**THE REPUBLIC OF UGANDA**

**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**

**LABOUR DISPUTE NO. 057 OF 2016**

**ARISING FROM CBN 036/2016**

 **DOUGLAS LUKWAGO ………………………….. CLAIMANT**

**VERSUS**

**UGANDA REGISTRATION SERVICES BUREAU ………………………. RESPONDENT**

**BEFORE:**

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**

**AWARD**

**BRIEF FACTS**

According to the Joint scheduling Memorandum, the Claimant was employed by the Respondent on probation on the 6th of February 2012 and confirmed in employment in August 2012, initially for 3 years. His employment contract was renewed for 5 years in November 2015. He was summarily terminated on the 10/7/2015 on the grounds that the IGG’s investigation had found that at the time of his appointment, he did not possess the requisite academic qualifications for the position of Planner/Statistician and he had applied for the position out of time. He claims his termination was unfair because he was not given notice contrary to the principles of natural justice and the terms of his contract of employment. He seeks special damages for unfair and or unlawful termination from employment and costs of the suit.

**ISSUES**

1. **Whether the Claimant’s employment was unlawfully and or unfairly terminated by the Respondent?**
2. **Whether the Claimant is entitled to the reliefs sought?**

When the matter came both parties agreed to settle out of court but settlement failed. The Respondent did not enter appearance on several occasions leading to the Claimant applying for the matter to be heard exparte. Court granted leave for the Claimant to appear exparte and set it down for hearing on the 9/4/2018. Claimant adduced his own evidence and made written submissions.

**SUBMISSIONS**

1. **Whether the Claimant’s employment was unlawfully and or unfairly terminated by the Respondent?**

Counsel for the Claimant submitted that the Claimant wsas employed after he responded to a job vacancy for Planner /Statistician. According to him he possessed a Bachelor’s degree in Development Economics and a certificate in Practical Data analysis using STATA/SPSS from the faculty of Economics and Management and Institute of Statistics and Applied Economics respectively of Makerere University.

He claimed that the degree comprised 40% statistics enhanced by his certificate in data analysis and he had served the Respondent as an intern for a year.

According to him the Board of Directors at the time considered his qualifications and his experience when they offered him the position of Planner/Statistician on the 6/2/2012 by letter marked “C1” and contract dated 2/7/2012 marked “C3”. The contract was extended for another 5 years vide contract dated 5/11/2014 marked C5. He further submitted that he performed his duty as Planner/Statistician satisfactorily as seen by his performance appraisals. He was therefore shocked when he was summoned to show cause why he should not be terminated for lack of qualifications, experience and late submission of his application letter dated 11/06/2015, marked C7 contrary to the job advertisement dated 11/04/2011.

Counsel contended that the decision to hire him was made by the Respondent and he was not obliged to know the inner workings of the Respondent to establish that there were irregularities. Therefore the Respondent was estopped from going against its offer to the Claimant, which confirmed his suitability for the position. He cited **PAN AFRICAN INSURANCE CO.LTD VS INTERNATIONAL AIR TRANSPORT ASSOCIATION,** where it was held that, *“The doctrine of estoppel by conduct prevents the party against whom it is set up from denying the truth of the matter. The Principle is that where a party has his declaration, act or omission intentionally caused the other to believe a thing to be true and to act upon such belief he cannot be allowed to deny the truthfulness of that thing.”*

Counsel further argued that although the Claimant was invited for a hearing he was not availed with the IGGs report, the sign in book and the job advertisement which indicated the job qualifications as quantitative Economics which were the basis of his termination. Counsel contended that by not availing the Claimant these documents, the Respondent had not accorded him a fair hearing and therefore the Respondent violated Article 28 of the Constitution of Uganda. He cited the Malaysian case of **KANDA VS GOVERNMENT OF MALAYSISA 1962, A.C 322** and **CHARLES TWAGIRA VS UGANDA CRIMINAL APPLICATION No.3 OF 2003.**

He further argued that the Respondent did not prove the reason for termination as provided under section 68(1) of the Employment Act 2006 and **OKELLO VS RIFT VALLEY RAILWAYS (U) LTD HCCS No.195 OF 2009**. He prayed that court finds that the Claimants termination was unfair within the meaning of section 71.

**DECISION OF COURT**

The Claimant adduced his own evidence and the Respondents having locked itself out of the trial did not adduce any evidence, save that it filed a joint trial bundle and a joint scheduling memorandum with the Claimants.

It was not in dispute that the Claimant was employed by the Respondent as Planner/Statistician from 6/2/2012 to 10/7/2015 when he was summarily terminated on grounds that at the time of his employment he did not possess the required academic qualifications for the position.

The employment relationship was based on a contract of service which the parties entered into on the 6/2/2012. A contract of service is defined under Section 2 of the Employment Act of 2006 as ***any contract, whether oral or in writing, whether express or implied where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship.”***

The employment contract is based on the ordinary law of contract and so the requirements as to agreement, consideration and intent apply. The difference however is that with the contract of employment there is unequal bargaining positions between the employer and employee.

The terms and conditions in a contract of service are determined by the employer. The employee is therefore subject to the command of the employer. In the same vain it is the employer who sets the standard and qualifications for the job, the processes and procedures for recruitment and any other preliminary requirements which the employee must fulfill before the appointment. Therefore the employee only subjects him or herself to the pre-employment requirements before recruitment. Once the parties have entered a contract of service they are both bound by the terms of the contract. See **STANLEY MUNGAI VS NATIONAL OIL CORPORATION OF KENYA INDUSTRIAL CAUSE NUMBER 44(N) OF 2009** **[2009] LLR 250 (ICK).** In the instant case the Claimant was terminated on grounds that he did not possess the required qualifications for the position of planner/Statistician at the time he was appointed. The evidence on the record shows that the respondents issued him a contract of service on the 6/2/2012 at a gross salary of Ugx.21, 168,000/= per annum and it was later extended for another 5 years on the 25/11/2014 effective 2/2/2015 at a gross salary of Ugx.42,336,000/= per annum.

In the absence of evidence to the contrary we believe the Respondent found the claimant qualified to hold the position of Planner/Statistician, given that they issued him 2 consecutive contracts for the same position.

We have considered the IGGs report at page 102 of the trial bundle. This report was the basis of the Claimants termination. It states among other things that, whereas the deadline for submitting applications was 26/04/2011 as per the advertisement, the Claimant’s application was dated 5/05/2011, thus rendering his recruitment irregular. It also states that the claimant did not apply for the job nor was he shortlisted for it and it was doubted that he sat interviews for it.

The letter dated 3/01/2012, marked D1, indicates that the Claimant lodged a complaint about not being shortlisted for the position of Planner and in reply the Respondent’s Ag, Registrar General by letter dated 6/01/2012, marked D2, advised him to appear before Panel A on the 18/01/2012. He was later issued with an offer of appointment on 6/2/2012 and a contract of employment on the 2/7/2012.

In view of this evidence we believe that the Claimant appeared before a panel, was found qualified for the position of Planner/Statistician and subsequently appointed to it. We have not had the opportunity to scrutinize both the purported late application and the job advertisement because they are not on the record.

In the absence of evidence as to what exact qualifications were required for the job of Planner/Statistician and in the presence of evidence from the Claimant that he responded for a job of Planner/Statistician and he was appointed to it, on the 6/2/2012, and he actually worked as Planner/Statistician for the 3 years stipulated, in the contract and the contract was extended on 25/11/2015 for another 5 years, the Claimants termination on grounds that he lacked the necessary qualifications was unlawful.

As a responsible and reputable Government Institution, the Respondent ought to have meticulously analyzed the Claimants qualifications, against the exact qualifications required, before making the decision to appoint him to the job. This is especially so, given the Country’s current high levels of unemployment in the midst of highly qualified graduates. It is incumbent upon such institutions to clearly state the Job specifications and the exact qualifications required for various jobs before advertising them and they should meticulously scrutinize the candidates’ qualifications against the exact qualifications required before appointing them. In our considered opinion, it would be a serious injustice to fault the employee in this case, for the Respondent’s failure to abide by its pre- employment procedures regarding the Claimant’s recruitment. We therefore reiterate our finding that the Claimants termination was in this case was unfair and unlawful.

 **Was the Claimant was accorded a fair hearing?**

The Claimant does not deny that he was given a hearing. He contends however that the hearing was not a fair hearing because he was not availed the IGG’s report, the sign in book and the advert which were the basis of his termination. He also asserted that the Respondent had not proved the reason for his termination.

**In BAKALUBA PETER MUKASA V NAMBOOZE BETTY BAKIREKE ELECTION PETITION APPEAL NO. 04 OF 2009, KATUREEBE JSC**, stated that a right to a fair hearing is one of the fundamental rights guaranteed by the Constitution of Uganda under Article 28 and it is one of the rights provided under **Article 44 of the Constitution,** that are non-derogable. Article 28(1) on the right to fair hearing states that:

***“In the determination of Civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”***

Although the constitution does not describe what amounts to a fair hearing, his Lordship(supra) invoked the ***BLACK’S LAW DICTIONARY (6th Edition) which defines***  ***“fair and impartial trial”*** as follows:-

***“A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole.”*** (Emphasis added).

and “Fair hearing” as follows:-

***“Fair hearing. One in which authority is fairly exercised: that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine, and to have findings supported by evidence.”*** (Emphasis added).

Apart from the letter notifying the Claimant about the hearing, there was no record of the proceedings of the hearing. The letter marked C7, which directed the claimant to show cause why his employment should not be terminated did not indicate that the IGGs report had been availed to him for his consideration before the hearing and although, he responded to the allegations put to him in that letter, the actual report t should have been availed to him before the hearing.

It is well settled that, where the termination of an employee is based on an investigation, the principles of natural Justice dictate that the employee in issue must be given the report before the disciplinary hearing to enable him or her respond to its findings. It seems to us that the Claimant was not given any of the documents which were used to decide his termination therefore rendering the hearing unfair.

It is trite law that before an employer terminates an employee, the employer should explain to the employee the reason for which he or she is considering the termination, the reason must exist at the time and the employee must be given an opportunity to respond to the reason. The employee is also entitled to make the response with a person of his or her choice. **See section 66 of the Employment Act 2006.** Section 68 also requires that the employer proves the reason for the termination.

The Claimant in the instant case pleaded that he was not given an opportunity to call witnesses and the Respondent did not prove the reason for his termination, because he was not found guilty of any misconduct. He also claimed that he was terminated without notice contrary to section 58 of the Employment Act 2006 and **BANK OF UGANDA VS BETTY TINKAMANYIRE, SCCA No. 12 OF 2007.** He prayed that court finds for him.

We already established that the Claimant was not availed the documents that were used to reach the decision to terminate him and there is no record of any hearing on the record. The Claimant however responded to the infractions against him in writing, although he contended that he was only asked one question about his qualifications.

We do not think that the Respondents should be faulted for only asking the claimant only one question. We only fault them for not allowing him to come with a person of his choice and for not letting him call any witnesses as is required under Section 66 of the Employment Act 2006. This however does not fundamentally render the disciplinary hearing a nullity. What was important was that the Claimant was notified about the infractions levelled against him and he was given time to prepare and appear before an impartial tribunal or disciplinary committee. The only flaw in the hearing was that he was not availed the investigative report and the other documents that formed the basis of the decision to terminate him so as to enable him respond to them.

That omission on the part of the Respondent was a breach of the principles of natural justice therefore the hearing was unfair.

In the same vain given our findings regarding the Claimant’s termination, it is clear that the Respondent did not prove any form of misconduct on the part of the Claimant’s, thus violating Section 68 of the Employment Act 2006.

The Claimant also claimed he was terminated without any notice. Section 58 of the Employment Act provides that before an employee is terminated he or she is entitled to notice or payment in lieu of notice. It provides as follows:

***“58. Notice periods***

1. ***A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-***

***(a) Where the contract of employment is terminated summarily in accordance with section 69; or (b) where the reason for termination, is attainment of retirement age.***

***(2) The notice referred to in this section shall be in writing, and shall be in a form and language that the employee to whom it relates can reasonably be expected to understand.***

***(3) The notice required to be given by an employer or employee under this section shall be-***

***(a) not less than 2 weeks, where the employee has been employed for a period of more than six months but less than one year;***

***(b) not less than one month, where the employee has been employed for a period of more than twelve months, but less than five years;***

***(c) not less than two months, where the employee has been employed for period of five, but less than ten years; and***

***(d) not less than three months where the service is ten years or more.***

***(4) Where the pay period by reference to which the employee is paid his or her wages is longer than the period of notice to which the employee would be entitled under sub section (3), the employee is entitled to notice equivalent to that pay period.***

***(5) Any agreement between the parties to exclude the operation of this section shall be of no effect, but this shall not prevent an employee accepting payment in lieu of notice.***

***(6) Any outstanding period of annual leave to which an employee is entitled on the termination of the employee’s employment shall not be included in any period of notice which the employee is entitled to under this section.***

***(7) During the notice period provided for in subsection (3), the employee shall be given at least one half day off per week for the purpose of seeking new employment.”***

The letter of termination marked C7 stated in part that:

***“… The Board considered the report of the IGG, both your written and verbal responses and determined that your employment be terminated with immediate effect on the grounds that at the date of your application for the position of Planner/Statistician you did not possess a honours degree in Quantitative Economics/Statistics as clearly stipulated in the advertisement dated April 11, 2011.***

***You are to hand over all URSB assets in your possession immediately to your supervisor…”***

This letter clearly stipulated that the termination was with immediate effect and it took effect on the same day on which the hearing took place. Clearly the Claimant was terminated without notice.

The Respondents did not prove any misconduct against the Claimant therefore, Section 69 of the Employment Act on summary termination would not apply to his case and given that he had worked for the Respondent for 3 years and 5 months, in accordance with Section 58 (3) (b) he was entitled to 1 months’ notice or payment in lieu of notice. We order that he is paid 1 months’ salary in lieu of notice.

**2. Whether the Claimant is entitled to the reliefs sought?**

We have established that the Claimants termination was both substantively and procedurally unlawful therefore he is entitled to some remedies.

He claims for a declaration that the claimant termination was wrongful, unfair and unlawful, Special damages for wrongful termination, for the extensive suffering as follows, payment in lieu of notice (3 months’ Salary) amounting to 12,768,000/=, unpaid salary for 10 days amounting to Ugx. 1,418,660/=. Unutilized leave (38 days) 5,390,933/=, severance pay (3 months) 12, 768,000/=, 4 weeks’ pay for failure to give a fair hearing, 4,256,000/= all amounting to Ugx. 32,345,593/=, General damages and aggravated Damages for wrongful unfair and or unlawful termination, interest on the special damages at a rate of 23% from 10/7/2015 till payment in full and costs of the suit.

**Declaration**

We have already declared that the Claimant was unlawfully terminated**.**

**Special Damages as follows:**

**Payment in lieu of notice**

We have already established that the Claimant worked from 6/2/2012 to 10/7/2015, which is for 3 years and 5 months therefore in accordance with Section 58(3) (b) he is entitled to 1 months’ notice or 1 months’ salary in lieu of notice. Although he claims that at the time of his termination he was earning Ugx.51, 072,000/=, there is no official communication to that effect on the record. We shall therefore consider the salary of Ugx.42,336,000/= as stipulated in his contract of employment dated 25/11/2014. Therefore he will be entitled to **Ugx. 3,528,000/=** as 1 months’ salary in lieu of notice.

**Unpaid salary for 10 days**

There is no evidence that the Claimant was paid for the 10 days he worked in July 2015. He is therefore entitled to **Ugx. 1,176,000/=** for the10 days.

**Unutilized leave (38 days)**

It was submitted for the Claimant that he applied for 7 days of leave and still had a balance of 38 days unclaimed. He contended that leave was an entitlement provided for under Section 54 of the Employment Act2006 and clause 11.1 of the employment contract. He prayed for the 38 days leave balance. Section 54 (1)(a) provides that:

Section 54(1) (a)

1. Subject to the provisions of this section-
2. “***An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months’ service to be taken at such*** ***time during such calendar year as may be agreed between the parties.*** (0ur emphasis).
3. **An employee shall be entitled to a day’s holiday with full pay on every public holiday during his or her employment or, where he or she works for his or her employer on a public holiday, to a day’s holiday with full pay at the expense of the employer on some other day that would otherwise be a day of work.**
4. **where an employee who works on a public holiday receives, in respect of work, pay at not less than double the rate payable for work on a day that is not a public holiday, that employee shall not be entitled to a day’s holiday with full pay or payment in lieu of the public holiday.**
5. **Subject to subsection (2), any agreement to relinquish the right to the minimum annual holidays as prescribed in this section, or to forgo such a holiday, for compensation or otherwise, shall be null and void.**
6. **This Section shall only to employees-**
7. **Who have performed continuous service for their employer for a minimum period of six months**
8. **Who normally work under a contract of service for sixteen hours a week or more.**
9. **An employee is entitled to receive, upon termination of employment, a holiday with pay proportionate to the length of service for which he or she has not received such a holiday, or compensation in lieu of the holiday.**

It is trite that the employer is obliged to grant his employees rest days every calendar year. The rest days however can only be taken at such time as may be agreed between the employer and employee. Therefore leave or rest days are an entitlement and not a privilege to be granted to the employee by the employer. The employee is expected to apply for leave and be granted the leave by the employer on an agreed date.

In the instant case the Claimant applied for and was granted 7 days leave from 1/04/2015 to 13/04/2015. Assuming that he had worked for 12 calendar months from January 2015 to December 2015 he would be entitled to 28days of leave. The leave form however indicates that he was entitled to 45 days meaning his leave days had accrued. His appraisal form also indicated that he was not able to take leave because of his work schedule. This Court in **EDACE MICHEAL VS WATOTO CHILD CARE MINISTRIES L.D APPEAL No. 21 OF 2015(CONSOLIDATED WITH L.D APPEAL No. 16/2015) *was of the position that an employer can only defer*** ***an annual leave to the following calendar year with the consent of the employee and in such a case the employee will take leave for both the previous calendar year and current calendar year.”***

 We did not find any application by the Claimant for the 38 days leave accrued nor was there any evidence that he protested its deference. In the circumstances his prayer for payment in lieu of the remaining 38 days cannot succeed.

  **Severance Pay**

Counsel submitted that the Claimant was entitled to severance pay as provided under section 87 of the Employment Act. 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 unfairly dismissed/terminated. Section 89 of the Act provides that severance allowance should be negotiable between the employer and employee. This court in **DONNA KAMULI VS DFCU BANK LDC 002 OF 2015,** held that where the employer and employee have not agreed on a method of calculating severance pay, the reasonable method shall be payment of 1 month’s salary for every year the employee has served. In the instant case we established that the claimant had served 3 years and 5 months therefore he would be entitled to 3 month’s salary as Severance pay amounting to **Ugx. 10,584,000/=** as severance pay.

**General Damages**

Counsel for the claimant argued that given that the respondent unlawfully terminated the Claimant, he should be awarded damages. He contended that the claimant was forced to sell his land to pay his monthly bills. He submitted that given that the claimant was not guilty of any misconduct he should be awarded general damages which are intended to return the aggrieved party to the position there were in before the wrong was done to him or her. He prayed for Ugx. 25,000,000/= as general damages.

It has long been settled that the only remedy for an employee who has been unlawfully terminated is damages. See **VIRES VS NATIONAL DOCK LABOUR BOARD (1958) 1 QB 658** cited with approval in **STANBIC BANK VS KAKOOZA MUTALE C.A No. 2 OF 2010.** We have already established that the claimant was unlawfully terminated therefore he is entitled to damages. It is trite that determination of the quantum of damages to be awarded is at the discretion of Court and General Damages are intended to bring an aggrieved party to as near as possible in monetary terms to a position a Claimant was in before the injury occasioned to him or her by the respondent occurred. The claimant prayed for an award of Ugx. 25,000,000/= as general damages Given that the claimant was earning Ugx.3,528,000/= per month and his employment was interrupted by his unlawful termination, we think that the award General Damages of Ugx. 25,000,000/- as prayed for is sufficient.

 In conclusion an award is entered for the Claimant in the following terms:

1. A declaration that his termination was unlawful.
2. Payment of Ugx.15,288,000/= as Special damages (payment in lieu of notice, severance pay, unpaid salary for 10 days).
3. General damages of Ugx. 25,000,000/=
4. Interest of 20% per annum on 2 and 3 from date of judgment till full and final payment
5. No order as to costs

Delivered and signed by:

**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 ………………..**

**DATE ……………………………**