**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE NO.058OF 2014**

**ARISING FROM HCT-CS-43/2014**

**ANN MAYANJA & 7 ORS …….…….. CLAIMANT**

**VERSUS**

**KAMPALA CLUB LTD ………… RESPONDENT**

**BEFORE: features**

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

**PANELISTS**

**1. MS. ROSE GIDONGO**

**2.MR. JACK RWOMUSHANA**

**3. MR. ANTHONY WANYAMA**

**AWARD**

**BRIEF FACTS**

The Claimants were formerly employed by the Respondent in various capacities on permanent terms. On 10/12/2013, they received a circular stating that; as part of the re-organisation of the Respondent club, their employment terms were going to change from permanent terms, to 2-year renewable contracts, based on the performance of each employee, through yearly appraisals. The same circular also served as notice in lieu of the old terms, since the new terms would take effect on 1/02/2014.

The Claimants contend that this was in contravention of the Employment Act and a breach of their contracts, and specifically a breach of the termination clauses, which they rejected. They were subsequently issued termination letters on 31/1/2014, with a 1 month and 22 days’ notice. According to them the termination was wrongful, hence this suit.

**ISSUES**

1. **Whether termination of the Claimants employment was lawful?**
2. **Whether the Claimants received just treatment from the date in annexture A?**
3. **Reliefs if any?**

**REPRESENTATIONS**

The Claimants were represented by Senior Counsel Mr. Joseph Byamugisha assisted by Mr. Albert Byamugisha of J.A Byamugisha Advocates and the Respondents were initially represented by Mr. Mukalazi Mubiru, Wandabo Joseph and Mr. Mathias Nalyanya of Mubiru- Musoke , Musisi & Co. Advocates and later by Mr. Kenneth Engoru of Lex Uganda Advocates & Solicitors.

**SUBBMISSIONS**

It was submitted for the Claimants that the termination notice given to the Claimants was contrary to notice period, as provided under section 58 of the Employment Act, because it did not take into consideration the duration the Claimant’s served the organisation. In senior Counsel’s view the Claimants termination constituted summary termination as provided under section 69 of the Employment Act which provides that;

 ***“ Summary Termination***

1. ***Summary termination shall take place when an employer terminates the services of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contract term.***
2. ***Subject to this section, no employer has the right to terminate a contrct of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.***

He contended that the 1 month and 22 days’ notice and an attempt to pay them in lieu of the notice were contrary to the provisions of the Respondent’s human Resources Manual and the Employment Act, because it is either notice or payment in lieu of notice and not both. He argued that the notice as provided under section 58 of the Employment Act, was intended to enable the employees seek alternative employment, which was not considered in the instant case, because the Claimants were not given full notice.

He contended further that whereas section 61 requires an employer to issue a terminated employee with a certificate of service when it is requested, in this case the certificates were only issued 5 months after the termination and they did not indicate the wages they were earning at the time of the termination. He also contended that by including reason for the termination as ***“Cause of end of employment: Restructuring”***the Respondent had breached Section 61(2), which provides that; the certificate must not contain any judgement or evaluation of the employee’s work and such judgement should only be stated if so requested by the employee.

It was his submission that it was false to state restructuring as the reason for the Claimant’s termination, because consideration of factors such as such as; satisfactory performance, attitude, capacity, efficiency, diligence, loyalty, age and health, as provided under clause 6.2.3 of the Respondents Manual were not followed thus rendering the termination unlawful.

In reply, Counsel for the Respondent submitted that the Respondent derived the authority to restructure itself from its Human Resources Manual, under clause 6.2.3 and the Annual General Meeting which approved the process. He stated that the Claimants and all the other staff were notified about the restructuring process and they were also issued with an advert, inviting them to reapply for the various positions established under the new structure. Each one was encouraged to apply for up to 3 positions. Each of the Claimant’s in their testimony admitted that they were advised to apply, but they did not do so and some of their colleagues who did apply were re- appointed.

It was his submission that the Claimants were terminated on 1/2/2014 and they were paid their terminal benefit, which they admitted they received. According to Counsel, Section 2 of the employment Act defines “termination of employment as:

 ***“… termination of employment means the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct…”***

He asserted that the Claimants termination was because of restructuring the Respondent and it was carried out in line with section 81 of the Employment Act, 2006, which provides that termination by redundancy. He also cited **David Kalyango vs Rakai Health Science Programme LDC No 038/2016** , in which this Court held that:

***“…restructuring is one of the justifiable reasons envisaged under the above section. It is clearly a reason given by the Respondent in accordance with section 68 of the employment Act cited above as well as in accordance with the decision of the Court cited above…”***

Citing **Cissy Nankabirwa Magezi vs The Board of Governors St. Kizito Technical Institute – Kitovu,** in which this court held that ***“… the Employer has an inherent right to re-structure posts in his/her organisation as long as the employees are aware of the process…”***, he insisted that the Claimants and all the other staff were notified about the restructuring as far back as 2011 in various staff meetings, through their labour unions and through the Annual general meeting held in March 2013 and subsequent staff meeting in November 2013. He contended that none of them disputed or challenged the process. He insisted that they were all given an opportunity to reapply and a second chance to was extended to those who did not meet the deadline, to do so even after its expiry, but the Claimants did not apply. In his view therefore, their claim does not qualify to be termed a summary dismissal.

He further submitted that given that the Claimants signed and acknowledged receipt of the amounts paid to them, as full and final settlement of their entitlements, they could not approbate and reprobate all at the same time. He explained that the basis of this principle is that no party can accept and reject the same instrument that is, one cannot say at one time that “***a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn around and say it is void for the purpose of securing some other advantage.”***

He cited **Adam kafumbe Mukasa &2 others vs Uganda Breweries Ltd LDC No. 191 of 2015** in a similar matter in which this court held that:

***“This Court is of the view that having signed to be bound by the terms of the letter, the claimants cannot at this time bring a claim to retract the same, It is trite that a person is bound by his or her signature unless fraud or duress is proved and this was not the case in the instant case. We are therefore inclined to hold that in light of acceptance which the claimant signed, this claim cannot be sustained. It is therefore dismissed.***

He refuted the assertion that the Claimants were compelled to sign the acknowledgements in their termination letters, because this would amount to duress which is unlawful amounting to “Coercion of the will”. He cited **Pao On & others v Lau Yiu & Another [1979] AllER 65,** which relied on **Barton V Armstrong [1976] A.C 104 ,** in which Lord Scarman in determining the criteria for determining whether there was coercion, stated in part that ***“… whether the person alleged to have been coerced did or did not protest, that at the time he did or did not have an alternative course open to him such as an adequate legal remedy , whether he was independently advised and finally after entering the contract the steps he took to avoid it”***

In relation to the facts of this case he stated that the Claimants signed and acknowledged to be bound by the amounts stated in their termination letter, they received the cheques issued to them, banked them, withdrew the monies and filed a suit in high court 5 months later. According to him these actions do not indicate that they were protesting, therefore they cannot claim that they were coerced.

He also refuted the assertion that the termination was a summary termination because they were given I month and 22 days’ notice and paid 1 month and 8 days in lieu of notice. Besides this was a termination resulting from restructuring, and they all participated in the process. According to Counsel, due process was followed therefore, it was not a summary termination. He also argued that section 58 could not apply because they were given opportunity to reapply and they did not apply. He concluded that he termination of the claimant was lawful.

In rejoinder Mr. Byamugisha, insisted that the Claimants were not given exit interviews, and during the period of notice, nor were they given a half day off every week, to enable them get other jobs. According to him the manual and the Annual general meeting which were relied on to terminate the claimants did not exempt the Respondent from the statutory requirement to give them notice as provided under section 58 of the Employment Act. He reiterated that in addition to not complying with Clause 6.2.3 of the manual, the Claimants were denied the right to reapply because they were just dismissed. According to him, whereas Counsel for the Respondent submitted that the Claimants were terminated in accordance with section 81 of the Employment Act, Commissioner labour was not notified as provided under subsection1 of the same section 81.

He insisted that the Respondent coerced the Claimants to sign the acknowledgement before they could be given their cheques, because according to one of them, a one Josephine Ajok, the manager told her that she would not receive her cheque if she refused to sign. He insisted that the intention of their signing was to enable them get their money but not to be legally bound. Therefore, the acknowledgement was illegal, null and void. He asserted that the reason why the Claimants were terminated was because they sought legal advice and in any case the right to reapply did not bar the application of Section 58 of the Act.

**DECISION OF COURT**

After carefully perusing the evidence on the record, the one adduced in court, and both Counsels written submissions, it is not in dispute that the Respondent undertook a restructuring exercise but instead of terminating its staff immediately, all the employees were given the option to reapply for the positions created under the new structure.

Section 2 of the Employment Act defines employer to mean ***“any person or group of persons ; including a company or corporation, a public , regional or local authority, a governing body of an unincorporated association, a partnership, parastatal organisation or other institution or organisation whatsoever, for whom an employee works or has worked , or normally worked or sought to work, under a contract of service and includes the heir, successors , assignees and transferors of any person or group of persons for whom an employee works , has worked or normally works.”***

And Employee to mean: ***any person who has entered into a contract of service or an apprenticeship contract, including , without limitation, any person who is employed by or for the government of Uganda, including the Uganda Public Service, a local authority or parastatal organisation but excludes a member of the Uganda Peoples’ Defence Forces.***

An employee therefore works for the employer, who under section 40 of the Employment Act has the responsibility to provide work to the employee. It is therefore the employer who determines what work to be done, how it will be done who is qualified to do it and where it will be done.

Section 81 provides that:

***81. “Collective Terminations***

***Where an employer contemplates termination of not less than 10 employees over a period of not more than 3 months for reasons of an economic , technological, structural or similar nature , he or she shall-***

1. ***Provide the representatives of the labour union, if any , that represent the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect , except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated ,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a)shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;***
2. ***Notify the commissioner in writing of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out***

***(2) An employer who acts in breach of this section commits an offence.”***

The Court in **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha LDAppeal no. 035/2018,** held that;

“*…The section makes it mandatory for the employees contemplated for termination to be informed through their representatives (unions) and in our view where they are not unionized or represented, to be informed individually, at least 1 month before the terminations takes effect.*

*Secondly the Commissioner labour must be notified in writing of the reasons for the terminations, the number and categories likely to be affected and the period over which the terminations will take place.*

*It is clear therefore, that a collective termination can never be a summary termination and it cannot be done without a justifiable reason. Although the Employer is at liberty to restructure his or her business or organization, he or she is expected to think through the process, because by so doing some of his or her employees are likely to loose their jobs. Therefore, the employer has to prepare the employees for any eventuality and the choice of those to be affected must be justifiable.*

The claimants in the instant case did not deny that they were notified about the restructuring process as far back as 10/12/2013. They were given the option to reapply but they did not reapply. They testified that they were given notice of 1 month and 22 days, paid their terminal benefits before the termination and according to Senior Counsel Byamugisha’s submission they were later paid 1 month and 8 days in lieu of notice.

It is our considered opinion therefore, that by inviting its staff to reapply for the positions under the new structure, the Respondent intended to identify who would best do the work under the various positions created under the new structure before they embarked on terminations. Therefore at that point the Respondent had not yet contemplated who would be terminated. It was the Claimants unanimous testimony that each of the Respondent’s staff was given an option to apply for up to 3 positions. We therefore respectfully disagree with Senior Counsel that the factors such as; satisfactory performance, attitude, capacity, efficiency, diligence, loyalty, age and health,(supra), provided for under Clause 6.2.3 were not taken into consideration by the Respondent before terminating the Claimants, because in our view the reapplication was intended to actually determine the competences of the staff to handle jobs under the new structure. We believe that had they reapplied for the positions these factors would have been considered. Therefore by failing to take the opportunity to reapply, the Claimants locked themselves out of the process which would have determined their competences to occupy some of the positions in the new structure. In our view therefore, they opted to cease their engagement with the Respondent when they locked themselves out.

It is important to note that the procedure for termination provided for under Section 81 of the employment Act as already discussed is different from that to be followed under sections 66 and 68 of the Employment Act. Whereas under section 66, it is a requirement for the employer to give the employee in issue the reason for his or her termination and an opportunity to respond to the reason and under section 68, to prove that the reason for termination is a justifiable reason, Section 81 provides that the employer can terminate the services of the employees for economic, technological or structural reasons after notifying the Employees Union representatives or where they are not represented, the individual employees, 1 month before the terminations contemplated occur. Therefore the requirement to give notice as provided as under Section 58 as argued by Senior Counsel would not apply to the instant case.

In the circumstances, the 1 month and 8 days’ notice that was given to the Claimants, given the requirements under section 81 of the Employment Act(supra) was sufficient notice.

Furthermore, the argument that the Claimants were entitled to be informed about the application of the criteria set out under clause 6.2.3 of the Respondent’s manual (supra) is not tenable , because the Respondent’s invitation to them to reapply for positions under the new structure, was not only in compliance with clause 6.2.3, but it was also an opportunity for them to be interviewed before the Respondent decided who to terminate, in light of the new structure. As already stated their failure reapply, to locked them out of the process and as Counsel for the Respondent submitted, they cannot approbate and reprobate all at the same time. This Court in **Dr. Elizabeth Kiwalabye vs Mutesa1 Royal UniversityLDC No.005/2017**, held that

***“… It is our considered opinion that an employer may take into account the history of the employee’s performance or his or her conduct when deciding who to terminate during a downsizing or restructuring process, but he or she is under no obligation to inform the employee so chosen why he or she was contemplated for termination. All the employer is required to do is to notify the entire staff about the downsizing or restructuring process, consult with the staff about the process and then notify those that are contemplated for termination at least 1 month before the termination occurs. The requirements of the business of the organization are exclusively defined by the employer …”***

In the circumstances, given that the termination was as a result of restructuring and the Claimants were aware about the restructuring process, having been notified in December 2013 and before and given that they were given an opportunity to reapply for some positions under the new structure but they failed and or refused to reapply and given that in accordance with section 81(supra), the Respondent was only required to give them 1 months’ notice before termination and they were given 1 months’ and 22 days’ notice, we find that, their termination was lawful.

1. **Whether the Claimants received just treatment from the date in annexture A?**

In addition to his submission on issue 1, Senior Counsel Byamugisha, submitted that the claimants were unjustly treated because when they sought legal advice the Respondent’s management became so angry and barred them from reapplying. He cited section75(h) which bars an employer from subjecting an employee to any disciplinary penalty or dismissal, for instituting a complaint or legal proceedings against the employer. He also cited section 4 of the same Act which is the same effect.

He contended that making it requirement for the claimants to sign an acknowledgement before they could be given their cheques was illegal and void. He cited the testimony of the 8th claimant which was to the effect that; she signed under duress by the Club manager and this should be considered unjust treatment.

He also cited the lack of exit interviews which were a requirement under clause 6.2.10 as unfair. According to him, having been unfairly terminated the Claimants were also entitled to severance pay, as provided under section 87 of the employment Act, and this was not paid to them.

In reply Counsel for the Respondent argued that in compliance with the requirements and procedures to be followed under restructuring, the Claimants were given ample notice about the restructuring process, which commenced in 2011, with various meetings which included all staff members, and each staff member was given an opportunity to reapply for up to 3 positions under the new structure which the Claimants did refused to do.

He refuted the assertion that the Respondent’s Management became very angry when the Claimants sought legal advice and that the Respondent barred them from reapplying. He argued that, CW1, Ann Mayanja and CW2, Josephine Ajok testified that the Respondent had a complaints management mechanism, but they did not invoke it to report the managers who purportedly barred them from reapplying. He wondered why out of the 22 staff who sought legal advice, 8 claimants were singled out and barred not to reapply. In his view they should have brought an independent witness to prove this allegation.

He asserted that in a restructuring process, the right to natural Justice, lay in being given an opportunity to re- apply and getting ample notice, which the claimants declined and therefore they cannot complain in a different forum. In his view it was wrong for Counsel for the Claimants to state that they were unfairly treated during the termination.

In rejoinder Mr. Byamugisha contended that the termination was not a collective termination but a redundancy and in any case the Respondent did not notify the Commissioner labour about it as is required under Section81 (1) (b). According to him even if the Respondent had notified the Commissioner, the terminations would still be unlawful because the Claimants were given less than due notice.

He insisted that the Claimants were coerced to sign the acknowledgement or else they would not receive their cheques and this was in violation of section10(1) of the contracts Act 2010, which is to the effect that an agreement made with the free consent of parties amounted to a contract, and in the instant case there was no free consent. According to him the claimants were terminated because they sought legal advice and not because of restructuring, therefore they were unjustly treated.

**DECISION OF COURT**

A careful perusal of the record showed that the 22 workers sought legal advice from, J. A Bymugisha Advocates, who are the legal representatives of the Claimants in the instant case. In their letter to the Respondent, dated 13/12/2013, the Advocates informed the Respondent that, they advised the Claimants not to resign their jobs, but to seek for the payment of their terminal benefits instead. They also told the Claimants that, by asking them to reapply the Respondent was in essence terminating their current contracts.

Although it was disputed that the Respondent underwent a process of restructuring and instead of outrightly terminating their staff, they offered them an opportunity to reapply for positions under the new structure, evidence relating to communications about the impending restructuring, left no doubt in our mind that there was a restructuring. The Claimants did not deny that the notice about the of restructuring stated that the terms and conditions would change from permanent terms to 2-year renewable contracts. We agree with the Claimants that by reapplying for positions under the new structure and under new terms, this would automatically terminate their previous contracts. However given that restructuring, whether they reapplied or not their previous contracts would terminate by restructuring.

We cannot overemphasis the fact that the Human Resources requirements of an organisation or business are exclusively defined by the owner of the organisation or business entity and he or she is at liberty for economic, structural or technological reasons to reorganize or restructure the organisation. The restructuring may involve either downsizing or rightsizing the Human Resources by; either reducing the number of staff and or changing the terms and conditions of service or job descriptions of staff. However before doing so, the employer or Business or Organisation owner must ensure that the staff are notified about the restructuring exercise in time, and those who are contemplated for termination are informed at least 1 month prior to their termination, to enable them prepare for any eventualities, including looking for alternative employment. We believe that this is the rationale for Section 81 of the Employment Act(supra).

We have already established that the Claimants were aware about the restructuring process, having been given notice about it in 2011 and December 2013. Although they claim to have been barred from reapplying, because the respondent’s management was very angry with them for seeking legal advice, they did not adduce any evidence to prove this assertion.

We are not convinced that out of 22 employees who also sought for legal advice that the Claimants were the only ones who were barred from reapplying, especially because they were among the 22 staff who sought legal advice. It was not disputed that some of the staff reapplied and were reappointed under the new structure, and the new terms and conditions.

We are therefore inclined to agree with Counsel for the Respondent that, the Claimants were terminated because they opted not to reapply and not because the Respondent barred them from reapplying, because they sought for legal advice. We reiterate that under the circumstances, they cannot now turn around to make a claim in this Court, having voluntarily opted out of the Restructuring process.

We also do not agree with the argument that they were not given an exit interview because they refused to reapply and locked themselves outside the process that would have given them opportunity to either remain employed or to exit in accordance with the law.

It is our finding therefore, that the Claimants were not unfairly treated by the Respondent and therefore their termination was lawful. In the circumstances they are not entitled to the claim for any severance pay.

**Reliefs if any?**

Having found that the Claimants were lawfully terminated, they are not entitled to any remedies.

In conclusion this claim is dismissed with no orders 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. MS. ROSE GIDONGO …..………..**

**2.MR. JACK RWOMUSHANA ……………**

**3. MR. ANTHONY WANYAMA ……………**

**DATE: 6TH MARCH 2020**