

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM No. 277 OF 2014
ARISING FROM HCT CS No. 167/2012

NYAMUTALE BARRET **CLAIMANT**

VERSUS

VECO EAST AFRICA (U) **RESPONDENT**

BEFORE:

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

PANELISTS

1.MS. HARRIET MUGAMBWA NGANZI

2.MR. FX MUBUKE .

3. MR. EBYAU FIDEL

AWARD

BRIEF FACTS

On 15/05/2009, the Claimant was employed by the Respondent Company as Finance and Administration officer and posted her to its Mbale Branch office.

On 8/05/2012 she received termination notice effective 10/08/2012. She got pregnant in At the time she was pregnant and on 21/3/2012, she notified the Respondent that she would take her maternity leave in July 2012. She however developed pregnancy complications leading her to take leave earlier in May

2012. She was issued a termination notice before her application for leave was approved. It is her case that she was terminated because she was pregnant, therefore the termination was unlawful.

The Respondent on the other hand contend the Claimant was terminated as a result of restructuring therefore the termination was lawful.

ISSUES FOR DETERMINATION

- 1. Whether the Respondent unlawfully terminated the Claimant's contract?**
- 2. What remedies are available to the parties?**

REPRESENTATION

Mr. Livingstone Ojakol of M/S Alaka & Co. Advocates Kampala, was for the Claimant and Ms. Shiela Kasolo of BKA Advocates(formerly Barugahare and Co. Advocates) was for the Respondent.

SUBMISSIONS

1. Whether the Respondent unlawfully terminated the Claimant's contract?

It was submitted for the Claimant that, the Respondent employed her as its Finance and Administration Officer and posted her to its Mbale office. According to Counsel, it was the Claimant's testimony that, on 21/03/2012, she became pregnant and she informed Respondent's Regional representative about her leave plan. According to counsel, the Claimant filed her leave application form (marked RE5) on 3/05/2012 and followed it up by email (marked RE7), on 13/05/2012. He contended that, the leave application was approved after the termination letter was served onto the Claimant on 8/05/2012.

Counsel further contended that the Respondent was notified about the Claimant's pregnancy and about her leave plans, before the meeting for restructuring took place, therefore the Respondent should have stayed any intention to terminate her.

He argued that , although the Respondent has a right to terminate the contracts of its staff, the termination must be done in accordance with the correct procedure for termination as provided under the Employment Act 2006, which was not done in the instant case. He contended that the Claimant's termination was in violation of section 56 of the Employment Act, which grants a pregnant employee a right to return to the job which she held immediately before her maternity leave or to a reasonably suitable alternative job on terms and conditions not less favourable than those which would have applied, had she not been on maternity leave.

He insisted that, the Claimant verbally, through telephone and by email respectively, informed a one Adocorach Rose and the regional representative about her leave plans, to enable the Respondent plan its activities while she was away. According to him RW1, the Country Manager acknowledged that the Regional Manager was aware of the Claimant's application for maternity leave, therefore the she fulfilled the requirement under section 56(4) of the Employment Act which entitled her to return to work after her maternity leave, therefore the termination was unlawful.

Counsel Kasolo for the Respondent, in reply did not dispute the fact that, on 15/09/2009, the Claimant was employed by the Respondent as its Finance and Administration officer. According to her, the Respondent initiated a restructuring process aimed at hiring senior staff with higher competencies in its finance department, as a result of regional restructuring for better efficiency

and more strategic positioning, therefore, each staff was expected to possess a basic minimum requirement of Master's degree. This resulted in the Claimant's position being rendered redundant because she lacked the required competency, hence the termination.

Citing **Charles Lwanga Vs Bank of Uganda LDC No 142/2014** and **Cissy Nankabirwa & Others Vs the Board of Governors St. Kizito Technical Institute Kitovu LDC No. 60/2016**, she further submitted that an employer had an inherent right to restructure posts in his or her organisation and could terminate a contract of employment due to restructuring provided the employee is given the reason for termination. she reiterated that, the Respondent's head office executed a strategic learning program for all its branches including the Respondent, which recommended among others that the Respondent is restructured. The restructuring required that, all staff at senior level should possess higher competency. In particular staff holding the position of Finance and Administration were required to have minimum qualification of Master's degree. According to her all the employees of the Respondent were notified about the restructuring process in a meeting held at the VECO Country office in Mbale on 20/04/2012 and the Claimant attended this meeting. She argued that during cross examination, the Claimant admitted that she attended this meeting. She also stated that, the Respondent had a private meeting with the Claimant and informed her that the restructuring had rendered her position redundant because it required a higher qualification which did not possess. She made reference to the memo marked RE4 in which the Country Contact Person Josephat Byaruhanga notified the Regional Representative of the Respondent about the steps taken regarding the restructuring process.

Counsel did not deny that, the Claimant applied for leave on 3/05/2012 and it was only approved on the 13/05/2012 after she received notice of termination. She insisted that, the Claimant was aware that, the leave approval form clearly stated that, the leave was approved in accordance with the discussion on the restructuring process and that the notice period given to the Claimant, coincided with the leave period. The approval also stated that she should formerly hand over, and the Claimant accepted the these terms before she took leave.

She insisted that the Claimant's contract was terminated as a result of restructuring and not because she was pregnant as claimed. She argued that the communication about her intention to take maternity leave from 1/7/2012, coincided with the restructuring process. But she only made a formal request for leave on 3/05/2012, after 13/04/2012, when her Doctor established that she had developed complications. By this time she had already been made aware of the ongoing restructuring process, therefore, the decision to terminate her was not in any way, influenced by her pregnancy, but by the mandate set by the Regional office.

Counsel refuted the assertion that the termination was done in violation of section 56(4) of the Employment Act because, this section prohibits termination of a mother on maternity leave, and the Claimant was terminated prior to taking her maternity leave which was fast tracked when she applied to take it on 3/5/2012 after her Doctor established that she had developed complications.

She insisted that the termination was due to restructuring and therefore it was not unlawful.

DECISION OF COURT

Section 2 of the Employment Act defines termination of employment as the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retiring age etc. The Employer in exercising the right to terminate his or her employee must do so in accordance with the law. (see Section 66 and 68 of the Employment Act 2006, **Hilda Musinguzi vs Stanbic Bank SCCA No 05/2016.**)

It was the Respondent's case that the Claimant was terminated as a result of restructuring. It is trite that an employer has an inherent right to restructure his or her organisation and as result of the restructuring the employer could terminate employees holding the positions he or she no longer requires. However, before terminating the employees, he or she is required to notify them about the restructuring and the contemplated termination, within a reasonable time. Section 81 of the Employment Act makes it mandatory for the employer to give such employees not less than 1 months' notice. Also See **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha LDAppeal no. 035/2018.**

Section 81 provides that:

"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;

A perusal of the evidence in the instant case, showed that in March 2012, the Claimant notified the Respondent about her pregnancy and gave notice that she would take her maternity leave from 1/7/2012. On 13/04/2012, however, her Doctor established that she had developed complications which required her to take leave earlier. She therefore applied for leave on 3/5/2012 as opposed to the scheduled date of 1/7/2012. Before the leave was approved, she was issued with a termination notice on 8/5/2012, to take effect in August 2012.

The minutes of the meeting held on 20/04/2012, which the Respondent adduced as evidence of notification to staff about the restructuring, under 1.02 stated that, that the strategic learning assessment report recommended that the Respondent adopts necessary staff competencies, operations and organisation expertise for effective value chain development. They however did not indicate that there would be any layoffs as a result. There was no mention about any staff being rendered redundant nor did they lay out any programme as a precursor to consultations with the affected employees as is envisaged under section 81(supra).

We also did not find any evidence indicating that staff had been consulted about the restructuring and that the Claimant in particular had been a one on one meeting with the respondent regarding the restructuring and likely redundancy

as was stated by Counsel for the Respondent nor did we find any evidence to show that she was notified about the fact that she would be affected by the restructuring as provided under section 81(supra).

In any case the Claimant had already submitted notice about her pregnancy in March 2012 and that she would take her maternity leave from 1/7/2012, however she had to take the leave earlier on 3/5/2012, as a result of complications she developed during the course of her pregnancy. Her supervisor approved the leave *"... as per Doctor's recommendation..."* and in the same vein stated that *"since the leave request follows the discussion meeting on your termination and a termination letter is already given to you ... you need to hand over full before you go on leave..."*

The application for leave was specifically for maternity leave for 14 weeks and additional 2 weeks carried forward from the previous year. Section 56 of the Employment Act 2006, entitles a female employee to maternity leave. It states as follows:

"56. Maternity leave

(1) A female employee shall, as a consequence of pregnancy, have the right to a period of sixty days leave from work on full wages hereafter referred to as "maternity leave" of which at least four weeks shall follow the childbirth or miscarriage.

(2) A female employee who becomes pregnant shall have a right to return to work, to the job which she held immediately before her maternity leave or to a reasonably suitable alternative job on return and conditions not less favourable than those which would have applied had she not been absent on maternity leave.

- (3) In the event of sickness arising out of pregnancy or confinement, affecting either the mother or the baby, and making the mother's return to work inadvisable, the right to return mentioned in subsection (2) shall be available within eight weeks after the date of child birth or miscarriage.***
- (4) A female employee is entitled to the rights mentioned in subsection (1), (2) and (3) if she gives not less than 7 days notice in advance or shorter period as maybe reasonable in the circumstances of her intention to return to work.***
- (5) The notices referred to in subsection (4) shall be in writing if the employer requests***
- (6) A female employee who seeks to exercise any rights mentioned in this section shall if requested by the employer, produce a certificate as to her medical condition from a qualified medical practitioner or mid wife."***

We do not accept the assertion by Counsel for the Respondent that the application for maternity leave coincided with the restructuring process and even if it did, the 2 are not synonymous. The Maternity Protection Convention No. 103 which was ratified by Uganda on 25/03/1963, and upon which section 56 of the Employment Act is based, was intended to protect the health of a Pregnant woman and nursing mother from continuing to work without rest. It was also to create assurance to such a woman that she would be able to return to work after the delivery of her child children or while nursing the child, hence the requirement for them to receive full wages during maternity leave. Once on maternity leave, the Contract of employment continues and all terms and conditions of employment apply as if the female employee was not absent. Article 6 of Convention 103(supra) further provides that:

“while a woman is absent from work on maternity leave in accordance with provisions of Article 3 of this Convention, it shall not be lawful for her employer to give her notice of dismissal during such absence, or give her notice of dismissal at such a time that the notice would expire during such absence ...”

By approving her maternity leave, meant that she was still an employee whose terms and conditions of service were not in any way affected by the maternity leave. Therefore, the assertion that the restructuring coincided with maternity therefore the termination was lawful cannot hold. The restructuring of the Respondent and the Claimant’s right to maternity leave are not synonymous. The law clearly states that where the employer is desirous of restructuring his or her organisation and there is a possibility that in doing so, some of the employees will be affected, it is mandatory that the affected employees are notified that their positions will be affected by the restructuring and section 81 (supra) provides that, the notice should not be less than 4 weeks. As already discussed, there is no evidence to show that the Respondent notified the Claimant that her position would be affected by restructuring or that the position had been abolished and a new one which required her to possess higher qualifications such as a master’s degree had been created under the new structure. In fact, there is no evidence on the record to show that it was a requirement that she must possess a master’s degree for her to remain employed in the Respondent on her return after her maternity leave. The law under section 56(2) provides, that she could be given a reasonably suitable alternative job *on return and conditions not less favourable than those which would have applied had she not been absent on maternity leave.*”

We also noted that the comment which her supervisor made on the leave form about her termination did not even make reference to any restructuring. It only referred to *"discussion meeting on your termination..."* and no reason was given for a termination. We find it incomprehensible for the Respondent to grant her maternity leave and in the same vein state that the maternity leave served as notice of termination!

The procedure applied by the Respondent is alien and contrary to the provisions under section 81 of the Employment Act, which requires the employer to prepare the employee for redundancy. It is not sufficient to merely state in passing that the company or organisation is undergoing a restructuring. In any case it is unlawful for the management of the organisation under restructuring must take deliberate steps to notify its employees about the restructuring before it considers terminating affected employees. The affected employees must be notified within a reasonable time not less than 4 weeks. None of these procedures was complied with by the Respondent. In any case, Article 6 of Convention 103(supra), provides that; *"...it shall not be lawful for her employer to give her notice of dismissal during such absence, or give her notice of dismissal at such a time that the notice would expire during such absence ..."*

We have no doubt in our minds that the termination of the Claimant was an afterthought and it was done in bad faith. The Claimant complied with the provisions of section 56 of the Employment Act when she notified the Respondent that she would be taking maternity leave from 1/7/2012, she applied earlier due to pregnancy complications, therefore by the time it was granted she was still an employee of the Respondent and she had a right to return to work after the delivery of her baby as provided under section 56 of the Employment Act(supra).

Therefore, by terminating her without any notice about her position being rendered redundant as a result of a restructuring, moreover after granting her maternity leave, the termination was done contrary to section 81 (supra) and 66 and 68, of the Employment Act, which require that an before terminating an employee the employer must give the employee a reason for the termination or dismissal, opportunity to respond to the reason and the reason must be a justifiable reason.

It is our finding therefore that the termination was substantively and procedurally wrongful and unlawful.

1. What remedies are available to the parties?

(a) She prayed for a declaration that her termination is unlawful. We have already established that it was unlawful.

(b) General damages

she prayed for General damages amounting to Ugx. 150,000,000/- because she estimated that had her contract not been terminated she would have continued in the employ of the respondent and would have earned Ugx,.]. 450,000,000/ up to the time she filed this suit. Counsel submitted that general damages are intended to compensate the injured party and in the instant case the Claimant worked for 3 years but her carrer was cut short when she was terminated and therefore she could not return to the job she previously held before maternity leave or to an alternative that was not less favourable in accordance s=with section 56(2). He prayed that court awardher Ugx. 450,000,000/ as general damages.

General Damages are awarded at the discretion of Court and are intended to return the claimant to as near as possible in monetary terms to the position he or she was in before the injury inflicted by Respondent occurred. Indeed, the

unlawful termination of the Claimant denied her the opportunity to return to her job after her maternity leave which made her lose her source of income and therefore, she qualifies for an award of general damages. Having served the employee for 3 years earning a gross of Ugx. 1,838,549/- per month, we think that, **Ugx. 28,000,000/-** is sufficient as general damages.

b) Prospective earnings

she claimed for ugx. 150,000,000/- for the salary she would have earned from 8/05/2012, when she was terminated to the filing of the case.

It is well settled that the only remedy to a person who is unlawfully dismissed is damages and remedies prayed for under the Employment Act. The claim for prospective earnings in our considered view cannot stand because it assumes that the Claimant will serve the contract to the end which may not be the case because of circumstances such as death of the employee, lawful termination of the employment, insolvency/closure of the Business, decision to change employment, among many others. Once a termination occurs whether lawfully or not. It takes effect on the day it occurs. In the circumstances this claim cannot stand it is denied.

(c) Interest

Interest of 15% is awarded on (b) above, from the date of Judgment until payment in full.

(d) Costs

No order as to costs is made.

This claim succeeds.

Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MS. HARRIET MUGAMBWA NGANZI

2.MR. FX MUBUUKU

3. MR. EBYAU FIDEL

DATE: 23RD APRIL 2021