

**THE REPUBLIC OF UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE CLAIM. NO. 175 OF 2014
(ARISING FROM HCCS 134 OF 2013)**

BETWEEN

**DR. PAUL KAGWA..... CLAIMANT
AND
PLAN INTERNATIONAL..... RESPONDENT**

BEFORE

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

PANELISTS

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

AWARD

BRIEF FACTS

The claimant was originally employed with Government of Uganda, Ministry of Health at the rank of Assistant Commissioner. Before he attained the retirement age of 60 years he sought and was granted a job with the respondent under a fixed contract of 5 years effective 15/09/2012. In the meantime the claimant applied for and was granted early retirement from the Ministry of Health.

According to the claimant on 13/05/2013, he was terminated without being accorded a hearing as required by the policy of the respondent.

According to the respondent, the claimant before termination, received numerous emails expressing dissatisfaction on his performance and after issues of none performance were put to him on 29th/05/2013, he responded to the allegations by mail dated 30/05/2013.

When on 1st/May/2013, the respondent gave the claimant an option to resign, he turned it down and was hence terminated for failure to perform.

According to a joint scheduling memorandum signed by both counsel and filed in this court on 22/05/2015, the agreed issues for resolution are:

- 1) whether the claim disclosed any cause of action
- 2) Whether the defendant (respondent) breached the contract of employment dated 14/08/2012

- 3) Whether the plaintiff (Claimant) was unlawfully terminated from his employment
- 4) What are the remedies available to the parties?

At the commencement of the hearing both counsel agreed to reduce the issues to:

- 1) Whether or not the claimants employment contract was unlawfully terminated
- 2) What remedies are available.

Let us now proceed to resolve the first issue.

Evidence led from the claimant sought court to believe that the claimant had diligently performed his duties and made significant progress having gone through his six months probation successfully.

Evidence led from the respondent on the other hand sought court to believe that the claimant was a poor performer and that his contract was terminated for poor performance.

It was the submission of the respondent as a preliminary point, that the contract of employment entered into by both parties was invalid. He relied on the Public Service Standing Orders S(i) (ii) and Paragraph 6 of the contract of Employment. Counsel did not avail the whole provision of S(i) (ii) of the Public Service Order to the court, although he argued that the said provision states that the officer shall not leave office until his or her application has been approved in writing indicating the date the officer may leave. In his submission, since the retirement was effective on 30/09/2012, the contract of employment that started on 15/09/2012 was illegal and not valid. The letter of acceptance of the retirement is on record as P exhibit 4 and signed for the permanent secretary. It categorically states that the retirement takes effect from 30th September 2012.

In cross examination the claimant explained that he took annual leave during which he reported to the respondent to start work. It is our considered opinion that the fact of taking leave by the claimant was meant to make him free from the duties at the Ministry of Health as he reported for duty at his new station. In our understanding, the respondent all along was aware of the procedures that the claimant was undertaking in order to take up employment with them. The respondent was aware that the claimant was employed by the Ministry of Health and they received and we believe read and internalized the letter of acceptance of retirement before they offered the employment to the claimant.

Clause 6 of the contract of Employment states:

“whilst employed at PLAN Uganda you will not enter into any other employment with or provide services to any third party”.

We agree with the submission of counsel for the claimant that clause 6 only applied to situations that would arise after the claimant had been employed and not before. Even then, during the period in contention, the claimant was on leave from the Ministry of Health and the Ministry did not complain about the fact that he used his leave to report to his new station since they had already in fact cleared him to do so.

Consequently, it is our considered opinion that the fact that the Ministry of Health accepted the retirement, the fact that the claimant took leave during the contested period, the fact that the respondent knew all the facts surrounding the early retirement before they wrote and signed the contract of employment, and the fact that clause 6 of the said contract prohibited the claimant from entering into another employment after and not before he was employed suggest that there was nothing invalid or illegal in the contract. The preliminary objection is disallowed.

Having disposed of the preliminary point, the next is the first issue. It is essential to consider the question whether the claimant was still on probation by the time his contract was terminated. Although counsel for the respondent submitted that probation ran to 14/02/2013, the claimant said that it run up to 15/03/2013.

In his submission counsel for the respondent argued that the claimant did not submit a report on time that would have formed the basis of either or not confirming him. He only submitted it on 9/04/2013 after his probation had expired and therefore according to counsel, by his own conduct, the claimant agreed to extend the probationary period.

According to the claimant, the law restricts the powers to extend probation to the employee and probation can only be extended by consent of the employee. He argued that an employee who has completed probation is deemed to have been confirmed. He relied on the authorities of **REUBEN KAJWALIRE VS A.G. CS NO. 214/2005** and **AHAMED IBRAHIM BHOLM VS CARS & GENERNERAL LTD SCCA 12/1992. Section 67 of the Employment Act 2006, provides**

- 1) “.”
- 2) “ **The maximum length of a probationary period is 6 (six) months, but it may be extended for a further period of not more than 6 months with the agreement of the employer.**
- 3)
- 4) **"A contract for probationary period may be terminated by either party by giving not less than 14 days notice of termination, or by payment, by the employer to the employee, of seven days wages in lieu of notice"**

According to the evidence of FIKRU ABEBE, the Country Director to whom the claimant reported, the claimant refused to sign his probationary period evaluation and also refused to sign self assessment forms.

According to the claimant, he filled the assessment forms and sent them to the Country Director who never gave him a feedback.

We have perused and internalised the **PLAN UGANDA, TERMS AND CONDITIONS OF LOCAL FIXED TERM EMPLOYMENT, (exhibit D7) especially provision 9 thereof which provides**

".....if an employee's performance is found to be unsatisfactory during the probationary period, they will be asked to leave by giving notice of 14 days.....Alternatively, management may decide to extend the probation for a further period of not more than 6 months with the agreement, with the agreement of the employee".

It is not disputed that ordinarily the claimant's probation ended on 14/02/2013. After perusal of all the e-mails (exhibit D1) especially those between August 2012 and February 2013, the probationary period, we draw a conclusion that the said e-mails do not constitute an assessment for purposes of either confirmation or extension of probation or termination for failure to successfully complete the probationary period. The emails were exchanges between the managers including the claimant and the Country Director about general administrative issues relating to the work of the organization. Nothing in the emails can be construed as a reprimand or failure on the part of the claimant to do any assigned task, during his probationary period.

The respondent argued that because the claimant did not submit the probationary report in time he, by conduct, extended his own probation period.

In cross examination the claimant insisted that he filed the report to his supervisor but the email that he used to file the report was blocked. He also claimed that he never discussed the report because the supervisor did not call him to do so.

In our considered opinion section 67 of the Employment Act (supra) is emphatic on the period of probation. In the case of **NYAKABWA J. ABWOOLI VS SECURITY 2000 LTD, LABOUR DISPUTED NO. 108/2014 (FROM HCCS 301/2010)**

This court observed that

"Probation is meant for the employer to observe and assess the employee as to the latter's suitability. The employer has a right after the period to extend the same, terminate the employment or confirm the same. Delaying confirmation of an employee to his detriment without any reason is not acceptable....."

In the instant case we are of the view that the respondent had a duty to inform the claimant that his probation had been extended for the reason that he had neglected to fill the assessment forms. In the alternative at the end of the probation period his services would have been terminated for failure to complete probation successfully. It was in contravention of section 67(supra) for the respondent to have terminated the contract on 13/05/2013, two months after probation period had ended. We are firm in the view that an employee on probation can only be terminated under section 67 (4) (supra) before the end of his probation as prescribed there under.

In other words the whole process of assessment and evaluation must be completed within the probationary period and the claimant should be informed within the same period otherwise the employee will in accordance with the case of **NYAKABWA** (supra) be deemed to have been confirmed.

Therefore the submission that the claimant delayed to submit his probationary assessment and that thereby agreed to extend the probation period is not acceptable to us. To accept this submission would be to legalize processes that may unreasonably delay the end of an employee's probation period contrary to section 67 stated earlier.

The sum total of all the above analysis is the finding that by the time the respondent terminated the claimant's employment, he had completed his probation and thereby been confirmed.

The next question is whether the claimant was given an opportunity to be heard. It was the contention of the respondent that the claimant committed a serious misconduct that did not require notice although the respondent gave the claimant an opportunity to respond to the allegations.

The summary of the submission of counsel for the respondent is that since the respondent had expressed dissatisfaction with the claimant via emails and he was advised to resign as an alternative to being dismissed which the claimant refused, the respondent lawfully terminated him.

We respectfully disagree with this contention. As pointed out earlier, the various emails were in the nature of the usual administrative work/guidance and hardly any of them could be interpreted to mean that the claimant was so incompetent as to deserve a termination in accordance with

**Section 69 (3) of the Employment Act which states that
"An employer is entitled to dismiss summarily, and the dismissal may be termed justified, where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service"**

Whereas under summary dismissal an employer may not give notice to the employee, the reason for dismissal should be clearly spelt out as the employee having fundamentally broken his or her obligation which reason must be proved in court. Dismissal without notice is not synonymous with dismissal without being heard.

In the case of **QUEENVELLE ATIENO OWALA VS CENTRE FOR CORPORATE GOVERNANCE** (industrial Court of Kenya, cause 81/2012 which was cited with approval by this court in **DONNA KAMULI VS DFCU (labour Dispute Claim 002/2015)** the court held

"It was insufficient that the respondent had various discussions with the claimant. It was immaterial that the claimant was even at one time appraised and found wanting..... Appraisals and discussions held between employees and their employers touching on employees work performance, do not add up to a disciplinary hearing, and can only be evidence in support of good or poor performance at a disciplinary hearing. Whatever records the respondent held against the claimant were to be subjected to the rigors of a disciplinary process before a decision could be made. Termination was lacking in both substantive validity and procedural fairness." We acknowledge that the claimant was given an opportunity to respond to the objections against him by e-mail.

Unfortunately for the respondent this response was not to allegations labelled against the claimant before a competent disciplinary committee expected to have been impartial and to have made a decision in accordance with the principles of not only natural justice and equity but also of the policy of the respondent exhibited as P7 which states on page 14:

"Disciplinary Hearing

The disciplinary hearing will be conducted by a manager, typically the employee's manager (normally the line manager will not have conducted the investigation that led to the hearing being arranged.) A member of the people and Culture team or the local people and culture manager will attend the hearing to advise The employer has a right to be accompanied at all formal hearings by a representative....."

Section 66(I) of the Employment Act provides

"Notwithstanding other provisions of this part, an employer shall, before reaching a decision to dismiss an employee on the grounds of misconduct or poor performance, explain to the employee..... the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.

(2) Notwithstanding any other provisions of this part, an employer shall, before reaching any 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 sub-section (i) may make".

In breach of the above provisions in the policy and under the Employment Act, it was the line manager of the claimant who brought the charges against him, who heard the charges and who terminated the contract of employment. There is nothing on the record to show that in accordance to section 2 of the Employment Act as cited above, the claimant presented his case to an impartial tribunal which considered both sides and later took a position to (terminate the contract).

In our own view, this cannot be described by any stretch of imagination as an opportunity to be heard given to the claimant by the respondent, even if this court was to believe that the claimant committed a serious misconduct.

Consequently, for the above reasons we take the position that, the claimant's contract of employment was unlawfully terminated.

The last issue is : What are the remedies available?

The claimant prayed this court to grant him (among others) severance allowance, special damages and general damages

SEVERANCE

The claimant sought severance allowance for 3 months.

Section 89 provides

"The calculation of severance pay shall be negotiable between the employer and the workers or the labour union that represents them".

Article 8 of the terms and conditions of the Employment exhibited as D7 provides for an elaborate method of calculation of severance pay which includes a calculation (among others) on the basis of how long the employee has worked. Having held that the termination of the contract of Employment was unlawful, we hereby grant the prayer for severance calculated in accordance with Article 8 of the terms and conditions above mentioned.

SPECIAL DAMAGES

It is trite law that special damages can only be granted after they have been strictly proved. The claimant claimed 23,700,000 as salary for each month multiplied by 53 months remaining on the contract.

In his own evidence, he informed court that almost immediately after he was terminated he was re-employed by the ministry of Health. It is our considered

opinion that financial loss by the claimant was rightly mitigated by the fact of being employed by the Ministry of Health. No evidence was adduced to show that in the current job the claimant was earning less than he would be earning had his contract not been illegally terminated.

Consequently, in the circumstances, the prayer for special damages for the remaining 53 months on contract is not granted.

However, in accordance with section 66(4) of the Employment Act, we grant a prayer for 23,7000,000 being four weeks wages, for failure of the respondent to afford a fair hearing to the claimant.

REPATRIATION ALLOWANCE

We decline to grant this prayer on the ground that on perusal of section 39 of the Employment Act, the circumstances under which the claimant was employed and terminated do not fall under the said section.

GENERAL DAMAGES

The claimant was employed by the respondent on the strength of his curriculum vitae which the said respondent used to bid for the project. Although he mitigated his financial loss by seeking re-employment with the Ministry of Health, we are of the opinion that being in the civil service he earns much less than he would have continued to earn had his contract of employment not been unlawfully terminated. He suffered anguish and inconvenience. We therefore consider 110,000,000/= sufficient general damages and so it is ordered. All the sums payable in this award shall carry an interest rate of 21% from the date of the award till payment . No order as to costs is made.

Signed:

1. The Hon. Chief Judge, Asaph Ruhinda Ntengye
2. The Hon. Judge, Linda Lillian Tumusiime Mugisha

Panelists

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

DELIVERED ON 27TH JANUARY 2016

