2015]

BETWEEN

RICHARD SSERWANGACLAIMANT

VERSUS

UGANDA BREWERIES LIMITEDRESPONDENT

BEFORE

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

PANELISTS

1. Mr. Ebyau Fidel
2. Mr. FX Mubuuke
3. Ms. Harriet Mugambwa

AWARD

Brief facts

By memorandum of claim filed in this Court on 06/11/2015, the claimant stated that being an employee of the respondent since 8/1/2001, he was in 2011 transferred to a non-existent section in the administrative hierarchy of the respondent company, without his knowledge.

When he challenged the transfer he was on 10/3/2011 served with a warning letter dated 21/2/2011 for failing to execute his duties properly against which he demanded a hearing in vain.

He was unfairly appraised on 10/7/2012 and falsely accused of gross misconduct and absconding from work and when he appealed against the appraisal no decision came out until 16/8/2012 when in response to the appeal he was served with a termination letter which disclosed no reason for termination. He lodged an appeal against the termination but no decision ever came out.

According to the memorandum of claim, the above events constitute extreme abuse of the rights of the claimant contrary to the Diago Code of Business conduct and the laws and regulations governing employment relationships in Uganda.

The Claimant prayed for a declaration that his dismissal was unfair and unlawful, severance allowance, certificate of service, general damages; special damages; aggravated damages; four weeks' net pay, costs and interest.

The Respondent filed a memorandum in reply on 16/11/2015 in which it was contended that after being served with a warning letter on 21/2/2011, the claimant was on 1/03/2011 deployed to the role of **Manager Projects and Special assignments** following a reorganisation of the operations department. On being appraised, the claimant was found wanting and on 16/8/2012 he was terminated in line with the Human Resource Manual, his contract of service and the applicable law within the prerogative of the Employer.

The issues agreed from the above facts in a joint scheduling memorandum filed on 27/4/2016 were:

- 1) **Whether the claimant's employment was unfairly terminated by the respondent company.**
- 2) **What remedies are available to the parties.**

Representation:

The claimant was represented initially by Mr. Muwema of Muwema & Co. Advocates who filed the memorandum of claim and signed the joint scheduling memorandum.

Subsequently during the trial, the claimant was represented by Mr. Charles Nsubuga & Mr. Abdulla Kiwanuka of Kiwanuka, Kanyaga & Co. Advocates. Mr. Turyakira Anaclet of Turyakira & Co. Advocates represented the respondent.

Evidence adduced

In an attempt to resolve the above mentioned legal issues, the claimant adduced evidence from his own testimony and after failing to trace a second witness, one Jovans Ndabayunga, he on 3/09/2018 abandoned this witness and closed his case.

The respondent opened its case with a witness one Priscilla Mwachha who having been partially cross examined, failed to turn up for completion of the cross examination and all attempts to secure her including witness summons did not work. After numerous adjournments, on 28/2/2020, the evidence of Ms Mwachha was expunged from the record and the respondent was allowed to provide a substitute which it failed. On 18/11/2020 Mr. Manderara Aali on brief from Mr. Turyakira for the respondent prayed for closure of the respondent's case and an adjournment for submission which was allowed by the court. Court was left with only the evidence of the claimant on the record.

In the presence of both counsel this court granted the claimant up to 2/12/2020 to file his written submissions and the respondent up to 16/12/2020. The court set 29/1/2021 for the quorum sitting to discuss the case and 05/3/2021 for Judgement /Award.

By 29/1/2021, neither of the submissions were filed and this court decided to ignore the submissions and go on to write the Award.

Consequently, the submissions which were subsequently filed on 02/Feb/2021 for the claimant and 1/3/2021 for the respondent, are not part of this Award.

The Claimant in his written witness statement testified that he was unlawfully transferred to a position from which he was later unjustifiably terminated. According to him, the communication of the transfer to him was oral contrary to **EABL Human Resource Policies Manual page 22 Subsection 4.3.** and the transfer was made on disciplinary grounds contrary to the **Manual page 21 subsection 4.2.2.** His complaints about the transfer were not answered contrary to **Manual 2008, page 19 Section 3.3 and page 03 section 3.0.**

The Claimant testified that the redeployment of 1/3/2011 contravened the **policy manual 2008 page 13, Subsection 1.10** and that when he appealed against what he called an unfair appraisal, the appeal was ignored. According to him the termination was abrupt without a hearing, investigation or sufficient reason.

DECISION OF COURT

The termination letter of the claimant dated 16/08/2012 stated:

“Dear Richard,

RE: TERMINATION FROM SERVICE

Reference is made to your appointment dated January 082001.

In accordance with your employment contract, the company hereby notifies you of its decision to terminate your services. This termination is with immediate (August 17, 2012). You will be paid three month's salary in lieu of notice, any untaken leave, share save, and RBS contributions less any indebtedness to the company.

You are hereby required to make a formal hand over to your line manager and hand over any property in your possession including the company Identity Card and medical cards to the Human Resources Department with immediate effect.

We thank you for the time you have spent with the company and wish you well in your future endeavours.

Yours faithfully,

UGANDA BREWERIES LIMITED

Signed

Alasdair Musselwhite

MANAGING DIRECTOR

CC Paul Kasimu GHRD

Brendan Rushe Supply Director

Legal Counsel UBL

Personal File

A careful reading of the above termination letter suggests that the claimant was terminated in accordance with a termination clause in the contract of service.

The claimant's case in our understanding is that the termination was unfair /unlawful because

- a) His transfer from the office of quality manager to that of special project manager was unlawful as the new position was non-existent.
- b) He was terminated without any reason and without any hearing.

a) Transfer from office of quality manager

The claimant in his testimony relied on the **EABL Human Resources Policies Manual page 22 Subsection 4.3**. In his evidence the claimant informed court that his transfer was oral contrary to this provision of the manual. **Section 5.2 at page 22 of the only policies Manual 2012** on the record, which deals with transfers states that lateral or permanent transfers will be made for specific reasons and on recommendation to Human Resource department who will inform the concerned parties in writing giving a notice of one month.

In cross examination the claimant insisted that the transfer to a new assignment was not in writing and that it was not by any notice of any period. Although in cross examination reference was made to a letter annexure "B" to the respondent's written witness statement, the statement was expunged from the record, and therefore no regard can be put to the said annexure. Consequently, we agree that the transfer was contrary to **Section 5.2 of the Human Resources Manual 2012**.

The Claimant testified that the notice was given contrary to the Policies Manual page 21 Subsection 4.2.2; Permanent transfers and that it was made basing on disciplinary grounds contrary to the Policies Manual page 21, Subsection 4.2.2.

We have carefully perused the above quoted Subsections in the **2012 EABL Manual** but they seem to provide no relevance to the evidence of the claimant. Page 21 does not cover Subsection 4.2.2 which is covered at page 10 of the manual under Gross misconduct. It is at page 22 where section 5.2.2 covers transfer as discussed above, and provides for notice of 1 month.

Page 22 of the EABL 2012 manual Section 5, the last sentence provides

“Transfers, be they permanent or Temporary shall be according to company policy and procedure and shall not, at any given time be used as a disciplinary measure.”

We must emphasize that the employer is vested with authority to transfer any employee to a department or a section in the same organisation where such employer believes that the services of the concerned employee are needed most as long as such transfer is not a demotion or fundamentally in conflict with the original terms specified in the contract of service. In our considered opinion the procedural flows in effecting a transfer of an employee cannot be seen to invalidate the decision of an employer to transfer an employee. Such flows do not make the transfer illegal or void, although they may be corroborative of other evidence, that the termination was unlawful. Even then we are not satisfied on the evidence that the claimant has proved the nonexistence of the office to which he was transferred and that it was fundamentally different from his original contract with the respondent. The transfer therefore was not illegal or invalid

(b) Termination without reason and without hearing

A right to a fair hearing is sacrosanct as expressed by **Article 28 and 44 of the constitution** and operationalized by the **Employment Act, Section 66 and 68**.

Although termination by giving notice is provided for under **Section 65 (1) (a) of the Employment Act**, no termination or dismissal can be effected without a hearing in accordance with **Section 66** or without proof of reason under **Section 68**. Under Section 2 of the employment Act the terms “Dismissal” and “Termination” are defined as “discharge of an employee for **“VERIFIABLE MISCONDUCT”** and “discharge of an employee for **“JUSTIFIABLE REASONS”** respectively.

The **Termination of Employment Convention (No 158)** which was ratified by the Government of Uganda, sets up a principle that Employment of a worker should not be terminated unless a valid reason for such termination connected with the worker’s capacity or conduct based on the operational requirement of the undertaking or establishment or service. It provides that in the event of a dismissal of an employee, such **employee shall be entitled to defend self against allegations.**

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In the case of Francis Oyet Vs Uganda Telecom Limited, civil suit 161/2010 (civil division), Hon Lady Justice Elizabeth Musoke, (High Court Judge as she then was) at page 10 of the Judgment had this to say

“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.”

This Court in **Okou R. Constant Vs Stanbic Bank LDC 171/2014** stated:

“It is granted that the employer is the owner of the business enterprise but the law recognises the fact that the employee’s job must be secure for sustainable development. Consequently, it is no longer tenable that an employer will wake up one morning and pay in lieu of notice or give notice to an employee and end the employment without legal consequences even if that was in accordance with the contract of service.”

The evidence of the claimant is that he was unfairly appraised in July 2012 and when he appealed against it no decision was taken only to terminate him. The termination letter is dated 16/8/2012 and provides for immediate termination citing the contract of service which we believe provided for termination by notice of either party.

The Claimant having been appraised, the Respondent should have at least raised concerns of poor performance at a disciplinary hearing or should have considered the appeal of the claimant against the poor performance.

The fact that there existed a warning letter of 21/2/2011 on his personal file, did not by itself constitute a reason for termination on 16/8/2012 1½ years later. As evidence unfolded the respondent did not want to dismiss the claimant for the reason of poor performance but opted to invoke the termination clause in the contract of service which as we have already pointed out in the above cited legal authorities was not sufficient to constitute a lawful termination. It is our finding therefore that the claimant’s employment contract was not only unfairly but unlawfully terminated. The first issue is in the affirmative.

The second issue is: **What remedies are available to the parties?**

1) Special Damages

The Claimant prayed for bonus of 11,906,359/= which according to him was withheld without justification, salary arrears of 789,808/= which according to him arose due to an uneffected salary review of 31/August 2012 as well as 3 months' payment in lieu of notice equivalent to 1,184,712. The law relating to special damages is that unlike general damages which are awarded at the discretion of court, special damages must be strictly pleaded and strictly proved in evidence.

The evidence of the claimant in his written witness statement is not clear how the figure of the bonus pleaded arose. Under **paragraph 28(c)** of the **written witness statement**, the claimant states that the respondent failed to pay him a monthly bonus and salary increment which were a motivation. The claimant also states that this was payable upon the Respondent making profit in excess of a set limit.

The evidence in our view was short of proving that the respondent made profit exceeding the bonus profits and was also short of the method used to reach at the claimed 11,906,359/= and 789,808/=. We do not find annexure "N" attached to the memorandum of claim useful in proving the bonus and salary arrears because it is a mere document of computation bonus, salary increment and severance allowance without showing the originator of the computation and how it was arrived at. In cross examination about incentives the claimant agreed that incentives were given for hard work and that they were not a matter of a right.

In the absence of proof that the claimant was entitled to the incentives and the absence of proof of the profits we hereby reject the prayer.

The claimant started working in Jan 2001 and was terminated in Aug 2012 making 11 years. In accordance with Section 58 of the Employment Act he was entitled to 3 months' notice or payment in lieu thereof.

However, on perusal of his witness statement, nothing is revealed about his salary entitlement. On perusal of the memorandum of claim, nothing is mentioned about his salary.

By the claimant's own pleading and evidence, this court was denied a method of tabulating his own payment in lieu of notice. We do not see the basis and origin of

the claimed 1,184,172 as payment in lieu of notice. Accordingly, this prayer is denied.

2) Severance pay

For the same reasons above mentioned in denial of payment in lieu of notice, severance pay is also hereby denied.

3) Certificate of service

Under **Section 61, of the Employment Act** the employer is obliged to provide an employee with a certificate of service, if so requested by the Employee. Accordingly, this prayer is hereby granted.

4) General Damages

We take cognizance of the fact that the claimant lost his job which helped him to cater for his family and we take Judicial notice of how difficult it is to get another job. He had worked for the respondent company for over 10 years only to be unjustifiably dismissed. Accordingly, we Award the claimant 15,000,000/= as general damages.

5) Four weeks' net pay

It is our considered opinion that this remedy is only applicable when a Labour Officer is the one handling the matter. Since unlike the Labour Office this court has a larger latitude to award unlimited damages depending on the circumstances and the discretion of the court, the damages so granted caters for the compensation of the four weeks provided for under **Section 78 (1) of the Employment Act**. This prayer is therefore denied.

6) Aggravated damages

We have found no reason in the circumstances of this case to grant the claimant aggravated damages. This prayer is denied.

For avoidance of doubt, let it be known that annexure "F", an acknowledgement of the claimant's receipt of 4,452,358/= as final settlement of the terminal benefits and as a discharge of the respondent from liability could not be relied upon by this court

because the evidence of one Rose Mary Nakuya to which it was attached was not available in court having been expunged from the record. In the same vein and for the same reason, annexure "A", an offer of appointment to the claimant at a salary of 219,604/= could not be relied upon to compute severance allowance or payment in lieu of notice.

All in all, the claim succeeds in the above terms with no orders as to costs but with an order for payment of interest at 15% per year on the amounts granted as general damages until payment in full. ALL benefits stipulated in the termination letter as being owed to the clamant, if not yet paid, shall be payable.

Delivered and signed by:

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

PANNELLISTS;

1. Mr. Ebyau Fidel
2. Mr. F. X. Mubuke
3. Ms. Harriet Mugambwa Nganzi

Dated: 05/03/2021