THE REPUBLIC OF UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT MASAKA
LABOUR DISPUTE CLAIM. NO. 60 OF 2016
(*ARISING FROM HCT-CS-048 OF 2015*)

BETWEEN

CISSY NANKABIRWA MAGEZI..... CLAIMANT

AND

THE BOARD OF GOVERNORS
ST. KIZITO TECHNICAL INSTITUTE-KITOVU..... RESPONDENT

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

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

AWARD

This is a claim of unlawful dismissal instituted by the claimant against the respondent. The claim was originally filed at Masaka High Court as civil suit No. 48/2015. The claimant was by letter dated 24/7/1997 appointed by the respondent on probation as a Bursar. On 06/02/1999, the claimant applied (and was granted)sick leave. While still on leave, the respondent by letter on 18/5/1999 appointed one Namala Pauline as school Bursar/Accountant. In 2004, the claimant was re-employed by the respondent temporarily.

On 6/01/2015, the claimant applied for annual leave for2 months but by letter dated 30/01/2015, the respondent granted her leave for one month effective 3/2/2015. The same letter reminded the claimant that both the job of Bursar and accountant had been advertised and advised her to apply. In fact the advert had been circulated in the churches and the respondent's notice board.

The deadline for submissions was Friday 13/02/2015 at 12.00 noon. The claimant did not apply and neither did she sit the interviews on 20/02/2015. One Kibaya Paul was interviewed and later on employed as bursar.

According to the claimant her leave was to end on 18/03/2015 while according to the respondent her leave was over on 03/03/2015 and when she failed to turn up from her leave she was taken to have absconded and therefore she was terminated.

Issues:

1. Whether the claimant was lawfully terminated.
2. What remedies, if any, are available to the parties.

In her evidence the claimant emphasised that after her long sick leave she was re-employed and her appointment was a temporary appointment. The respondent as well emphasised that the appointment was indeed temporary. Under the employment Act, an employee may be employed on probation, or as a casual employee or on permanent basis, or on fixed contract terms. Each contractual relationship has distinct terms which must not be in conflict with the provisions of the Employment Act.

The term "temporary employment" is not used in the Employment Act. In our considered view, it may imply somebody being in a given post for the time being until the post is filled officially or formally.

But section 67 of the Employment Act provides for a fixed period for which an employee may work on probation. Is Temporary employment the same as probationary employment?

In the Kenyan case of **ABRAHAM GUMBA VS MEDICAL SUPPLIES AUTHORITY(2014)KLR** the court in distinguishing the two, held that whereas probation is given to new employees to enable them learn the operations of their employers and to enable their employer assess whether the employee

fits the job requirements, temporary employment on the other hand is where an employee is expected to remain in a position only for a certain period of time. Therefore in probationary employment there are prospects of confirmation and permanency on the job which is absent in temporary employment. Consequently in the former, it is expected that depending on one's performance, one is confirmed in appointment with better terms or one is done away with for incompetence .In temporary employment at a certain time the employee has to exit because either the job no longer exists or the 'owner' has come or time is up or the job has been formally given to the most qualified.

Nonetheless, from the evidence on the record, we gather that the respondent was not in full control of recruitment of staff for the institution. The Ministry of Education was in full control. This is the reason why the appointment by the respondent was "temporary" pending confirmation by the Ministry of Education.

It is our considered opinion that all Boards of Governors of Government Education institutions govern the said institutions on behalf of government, through the Ministry of Education. We are positive that in matters of employment, such Boards of Governors can only employ personnel on Temporary terms or on such other terms that will not be exclusive of the Ministry of Education's prerogative to so employ the same staff under terms deemed fit by the Ministry of Education. Therefore to the extent that the Board of governors employ personnel subject to confirmation by the Ministry of Education, section 67, of the Employment Act may not apply.

Following her application for leave for two months, the claimant was granted leave for one month effective 3rd February 2015. The letter expressly stated that the claimant was expected to report back to office on 3/3/2015 and reminded the claimant that both the posts of bursar and accountant had been advertised and that she was free to apply.

In her testimony the claimant told court that although the letter granting her leave expected her to report back on 3/3/2015 since she received the letter on 18/3/32015, she was entitled to return on 18/03/2015 if she was to make a month on leave in accordance with the letter.

The RW1, on the other hand testified that he in fact delivered the letter granting leave to her on 3/2/2015 and that in teaching institutions, the staff ordinarily do not get the usual official leave because of the provision of holidays for students. We take note that under the employment act, an employee is not expected to be terminated for the reason that he/she were on leave.....

We do not accept the contention that teachers and other staff are not entitled to leave by virtue of the provision of holidays since the Employment Act is very categorical in this aspect. what may be acceptable to us is that because of the nature of the work of such institutions, in applying and being granted leave, the interest of the students has to be taken into account. Consequently it appears the management of the institutions ordinarily grant leave to members of staff during holidays, but exceptionally outside holidays, depending on the circumstance of a given employee.

In the instant case, the claimant was granted leave for 30 days and she was expressly informed to report back to office on 3/3/2015.

In our considered opinion even if this court was to believe that the claimant received the letter granting her leave on 18/02/2015, she was under an obligation to inquire from her boss as to whether the leave was for one month or for less period since it was in the discretion of the management to grant the leave in the first place outside the holidays.

This is reinforced by the claimant's own evidence in cross examination that she was in fact working between 30th January 2015 and 18/02/2015. She should have requested the management to re-adjust the leave days and as already intimated above, it would still depend on the discretion of the Principal.

We do not therefore accept the contention of the claimant that because she received the grant of leave on 18/2/2015, her end of leave shifted from 3/3/2015 to 18/3/2015.

It was submitted on behalf of the claimant that because her job was advertised while she was on leave and because the last date of receiving applications was on 13/3/2015 when according to her she would still have been on leave, she could not legally apply for either of the jobs advertised.

We respectfully disagree. There was no legal impediment and we do not think such impediment exists anywhere, that one who is on leave may not apply for a job whether the job is the one he or she occupies or not.

We are of the view that the claimant was fully aware that the job was advertised and we think the onus was on her to apply and convince the panel about her suitability for the job. It is our view that the fact that one is occupying a certain position does not exclude the employer from advertising the same position if the said employer seeks more qualifications or if the same post is being restructured. The employer has an inherent right to restructure posts in his/her organisation as long as the employees are aware of the process. In the instant case the claimant was made aware first in the church and later on in a letter written to her. Having been on leave therefore would not in any way affect her ability to apply for either of the jobs. In any case she did not adduce any credible evidence as to why she did not apply for either of

the jobs. She put emphasis on paragraph 9, 12, and 13 of the written witness statements which stated.

"**That on the 1st day of February 2015, it was a Sunday and I attended the Holy Catholic Mass at Kitovu cathedral where I was shocked to hear an announcement made by my very boss, the principal calling for suitable persons to fill the employment gaps existing in St. Kizito technical Institute – Kitovu, namely that of the institute Bursar and institute accountant.**

That the said advertisement of my position in annexture "E" above was made without any notice given to me at all whereas I was fully in my employment and that I had even worked on that day it was written, the day before it was written, the day after it was written and even on the Saturday before it was read in public in church."

Paragraph 13 is to the effect that the advert was read in all the Catholic parishes in the Masaka diocese.

The contention in the above evidence as we understand it, is that since the claimant was in occupation of the office of Bursar, the respondent had no business advertising for it without informing the occupation. As we have already said, this position is not acceptable to us.

The claimant in paragraph 14 of the written witness statement acknowledges that she had no qualifications of the job of bursar as advertised,, though she qualified for the job of accountant.

We have not been persuaded by the claimant as to why she did not apply for the job for which she was qualified.

Relying on the case of **NAJJEMBA JOY VS THE BOARD OF GOVERNORS NAALYA SECONDARY SCHOOL**, **HCCS 279/2013,** counsel for the claimant submitted that the advertisement must be interpreted to have amounted to a dismissal without notice or a summary dismissal.

In our view there is nothing further from the truth. Upon perusal of the cited case we find that whereas in the cited case no termination letter for any reason was given to the plaintiff, in the instant case there was a termination letter for the reason that the claimant absconded.

In the instant case the advertisement **was well known by the claimant** who had all the rights to apply for the job of her choice and qualification and as already pointed out her being on leave could not be an obstacle to her ability to apply for the same. The advertisement could not therefore within the meaning of **NAJJEMBA** be interpreted to have amounted to a **dismissal without notice** or a summary dismissal.

We subscribe to the submission of counsel for the claimant that leave is an entitlement to the employee and that no employee should lose his/her employment for the single reason that he/she took leave.

The claimant took leave effective 3/2/2015 for one month. She was expected to return on 3/3/32015 but she returned on 18/03/2015. Her job was given away to one Kibaya who sat and passed an interview which the claimant did not respond to.

The interview was on 20/2/2015 whilst the claimant was still on official leave. The question is, was it fair for the respondent to dismiss the claimant for abscondment from a job which did not exist for her by the end of her official leave?

In his written submission, counsel for the respondent contended that the claimant's position had been rendered vacant by the time the claimant went on leave and that this fact had been put to her.

We, indeed, agree to this submission. The claimant had been informed of the advertisement of the job. It was not prudent of her to think as she testified in cross examination, that she was still serving and that the advertisement was for the general public excluding herself, the reason she did not approach her superiors about the same advert. She seemed to have been only interested in the job of the bursar which was restructured to demand higher qualifications than she had. She was not interested in the job of accountant, which she qualified for and which she would have applied for.

She was therefore terminated in our view, because the job she was occupying had been restructured and she failed to apply and get considered for the job that she qualified for. We cannot reasonably say that the claimant was terminated for absconding because by the time she was expected to report back to her job, as counsel for the respondent correctly submitted, her job had been advertised and every necessary step had been taken to fill the vacancy.

Consequently the termination letter in our view, gave a wrong reason for terminating the claimant, although the termination by itself was not unlawful since the job had been restructured and the claimant not only made aware of this but given opportunity to apply for the next available job but which she failed to do.

The next issue relates to damages.

Having declared that the termination was not unlawful, it follows that no damages arising from unlawful termination may be awarded. However, the claimant is entitled to payment in lieu of notice and in paragraph 8 of the defence, the respondent conceded to pay 1,100,000/ which is hereby awarded.

The claimant also prayed for the wages of the Months of March and April. The evidence reveals that the claimant was given official leave during the Month of March and she was terminated at the end of April 2015. In accordance with paragraph 5 of her plaint this court hereby grants her 680,000/ being wages for both months.

We have not found any evidence to suggest that in her employment the claimant applied for leave which was denied. We therefore agree with counsel for the respondent that payment in lieu of leave is not recoverable. Severance allowance is not also recoverable since the court has ruled out unlawful or unfair termination. It is our finding as already alluded to earlier in this award that the claimant was not terminated for abscondment or any other unreasonable conduct but for her job having been restructured and her failure to apply and therefore be considered for the job she qualified for. We are therefore in agreement that she is entitled to a certificate of service and we so order.

We subscribe to the submissions and sentiments of counsel for the claimant to the effect that the claimant's termination letter alleged abscondment as a reason for termination which was not the case as discussed already. Whereas this misdirection did not amount to unlawful termination in the circumstances of this case, we form the considered opinion that it caused a misaprehension in the mind of the claimant for which she is entitled to relief. We herby a ward her 1,500,000/. No order as to costs is made.

SIGNED:

1.Hon.Justice Ruhinda Asaph Ntengye, Chief Judge.....

2.Hon. Lady Justice Linda Lillian Tumusiime Mugisha.....

PANNELLISTS

1.Mr. Ebyau Fidel.....

2.Mr.F.X. Mubuuke.....

3. Ms.Harriet Mugambwa.....

Dated. 21st/10/2016