THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REEFRENCE No. 001 OF 2019

ARISING FROM MGLSD/LC/186/2019

EVA NAZZIWA LUBOWA ……..CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND ……RESPONDENT

BEFORE:

1. **THE HON. AG. HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR. RWOMUSHANA REUBEN JACK

2. MS. BEATRICE ACIRO OKENY

3. MS. ROSE GIDONGO

AWARD

BACKGROUND

This suit was brought against the Respondent for a declaration for unfair termination of employment, compensation for the contract period, payment/ compensation in lieu of

notices, unpaid leave, gratuity, severance allowance, general and aggravated damages for unfair termination.

FACTS OF THE CASE

On and about 2/01/2015, the Claimant entered into an employment contract of services with the Respondent, as a Human Resources Manager for a period of 3 years. According to her, she assumed the Position after being granted "Leave without pay", from the Ministry of Public Service, for 3 years. Upon exhibiting diligent and exemplary service, the Respondent renewed her contract on the 20/12/2017, for a period of 5 years. This was accompanied with a further renewal of her “leave without pay” for a period of 2 years. However, on 19/09/2018, the Respondent unilaterally terminated the new contract on grounds that, she was holding two jobs and earning two salaries. Her Appeal was not considered either. She contends that her termination was unlawful.

The Respondent on the other hand, admits that, it employed the Claimant as it’s Human Resource Business Partner (Business), on a 3-year contract which was renewed on 20/12/2017 for a 5-year period, effective 2/02/2018. However, following receipt of information from a whistleblower by the Respondent’s Managing Director, she was still an employee of Government and the said information having been confirmed by the Permanent Secretary Ministry of Public Service, who informed the him that the Claimant applied for and was granted “Leave without Pay” from the Ministry for an initial period of 3 years and subsequently for another 2 years with effect from 2/01/2018, an investigation was committee was constituted in accordance with Section 28.7.4.1 of the Respondent's Human Resources Policy (HRP) Manual (see "R EX 4"), to investigate the matter.

According to the Respondent, the Investigative Committee found that, the Claimant had indeed continued to be an employee of Government while under its employ but she did not disclose this information to the Respondent contrary to Sections 28.7.2 (i) and (xxxvii) of the HRP Manual. On 27/08/2018, she was subjected to disciplinary proceedings in the presence of her legal Counsel and the Committee found, among others, that she was an employee of the Ministry of Public Service, albeit on "leave without pay" until 1/01/2020. According to the Committee, the non-disclosure by the Claimant was in contravention of Section 28.7.8.7 of the HRP Manual and her continued employment with the Ministry of Public Service undermined the Respondent's core values, hence her termination on 19/09/2018. Her appeal was not considered because, it was filed outside the 6 days prescribed under Section 28.8.2 of the HRP Manual.

ISSUES FOR RESOLUTION:

1. **Whether the termination of the Claimant was Lawful?**
2. **Whether the Claimant is entitled to remedies sought?**

REPRESENTATION

The Claimant was represented by Mr. Davis Wesley Tusingwire of M/s T-Davis Wesley & Co. Advocates, Kampala and the Respondent was represented by Mr. George Omunyokol of M/s GP Advocates , Kampala

SUBMISSIONS

1.Whether the termination of the Claimant was lawful?

It was submitted for the Claimant that,after she was considered the successful candidate for the position of Human Resource Manager and Human Resource Business Manager, she was granted “leave without pay”, “Exh.PEX2 & 5, from the Ministry of Public Service, to enable her undertake work with the Respondent. According to Counsel, this was after she underwent the necessary recruitment processes, including, supplying her academic documents and Curriculum Vitae and these documents indicated that, indeed she was an employee of the Public Service. He contended that the Respondent through its Managing Director RW1 Byarugaba Richard, terminated her on grounds that she was still an employee of the Ministry of Public Service, without necessarily addressing his mind to the meaning and import of "leave without pay." He argued that the Respondent had ignored the clarification from the Ministry under REX1 that, having taken “leave without pay” , the Claimant laid no claims to any salary, promotion, deployment or any other terms of a Civil Servant active in service, save that, on the termination of leave without pay, she could be redeployed without being re-interviewed. It was further his submission that, in any case, after her leave without pay was granted and she assumed her role at the Respondent, Ministry Of Public service declared her position at the Ministry vacant. According to him, “Leave Without Pay” has its import and meaning under the Uganda Public Service Standing Orders 2021 under Section (C-c) and it was for purposes of preserving continuity of service with approval from the responsible Permanent Secretary.

He contended that, despite the Claimant being legally on leave without pay and legally being employed with the Respondent, her contract was unlawfully terminated even after the investigative committee cleared her of any wrong doing. He contested the manner in

which the Claimant was terminated, when on 5/7/2018, the Managing Director invited her into his office and asked her to resign or be fired, and in his view it was at this point that her termination occurred and the subsequent processes were simply rubber stamping that decision. Citing the definition of termination of employment as provided under the Employment Act No. 6 of 2006, 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 retirement age, S. 65 which enumerates circumstances under which termination is considered to have occurred and Section 68 which requires the employer to furnish proof of the reasons for termination of the employee's contract and where such proof is furnished then the termination shall be deemed unfair and **Buyonje Charles vs Rakai District Administration LDC No. 232 of 2016** in which this Court's holding is to the effect that, "leave without pay" was leave granted to public servant for a specific purpose and for a specific period and it is leave granted to an employee for his personal or career development, the Claimant having been granted leave without pay, ceased to hold any remunerable positions with the Ministry of Public Service, therefore her termination for holding 2 jobs was not justifiable. He argued that, upon executing the second contract and upon being granted additional leave without pay, the Claimant was under a legitimate expectation to serve the contract and was at liberty to decide to stay with the Respondent or go back to Public Service. However, this legitimate expectation was cut short by the Respondent's decision to unfairly terminate that contract. He relied on **Bank of Uganda vs Joseph Kibuuka & 4ors CACA No. 281 of 2016,** where the Court in confirming the findings, decisions, and orders of this Court and in line with the holding in, **Council of Civil Service Union vs Minister of Civil Service [19851 ac 374 408-409,** where it was

stated that: *" a legitimate expectation to the right to a hearing arises, among others, when a decision made by the decision maker affects another altering rights or obligations of that person which are enforceable by or against him in private law, or by depriving him of some benefit or advantage which he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do. Further that this inures until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to Comment."* It was his submission that in the circumstances, the Respondent could not hide behind the processes leading to the Claimant's termination to take away the legitimate expectation she had, when it was the Managing Director who asked her to resign or be terminated and he was the same person who constituted the investigative committee which reported to him. He was also the same person who constituted the disciplinary committee and subsequently terminated her contract.

He therefore invited the Court to find that the claimant's termination by the Respondent was unlawful and award her claims as stated in her memorandum of claim.

In reply, Counsel for the Respondent citing the definition of termination under section 2 of the Employment Act(supra) and Section 65(1) (a) of the Act which provides that, one of the instances where termination shall be deemed to take place is where the contract of service is ended by the employer with notice, he argued that, it is the law that, a contract of service can be terminated by an employer at any time, as long the employee in issue, is given notice of the said termination or is paid in lieu of the notice. It was his submission

that, the argument that, an employee who is either "terminated" or "dismissed" is entitled to reasons for the dismissal or termination was settled by the Court of Appeal in **Uganda Development Bank v Florence Mufumba Civil Appeal 241 of 2015,** whose holding in determining whether this court had erred in holding that, the Respondent's contract was wrongfully terminated was to the effect that, while an employer is entitled to terminate the contract with its employee (with notice) at any time, with or without reason, this must be done in accordance with the relevant provisions of the employment contract and the Human Resource Manual. His argument was further to the effect that, since an employer- employer relationship is usually governed by both the employment contract and the employer's Human Resources Manual, a breach of the provisions of the Human Resource Manual, amounts to a breach of the employment contract. He relied on **Eseza Catherine Byakika v NSSF LD No. 57 of 2015,** for the argument that, breach of the provisions of the employers Human Resources Manual, entitled the employer to terminate the employee's contract and the termination in this case would be lawful.

According to Counsel, the relationship between the Respondent and the Claimant in the instant case was governed an employment contract and the Respondent's HRP Manual and clause 10.1 of the employment contract provided for termination by either party, by written notice or payment in lieu of such notice. The Human Resources Policy under section 23.4 on the other hand provided for the termination of a person's contract through among other processes, through disciplinary processes. (Section 23.4.2).

He argued that, the Manual provides that, an employee may be dismissed as a result of a disciplinary action for Gross Misconduct and one of the grounds for disciplinary action as

was in this case, was deliberate conduct that, undermines the Fund's core values and being in gainful employment with another organization or entity whilst in the service of NSSF (Section 28.7.2 (i) and (xxvi) of HRP Manual). In this case the disciplinary process would include, investigation suspension (where the employee maybe temporarily relieved of his or her duties as the Investigative Committee carries out investigation), a disciplinary hearing (handled by a duly constituted Disciplinary Committee) and where the Committee is satisfied that the offence justifies dismissal, it shall direct the Head of Human Resources and Administration to communicate its recommendations to the Executive Committee (EXCo) for review and approval. After the EXCO has deliberated on the matter, the Head of Human Resources and Administration would be required to communicate the decision to the employee. (Sections 28.7.3- 28.7.8 of HRP Manual). He insisted that the Employment Act does not require an employer who terminates an employment contract with an employee with notice to give reasons for the termination, as long as the termination is done in accordance the terms of the employment contract and the employer's Human Resources Policy Manual.

It was further his submission that, in the instant case, the Respondent, terminated the Claimant's contract of service with her, pursuant to Clause 10.1 of their employment contract because, she deliberately failed to disclose that, she was still an employee of Ministry of Public Service, while under the employ of the Respondent thus undermining the Respondent's core values as provided under Sections 3.9.2 and 28.7.2 her Human Resources Policy and this was a breach to her employment contract. However, before her termination she was notified about the offence Committed, an Investigative Committee

was constituted to investigate the allegations therefore, contrary to her allegations that, this Committee had exonerated her of any wrong doing, the Committee wrote an internal memo dated 10/08/2018, in which they confirmed to RW1 that they had indeed not seen any documentary evidence on the Claimant's HR Personal file indicating that, she made any disclosure to the Fund of the fact that, she was still an employee of the Ministry of Public Service on leave without pay even after being appointed HR Business Manager at the Fund on2/01/2015,(see Exhibit "P EX 11"). It was after this confirmation that, a Disciplinary Committee was constituted by RW1 to accord the Claimant a fair hearing and as already stated, she was notified the same and she participated in the proceedings, accompanied by her legal representative. She was found guilty of breaching the provisions of the Respondent's HRP Manual and her contract was subsequently terminated. Therefore, it was not correct for her to assert that the CEO RW1, was solely responsible for her termination because all the processes were done in compliance with the Respondent's Human Resources manual and based on substantiated information from a whistleblower.

Counsel refuted the allegation by the Claimant disclosed her employment relationship with the Ministry of Public Service and the fact that she was "on leave without pay", in the Curriculum Vitae which she submitted when she applied for the position. This was because the recruitment was undertaken by a private firm and no evidence was led to prove this disclosure upon her appointment as HR Business Manager. He further argued that, this position was also confirmed by the Investigative Committee in their Internal Memo to RW1 dated 10/08/2018 marked Exhibit PEX 11 at page 28 of the Claimant's trial bundle.

He also refuted the Claimant's argument that since her position at the Ministry of Public service had been declared vacant following her leave without pay, she could not be said to have contravened the Respondent's Code of Business Conduct and Ethics. According to him, "leave without pay" is defined under the Uganda Public Service Standing Orders Part (C-c) (1) as leave granted for the sole purpose of preserving continuity of service and the duration of that leave is qualifying period for purposes of Pension but it does not attract other privileges and benefits. He also cited Para 5 of the Establishment Notice No. 1 of 2015 of the Ministry which states that, one of the conditions for granting leave without pay was that, "the position whose incumbent has been granted Leave Without Pay shall be declared for immediate filling" (see "R EX 1"). Legally, therefore, even where salary is not earned or where a position has been filled, a person on leave without pay is still considered an employee of the organization from which they got leave. He contended that, her failure to disclose to the Respondent that, she was still an employee of the Ministry of Public Service, was a breach of one of the Respondent's core values of integrity as laid down in its Code of Business Conduct and Ethics as per Section 3.9.2 of the HRP Manual. He argued that, even if by being on leave without pay, she was not earning a salary from the Ministry, on attainment on the age of 45, as she would have completed the 2nd year of the 5 year renewed contract, she would be eligible for retirement from Government with pension, which would be a gain in so far as there was a future pension, gratuity or allowance that the she would benefit from upon acquiring the age of 45 years (minimum retirement age). Therefore, her nondisclosure was, deliberate and it amounted to breach of her contract, which was a justifiable reason for her termination.

He argued that **Bank of Uganda v Joseph Kibuuka & Ors Civil Appeal No. 281 of 2016**, which the claimant relied on was distinguishable from the current case because in this case, the Claimant breached her employment contract by contravening the provisions of the Respondent's Code of Business Conduct and Ethics and she was terminated in compliance with all the provisions of the HRP Manual.

He also submitted that, upon termination of the employment contract, the Respondent processed and paid the Claimant all her terminal benefits including her base salary at the date of departure, leave payment for the 10 leave days outstanding as well as one month salary in lieu of notice (see para 18 of RW1's Witness statement and "R REX 3") and she herself admitted that she received all her terminal benefits.

He insisted that, it is trite that, the employer may terminate the contract with his servant at any time and for any reason, even for none. This, however, must be done in accordance with the relevant provisions of the employment contract and the Respondent ably demonstrated that, it complied with all the terms of its HRP Manual, in regard to disciplinary processes, right from placing the Claimant on investigative Suspension, subjecting her to a disciplinary hearing; terminating her employment, giving her justifiable reasons for terminating her employment and paying her terminal benefits. According to him, the Respondent has also ably demonstrated that, the Claimant contravened the provisions of the HRP Manual in so far as she was in gainful employment with another entity which she deliberately did not disclose, thus breaching her employment contract. Therefore, Court should find that, her termination was lawful and justifiable.

DECISION OF COURT

1.Whether the termination of the Claimant was Lawful?

We shall first discuss whether an employer can terminate an employee without any reason as Counsel for the Respondent submitted, before we resolve this issue.

Indeed, Section 2 of the Employment Act provides for the definition of "termination" to mean 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 retirement age etc and termination shall have the meaning given by Section 65 of the same Act. The Act also defines "dismissal" as the discharge of an employee from employment at the initiative of the employer when the said employee has committed verifiable misconduct. Further Section 66 (1) and (2) of the same Act provides that for the procedure to be followed before terminating any person as follows:

> ***"66. Notification and hearing before termination***
>
> *(1) Notwithstanding any other provision of this part, an employer shall before (*our emphasis) *reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal (emphasis ours) and the employee is entitled to have another person of his or her choice present during this explanation,*
>
> *(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations*

which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.

Section 68 of the Act also requires the employer to prove the reasons for dismissal and where the employer fails to do so, the dismissal shall be deemed to be unfair. This section further provides that *"…the reason or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee."*

These principles of the law are based on Article 4 of ILO Convention 158, which provides in part as follows: "… *no employee should be terminated unless there is a valid reason connected to the employee's conduct or work based on operation standards required of him under the contract…"*

It is settled that, an employer's right to terminate an employee cannot be fettered by the Courts of law, as long as the employer follows the correct procedure before exercising the right to terminate or dismiss. In ***Hilda Musinguzi Vs Stanbic bank (U) ltd SCCA 05/2016,*** **Justice Mangutsya JSC,** as he then was, held that*;*

"… the right of the employer to terminate a contract cannot be fettered by the Court so long as the procedure for termination is followed to ensure that no employees contract is terminated at the whims of the employer and if it were to happen the employee would be entitled to compensation…" (emphasis ours). We therefore, respectfully do not agree with the assertion by Counsel for the Respondent that an employer can dismiss an employee at any time and for no reason as long as, he or she gives the employee notice or

he or she complies with the employment Contract and or the Human Resources Manual. This is because the law under Sections 66 of the Employment Act, makes it mandatory for the employer to give the employee in issue a reason and an opportunity to respond to the reason before, the termination or dismissal.

Therefore, before an employer can terminate or dismiss an employee, he or she must follow the correct procedure for termination or dismissal as laid down under Sections 65, 66, 68, 69 and 70(6) of the Employment Act.

In the circumstances, the argument that, giving notice or complying with the contract or Human Resources Manual before termination is not sufficient, is no reason or hearing is accorded to the employee in accordance with the Employment Act 2006(supra).

The dispute in this case as we understand it is that, the Claimant was terminated for not disclosing that, she when she applied for and was appointed to the Position of Human Resource Business Manager at the Respondent she was still an employee of the Ministry of Public Service, "on leave without pay", therefore was holding gainful employment with another entity, while in the employ of the Respondent which was contrary its code of Business and ethics.

It is trite that an employment relationship is based on a contract of employment, whether for services or of services and the contract may be express or implied, it may be oral or in writing. The Employment Act under section 2 defines contract of service to mean *any contract, whether oral or in writing, whether express or implied, where a person agrees in return for renumeration, to work for an employer and includes a contract of*

apprenticeship" The definition connotes that, the employment contract must be consensual and it should be reciprocal. Section 40 of the same Act, is to the effect that once the contract of employment is executed between the parties, the employer must provide the employee with work, while Section 41 entitles the employee to renumeration for the work done. Therefore, just as is the case in contract law, the employment contract begins with an offer by a person who is willing to enter into a contract to another person on certain terms which if accepted by the other, there is an agreement. The agreement is an indication that, the parties are ready to be bound by the terms of the agreement. The acceptance is supposed to be unequivocal and unqualified. The contract must also be supported by consideration (renumeration for the services rendered by the employee). An employment contract is therefore intended to create legal relations between the parties with legal consequences because the sential elements such as offer, acceptance and consideration among others must exist. Similarly, a contract of employment may be vitiated by factors such as misrepresentation, mistake duress, undue influence and illegality. It is assumed that according to Section 2, 40 and 41(supra), it is the duty of the employee to personally perform the work given, to exercise a duty of fidelity /good faith, that is to be loyal and faithful, to use reasonable care, skill and diligence in the performance of the work , to be obedient, and to protect the interests and to keep confidentiality and honesty among others (**Walden Vs Barrance [1997]**[1]**.**

A duty of "good Faith" connotes honesty, loyalty and faithfulness. Even if a contract of employment is not an 'utmost good faith' contract, such as in the case of insurance, where

[11] 5NZELC(Digest) 98 433

a party entering the contract is under the obligation to make full and frank disclosure of all material facts to the other party prior to the conclusion of the contract, which if not done could lead to the rescinding of the contract, the employee in an employment contract is under an implied duty to exhibit honesty in his or her dealings with the employer. The duty of good faith in our considered should begin from the time of the recruitment process as a job applicant and since the duty is owed to the Employer, the onus is on the employer to request for and provide the scope of information or action respectively, required of the job applicant and where the request for information and scope of action is not requested, or provided, there is no duty on the job applicant or employee to provide such information or take such action. However, where information is so requested and the scope of action defined to the job applicant, he or she is under obligation to honestly provide the employer with the information or do the action so requested. Where false information is provided by the applicant and or the action is not undertaken as requested, this would amount to a misrepresentation breach of the duty of good faith, which is a fundamental breach, of the contract of employment. It is expected that, such information is usually provided for in the job applicant's curriculum vitae and it may relate to his or her status, academic qualifications for the job and or experience among others.

After carefully analysing the evidence on the record and the one adduced in court, we found that, the Claimant admitted that, when she signed her first contract with the Respondent in 2015, she was still an employee of the Ministry of Public service, although she was on "leave without pay". According to exhibit PEX1, at page 1 of her Trial Bundle, on 18/11/2014, after she secured the appointment to the post of Human Resources Business

Manager with the Respondent, she applied to the Permanent Secretary, Ministry of Public Service for "leave without pay." Her application for leave without pay read in part as follows:

> "*... I applied for the post of Human Resources Business Manager at he National Social Security Fund, Uganda . I was interviewed and consequently offered the appointment as Human Resources Business Manager on contractual basis for (3) years w.e.f 2nd Jabuary 2015. Please find copy attached.*
>
> *The purpose of this communication is to request you to grant me leave without pay for three(3) years to serve in the National Social Security Funds and get both experience and exposure which could be instrumental in the long run especially in view of the eminent creation of the Public Service Pension Fund*
>
> *Eva Nazziwa Lubowa(Mrs)*
>
> *ASSISTANT COMMISSIONER /HUMAN RESOURCES MANAGEMENT"*

She was granted the leave on 21/11/2014, on condition that she would not lay any claim to the post she was holding in the Public Service at the time and after the leave without pay expired, she would be deployed to any suitable vacant post for which she was qualified and where this was not possible, she would be considered for retirement in accordance with the regulations in place at the time. She was also notified that her position in the Public Service would be declared vacant.

It is very clear from the letter granting her leave without pay, that, she was granted leave without pay for 3 years, and thereafter she was no longer considered an employee of the

Service for purposes of being assigned duties and paid remuneration as is provided under Section 40 and 41 of the Employment Act(supra) respectively. Therefore during this period, she could not be considered to be in gainful employment at the Ministry of Public Service. **Was it a requirement for her to disclose this fact to the Respondent and if so whether non-disclosure amounted to a breach of a duty of good faith?**

It was the Claimant's testimony that, at the time of her consideration for appointment to the fund, it was not a requirement for her to disclose her status and particularly that, she was "on leave without pay". During her re-examination, she stated that:

> *"... I disclosed that I was an employee of Public Service, I went through the recruitment, I had 2 interviews with the Board, when asked, I said I had to report in January 2015... I used the contract to seek leave without pay.*

Although she did not adduce evidence of this disclosure in court, as already discussed since the duty of good faith is owed to the employer, it is the responsibility of the employer to request the employee or job applicant to provide any information required and the employee is under no obligation to provide any information that is not requested by the employer. In any case it is the employer who is responsible for providing the requirements for a job applicant to qualify for appointment and the particulars of employment, while the role of the employee is to abide by the terms or particulars of employment. (see section 59 of the Employment Act, **Akonye David vs Libya Oil LDC No. 082/2014)**

We found nothing on the record, to indicate that, the Claimant was required to make any disclosure about her employment status, when she applied for and was considered for

appointment. We respectfully do not associate ourselves with submission by Counsel for the Respondent, that she was in breach of the Respondent's Policies because we believe she not yet officially in possession of the said policies before her appointment and execution of the contract of employment, because she still being considered for employment. We do not think that an applicant would be privy to policies governing or relating to a position he or she has not yet been appointed to, let alone the terms of the same position. We believe a person and in this case, the Claimant was only expected to provide information which she was requested to submit in support of her application for consideration for appointment and nothing else. No evidence was adduced by the Respondent to indicate that she was required to disclose her employment status during recruitment process when she was being considered for appointment with the Respondent in 2014. We strongly believe that, had it been a requirement, the Respondent would not have considered her for appointment or even appointed her without this information or without exercising due diligence to ensure it was on her record in the first place.

We also established that, she was subjected to disciplinary proceedings and she was given an opportunity to respond to the allegations which were made against her and she participated in the hearing and made a response. To that extent, the Respondent complied with the requirement to give the Claimant a hearing in accordance with section 66 of the Employment Act. However, after carefully analysing the Disciplinary Committee's report, marked REX2 on the Respondent's trial bundle, at page 16 and particularly paragraphs 8.5 and 8.6, we established that:

"…the Committee observed that, there was no detailed description in the HRP Manual and employment contracts of what would be required of an employee to declare upon taking up employment with the Fund,. The requirement was therefore left to Judgement.

8.6 The committee noted that, the fund only conducted due diligence/ background checks before employment, which information is only relevant before employment. After employment no due diligence is conducted, which may make any discoveries seem subjective…"

In light of these observations, it was clear to us that, in fact, the Respondent did not require the Claimant to make any disclosure about her employment status during the recruitment process, therefore even if the Whistleblower's report about her employment with the Ministry of Public Service was confirmed, and it was established that she was on leave without pay, therefore she had no claim to her employment in the Service, we found no basis for the allegations that, her non-disclosure amounted to a breach of the values of the Fund, when it was not a requirement for her to make such a disclosure prior to her appointment. The Respondent alleged that, by not disclosing her employment status during the recruitment process, she had breached clauses 3.3.3, 3.14, 3,9 which deal with conflict of interest during the execution of her duties during employment and not before she was appointed . We also found that clause 3.9.2 which provides that :

"Employees shall not during normal working hours or such other hours of rest or recperation, be engaged for gain by other parties and or carry out any sporting

physical or recreational and or associated activities for pay or without pay, unless they obtain prior written consent of the managing director"

only applied after her appointment and during the course of her duty and not before. Even clause 5.6 of her contract, which required her to exercise "utmost good faith," was intended to apply during her employment and not before.

In the absence of an evidence to indicate that, she was expressly required to make any pre -employment disclosures, and particularly disclosure about her employment status, we found no basis to hold that she had breached any of the Respondent's Policies, especially given that all the policies applied after assumption of duty and not before. RW1, the CEO, in his testimony did not adduce any evidence to indicate that, it was a requirement for the Claimant to make such a disclosure and how fundamental it was for her to do so neither was any evidence adduced to show that her non -disclosure impacted her performance or that of the Respondent. On the contrary it was RW1's testimony that, she had performed her first contract very well.

Having established that she was on leave without pay, therefore she was not in gainful employment with the Ministry of Public Service, therefore she was not holding 2 jobs as was alleged, we found it peculiar that, the Disciplinary committee went ahead to recommend her summary dismissal.

We reiterate that, in the absence of evidence that, she was expressly required to disclose her employment status during the recruitment process, it would be a matter of conjecture

to assert that, had she made the disclosure, the Fund would probably not have appointed her as the respondent would like this court to believe.

Even she was holding the position of HR Business Manager, who was responsible for managing the Human Resources of the Respondent and therefore she was expected to exercise the duty of good faith with a higher standard of conformity and compliance with the Respondent's Policies than any other staff of the Respondent, the Respondent did not provide any evidence to show that, she was required to make any disclosure about her employment status as a job applicant and she failed to comply. We were also not able to see the nexus between her purported failure to disclose her employment status appointment and the violation of the Funds values.

As already discussed she took leave without pay, therefore she was available to undertake her contract with the fund and she did so very well, leading to being given an extension of 5 years. Even if her leave without pay was extended for only 2 years, we found nothing to show that, this was in breach of any of the Respondent's Policies, because she was still available to serve while on leave without pay for 2 years and she was at liberty to resign from or rejoin the Public Service, if she so wished. We did not see how her choice to do either would negatively impact the Respondent especially given that she had not yet exercised the option by the time the whistleblowing occurred. In any case as already established, there was no proof that it was requirement for her to make any disclosure about her employment status at the time of recruitment.

We respectfully do not associate with the submission by Mr. Omunyokol for the Respondent that, taking leave without pay meant that, the Claimant was gainfully

employed because the leave was a qualifying period for pension. Our understanding of subsection (1) of Section(C-c) of the Uganda Public Standing Orders, on "Leave without pay," which provides that:

"1. *leave without pay is leave granted for the sole purpose of preserving continuity of service and the duration of that leave is qualifying period for purposes of the pension but it does not attract other privileges and benefits…'*

Is that, the officer who has taken leave without pay does not necessarily intend to return to the Service, therefore the leave without pay is intended to preserve the period of service the officer had with the Public Service for purposes of computing his or her pension, which accrued during that period of service. We believe that this is the import of the Permanent Secretary's clarification in PEX1, where she stated that, after the expiry of the leave without pay the officer may be redeployed without being interviewed or retired in the event that it was not possible to re deploy him or her. The expectation therefore is that, after the expiry of the leave without pay, the Officer in issue could apply to rejoin or to sever the relationship with the Public Service.

It is therefore not the correct to state that, once the Claimant attained the age of 45 and she opted to apply for her pension, doing so would amount to being in gainful employment with the Ministry of Public Service. This is because the pension in her case accrued during the 15 years she was in gainful employment with the Ministry of Public Service and before she was employed by the Respondent Fund. Her appointment to the position of HR Business Manager at the Respondent had no effect on the pension she had already earned during her service at the Ministry of Public Service. In any case the period of her leave

without pay would not be reckoned in the computation of the said pension. Therefore, the argument by Counsel for the Respondent that, by being eligible for her pension on the attainment of 45 years, would amount to erroneously receiving future gratuity moreover during the second year of her second contract cannot hold. The pension was earned before her appointment with the Fund.

The Respondent having not expressly provided for detailed requirements for pre-employment disclosures by Job applicants and especially in the instant case, having not expressly requested the Claimant to make any disclosure about her employment status during the recruitment process, she cannot be said to have breached any of the Respondent's Policies, moreover which she was expected to comply with after her appointment and not before.

Therefore, she cannot be found to be in breach of the duty to exercise utmost good faith, before her recruitment especially when she was not required to make a pre- employment disclosure about her employment status. In our considered view the expectation given the circumstances of this case, was that the Claimant owed this duty to exercise utmost good faith, after she executed the contract of employment and bound herself to abide by the employers policies and not before. Therefore she would only be faulted, if she was expressly required to make a disclosure about her status before and during the recruitment process and she failed and or refused to do so or if she rendered false information about, what she was requested for in a bid to influence the Respondent to appoint her, as in the Canadian case of **Clark vs Coopers &Lybrand Consulting Group[1999] CanLJI14878,** where the employee misrepresented to the employer about his academic qualifications and

in reliance upon the misrepresentation, he was offered employment but 2 years into the employment relationship, the employer got to know about the misrepresentation and dismissed him without notice. It was held that the deception of the employee amounted to fraudulent misrepresentation, because it induced the employer to enter into the contract of employment with the employee in the first place. We have already established that, in the instant case, there was no requirement for the Claimant to make any disclosure about her status during the recruitment process, therefore she cannot have made any misrepresentation.

The Respondent having not proved that, the Claimant breached any of its Policies as required under section 68 of the Employment Act (supra), it is our finding that the Claimant's termination was unfair and unlawful. This issue is determined in the negative.

2. Whether the Claimant is entitled to remedies sought?

Having established that she was unlawfully terminated, the Claimant is entitled to some remedies. She prayed for the following remedies; as follows:

a) **Declaration for unfair termination of her employment**

We have already established that she was unlawfully terminated.

Compensation for the contract period, (5 years): 17,096,475 x 12 x5 1.025,788.500/

It is an established principle that a claim for future earnings is speculative because there is no guarantee that the employee will serve for the entire duration of the Contract for reason such lawful termination, resignation by the employee, closure of business, death and or incapacitation as a result of illness or accident among many others. In the circumstances,

the claim for the payment of salary for the 5 years that the claimant did not serve as a result of her unlawful termination cannot hold. This claim fails.

III. Payment/compensation in lieu of notice (5 months)

It was the Claimant's testimony that she was paid 1 months in lieu of notice which she was entitled to in accordance wither her contract and section 58(3)(b) of the Employment Act. Therefore, the claim for the payment of 5 months in lieu of notice cannot stand. It is denied.

IV. Unpaid leave 17,096,475 x 5 = 85,482,375/=

This court has held that although Section 54 of the Employment Act entitles an employee to rest days, the rest days cannot be taken at the whims of the employee. The employee is expected to apply to the employer for leave and the period within which the leave will be taken must be agreed between them. Therefore, a claim for accumulated or untaken leave will only succeed where an employee has demonstrated that, he or she applied for leave and it was denied.

According to her contract of employment, under clause 7, the Claimant was entitled to 30 days leave on full pay which would be taken at such times as would be agreed between her and her superviser and her leave could also be differed for 6 months, on the requirements of the employer. Further the contract under clause 6.3.3 provided that, while she was on leave, she would be entitled to 30% of gross monthly salary calculated at the rate for the number of days of leave being taken. The Claimant however, did not lead any evidence to prove that, she had applied for leave for the period she worked and it was denied. In addition, we have already established that a claim for future/prospective earnings 'stand,

similarly, a claim for annual leave for the 5-year contract following her termination cannot hold. This claim is therefore denied.

V. Gratuity (1 month): 17.096,475 x 1 = 17,096,475/=

Gratuity is paid at the discretion of the employer. It is payment to an employee over and above actual amount due to the employee for the services rendered to the employer after a determined period of time. It is paid at the time of retirement, resignation, layoff or voluntary retirement or on termination of employment. The contract of the Claimant in the instant case, made no provision for the payment of gratuity. It only entitled her to medical insurance cover and contribution by the employer of 10% of monthly gross salary to the in house staff provident fund. In the circumstances this claim fails.

VI. Severance allowance (5 months): 17,096,475x 5 = 85,482,375/=

Section 87(a) of the Employment Act, entitles an employee who has been in an employer's continuous service for a period of 6 months to severance pay, if he or she is found to have been unfairly dismissed/terminated. Section 89 of the same Act, provides that severance allowance should be negotiated between the employer and employee. However where no formula for calculating severance pay exists, this court in **DONNA KAMULI VS DFCU BANK LDC 002 OF 2015,** held that, the reasonable method for calculating severance pay shall be payment of 1 month's salary for every year the employee has served. This decision was upheld by the Court of Appeal in **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017.** It is an agreed fact that the Claimant in the instant case was employed by the Respondent from 2/0/ 2015 to 19/09/2019 when she was

unlawfully terminated, therefore she served for a period of 4years and 9 months. Having found noting on the record to indicate that the parties had an agreed formula for calculating severance pay, in light of the decision in **Donna Kamuli** (supra) she is entitled to payment of 4 and ½ months salary at the rate of **17,096,475x 4.5** amounting to **Ugx. 76,934,137/-**

VII. General Damages

It was submitted for the Claimant that, the Respondent's actions and conduct led to financial loss on the part of the Claimant who now seeks general damages. He relied on **Bank of Uganda versus Joseph Kibuuka & 4Ors CACA 281 of 2016,** where Court found that, the termination was unlawful and awarded damages. According to Counsel, the general rule is that where there is breach of contract by one party the other party is entitled to bring an action for damages.

Indeed, it is a settled matter that any person who is unlawfully terminated or dismissed is entitled to an award of damages in addition to other remedies he or she may have prayed for under the Employment Act. General Damages are compensatory in naturea and intended to return the aggrieved person to as near as possible in monetary terms to the position he or she was before the injury occasioned by the Respondent. The Claimant was employed as the Respondent's HR Business Manager. Following the successful completion of her initial 3-year contract with the Fund, she was given an extension of 5 years. We have already established that her second contract was unlawfully terminated after she had only served 9 months of the contract therefore she is entitled to an award of damages. At the time she was earning Ugx 17,096,475/- per month. We think that an award of Ugx. 145,000,000/- is sufficient as general damages.

VIII. Interest

It was submitted by Counsel for the Claimant that the rationale for awarding interest is that the Respondent has kept the Claimant out of her money while the Respondent has use of it themselves and ought to compensate the Claimant. he relied on Section 26(2) of the Civil Procedure Act cap 71 provides thus,

"Where and in as far as a decree is for payment of money, the Court may, in the decree order interest at such rate as the Courts deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at Such rate as the Court deems reasonable on the aggregate so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit."

According to him, the section gives Court discretion to award reasonable interest on the principal sum. He argued that the award would remedy the Respondent's withholding and deprivation of the Claimants money from the date she incurred loss. He also relied on **Charles Lwanga vs Centenary Rural Development Bank, Court of Appeal Civil Appeal No. 30 of 1999,** in which the Court of Appeal awarded the Plaintiff interest at 20% per annum from date of dismissal from employment. Having awarded the Claimant general damages we have no reason to grant her interest. However given thatafter she was terminated from the employ of the Respondent she resumed her employment with the Public Service, we shall award her interest on the award of damages above, at the rate of 15% per annum from the date of this award until payment in full.

X. Costs

It was the submission for Counsel for the Respondent that, under Section 27 of the Civil Procedure Act Cap. 71, costs follow the event and they are awarded at the discretion of the Court to the successful party. He also relied on **Francis Butagira Vs Deborah Namukasa (1992-1993) HCB 98,** for the legal proposition that, costs should follow the event and a successful party should not be deprived of Costs save for good cause. Therefore the Claimant should be awarded costs of the suit. This Court has taken the position that, the award of costs against in Labour disputes would further widen the gap between employees who have lost their employment because they would be render destitute and their employers who are the holders of capital. Similarly awarding costs to the employers especially after their Employees have been awarded various remedies including General damages, could be detrimental to the sustenance of the employers business and the economy as a whole. Therefore in bid to create equality between the parties this court has taken the position not to award any costs, save in exceptional circumstances.

In the circumstances no order as to costs is made in the instant case.

In conclusion this claim succeeds in the above terms. No order as to costs is made.

Delivered and signed by:

THE HON. AG HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA …….

PANELISTS

1. MR. RWOMUSHANA REUBEN JACK …….

2. MS. BEATRICE ACIRO OKENY ……..

3. MS. ROSE GIDONGO ……..

DATE: 22/12/2022.