**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE CLAIM NO. 149 OF 2019**

**ARISING FROM M/LD NO.008/2019**

**BIKABA MOSES ………………………….. CLAIMANT**

**VERSUS**

**ABACUS PARENTERAL DRUGS …………………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1. MS. ADRINE NAMARA**

**2. MS. SUSAN NABIRYE**

**3. MR. MICHEAL MATOVU**

**AWARD**

**BRIEF FACTS:**

On 6/3/2009, the Claimant was employed by the Respondent as a boiler Machine operator under her utility department. He was confirmed in the position on 4/05/2010. In 2015, he suffered injuries in his ears arising out of an accident in which a boiler burst and spilled dangerous ashes. In 2017 he sued the Respondent for the injuries and got compensated for them. He was however terminated on 25/09/2018, on grounds of misconduct and insubordination, for refusing to sign the Respondent’s health and safety agreement.

**ISSUES:**

1. **Whether the Claimant was wrongfully terminated or dismissed?**
2. **whether the Claimant was dully paid his transport allowance in accordance with the contract of service?**
3. **Whether the claimant is entitled to remedies?**

**REPRESENTATIONS:** The Claimant was represented by Mr. Samuel Arinaitwe of Bagyenda &Company Advocates and the Respondent by Ms. Salaama Nakasi of M/s KMT(Kinobe, Mutyaba) Advocates.

**EVIDENCE:**

The Claimant adduced evidence through himself, his 2 witnesses having been expunged from the record. The Respondent adduced evidence through its Human Resources Executive, Allan Wodulo.

According to the Claimant he worked for the Respondent for 9 years. The Respondent accused him of refusing to comply with the safety regulations, when he refused to sign them until he consulted with his lawyers. He was also accused of absconding from duty, when he was absent from duty for 7 days purportedly because he was unwell. He was invited for a disciplinary hearing which recommended his termination.

The Respondent’s witness Allan Wodulo on the other hand testified that every staff was given the employment policy on assumption of duty. He was however not certain that the Claimant had been given a copy of the policy or memorandum and articles of the Respondent. According to him all staff knew the procedure used to apply for sick leave. But the Claimant only brought medical reports of his sickness after he was forced to do so. It was also his testimony that where an employee residing in the Mbalala area fell sick, the employee had to seek a referral from the Respondents medical Officer, where the Medical officer could not handle the case, before attending the clinic. However the procedure was not written down. He said the Claimant was given warning several times but he did not comply. He said that the Claimant never complained about unpaid allowances during the 9 years of service and at the hearing. He said that on termination, the Respondent paid all that was due to him, including , gratuity, days worked for and notice pay.

**SUBMISSIONS**

It was submitted for the Claimant that the warning letter, invitation to the hearing and termination all happened in a space of 15 days. Counsel contended that the Respondent did not bother to consider the medical reports which the Claimant brought as evidence of his sickness. He also stated that whereas the Respondent testified that there was an established procedure, the same was not adduced in court. According to him the Claimant made efforts to communicate to the respondent. Counsel cited page 8 of the Minutes marked RE4 where the human resources officer admitted at the disciplinary hearing that he had received a message from a staff on the Claimant’s phone number.

Counsel further contended that the document which the Claimant was accused of refusing to sign was not put to him during the disciplinary hearing. He arguement that in the absence of a written policy to guide on what was breached, it was not clear whether the claimantt’s absence for 4 days amounted to gross misconduct. He also contended that the claimant was entitled to be given all documents that were the basis of the allegations against him at the hearing, but this was not the case. He cited **Donna Kamuli Vs DFCU Bank LDC No. 002/2015**, for the legal proposition that due process had to be followed before a decision could be made against the Claimant. He insisted that the Claimant’s termination was lacking in both substantive validity and procedural fairness, because the minutes did not show the basis of the decision to terminate the claimant. He insisted that the claimant was not given a fair hearing because unlike in **Mbiika Denis Vs Centenary Bank LDC No. 023/2014** where this court held that it was incumbent upon the Respondents to give the Claimant time to study the indictment and reply to it, in the instant case this was not done, because the Respondent did not consider the evidence in support of the Claimant’s sickness and she did not consider the fact that he needed to consult with his lawyers before signing the policy on safety.

He also refuted the assertion that the claimant refused to report to the new duty station when he returned from sick leave because he was immediately summoned for a disciplinary hearing.

He also insisted that the claimant was not paid for the extra hours worked. He asserted that the respondent did not deny that the claimant was entitled to transport allowance which was cleary indicated in his appointment letter Marked annexure “A”. He refuted the Respondent’s assertion that there was a procedure for claiming extra hours yet she failed to produce the said policy in court. According to counsel the Respondent’s failure to pay the Claimant’s transport allowance was a continuous breach because the claimant had lodged his complaint about it in the respondent’s complaint book in vain, way before his termination.

In reply Ms.Nakasi re-stated facts of the case,as they were stated by Mr. Arinaitwe and on issue 1, she submitted that; the claimant could be dismissed for verifiable or gross misconduct and this court has already pronounced itself on the acts that amount to both verifiable and gross misconduct. She submitted that insubordination was one of the acts of misconduct.

It was her submission that the Claimant was dismissed for justifiable reasons, for refusing to wear protective gear and refusing to sign commitment form to abide by the safety regulations. According to her after the Claimant suffered injuries as a result of an accident in which the pipes from the boilers cracked, the respondent established that at the time most of the workers were not wearing their safety gears. Following this accident, the Respondent introduced new safety gears and safety guidelines which each staff had to sign committing to abide by them. All staff signed save for the Claimant who refused to signs without justifiable reasons and he even testified that he refused to sign the document.

Counsel further contented that according to RE3, the claimant was given several reminders to wear safety gear and issued with several warnings about his refusal to wear safety gear which he did not comply with resulting in management removing him from the high risk area to a low risk area for his protection. It was her submission that management concluded that the Claimant’s refusal to wear safety gear was a ploy to further expose himself to injury so that he could claim more compensation.

Counsel asserted that his refusal to wear the safety gear and his refusal to abide by the safety regulations amounted to gross and verifiable misconduct which justified his dismissal.

She further submitted that the claimant had also committed an act of insubordination when he refused to assume the duties assigned to him in a low risk area having refused to wear safety gear. According to Counsel these allegations of misconduct were not controverted by the claimant and citing **Florence Mufumbo Vs UDB LDC No. 138/2014,** in which this court gave insubordination as one of the acts of misconduct, the Court should find that the Respondent in the instant case was justified to dismiss the Claimant.

With regard to the allegation about absenteeism, Counsel argued that the claimant was absent from work on several occasions and he was warned about it but he did not comply and it was only after he was called for a disciplinary hearing that he brought medical reports to show that he was absent because he was sick. She contended that at the time the claimant went to the clinic from which he got medical reports , it had been delisted from the medical service providers of the company and besides he only produced these reports after he was forced to do so at the hearing. It was her submission therefore that Court should find that this was another act of misconduct that warranted his dismissal.

She insisted that before terminating the Claimant the Respondent followed the procedures as laid down under the law, by inviting him to a disciplinary hearing, and he was given prepare to attend the hearing. He attended the hearing with a friend a, one Twongierwe Batheromew and 2 members of his Labour Union, one Kafeero Isaac and Richard Adiri Ofareho. She therefore refuted his assertion that he was denied a fair hearing yet the minutes indicate that he received a fair hearing. Citing Grace Matovu Vs UMEME Ltd, LDC No. 4 of 2014, it was her submission that this court held in many cases that the disciplinary hearing need not follow the strict procedures of Courts of law, as long as the employee was given an opportunity to defend him or herself, therefore Court should find so.

**DECISION OF COURT**

It is trite law that the employer can dismiss an employee for a reason and the reason must be justifiable. Section 2 of the Employment Act defines **“*dismissal from employment” to mean the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct.”***

Section 66 (1), (2), (3) and (4)of the same Act provides that:

***66. Notification and hearing before termination***

***(1) Notwithstanding any other provision 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, in a language the employee may be reasonably expected to understand, 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 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.***

***(3) The employer shall give the employee and the person, if any, chosen under subsection (1) a reasonable time within which to prepare the representations referred to in subsection (2)***

***(4) Irrespective of whether any dismissal which is a summary dismissal is justified or whether the dismissal of the employee is fair an employer who fails to comply with this section is liable to pay the employee a sum equivalent to 4 weeks net pay.***

Section 68 provides that:

***Proof of reason for termination***

***(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71***

***(2) The reason or reasons for dismissal shall be matters, which the employer, at the tie of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee….”***

After carefully analysing the evidence on the record and the submissions of both Counsel the Claimant’ case as we understand it, is that he was dismissed without justifiable reason and without being accorded a fair hearing.

From the evidence it is clear that the Claimant previously suffered injuries resulting from an accident at the factory because he was not wearing protective gear at the time the accident happened. It is not disputed that following that incident the Respondent provided new protective gear and strengthened its guidelines on wearing the protective gear by requiring each staff to sign a commitment to abide by the guidelines. It is also not disputed that the claimant refused to sign the said guidelines on the ground that he had to consult his lawyers before doing so.

It is the responsibility of an employer to draw a contract of service and for the employee to abide by the terms of the contract once he or she signs it. A contract of service is defined under the Employment act as to mean:

**“*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”.***

It is not disputed that the Claimant was warned about his refusal to sign the health and safety agreement. However his letter of appointment Marked “A”, on his trial bundle, clearly states that his employment will be **“… *governed under the established terms and conditions of service as laid down in the employment policy.”*** The policy attached as RE5 on the Respondent’s bundle provides for occupation, safety, health and Environment policy under, Ref No.13 and makes it a requirement for employees to observe occupational and safety obligations. It specifically provides as follows:

***“… Employees are also required to observe their Occupational Health and safety obligation, together with their managers, supervisors and safety representatives, they must:***

* ***Observe all Health and safety regulations, procedures and instructions,***
* ***Take responsibility for their own safety, compliance with safe work procedures and to use the safety equipment provided and***
* ***Do nothing which is likely to cause injury or health hazards to themselves or others…”***

The Claimant signed the contract of employment there was nothing to indicate that he signed it under duress. In fact, he served under the said contract for 9 years. Section 13 of the Occupational health and safety Act 2006, provides under Section1(a) that***:***

1. ***It is the responsibility of an employer –***

***To take, as far as is reasonably practical, all measures for the protection of his or her workers and the general public from dangerous aspects of the employer’s undertaking at his or her own cost…"***

Equally under section 35(1) (a) , of the same Act , it is the duty of the worker while at work-

1. ***to take reasonable care for the health and safety of himself or herself and of any other person, who may be affected by his or her acts or omissions at work…***

It seems to us that by requiring the Claimant to sign to commit to its health and safety agreement after the accident involving the Claimant, the Respondent was making amends, in a bid to fulfil her mandate under the Occupational health and safety Act(supra). The requirement for him to sign to commit to the Respondents safety measures, was not only a reasonable directive, but a statutory requirement which the claimant was comply with. The Claimant did not adduce evidence to justify the reason for the requirement for him to first consult his lawyers before signing the agreement and having served with Respondent for 9 years we would have expected him to appreciate that this was a fundamental provision under his contract of service and moreover having been a victim of injuries suffered from an accident at his work place because he was not wearing protective gear.

His refusal to sign the commitment and his insistence on working in the same high-risk area after he was directed to report to the Manager Maintenance for a new assignment in a low risk area, amounted to insubordination. According to the Black’s law dictionary 8th edition insubordination is defined as:

**“*a wilful disregard of an employer’s instructions especially behavior that gives the employer cause to terminate a worker’s employment and or an act of disobedience to proper authority especially a refusal to obey an order that a superior officer is authorized to give.”***

We are not convinced that he was not given ample time to move to a less risky assignment after he refused to wear protective gear, because he was notified to go to the Manager maintenance for the new assignment in the warning letter dated 9/9/2018, and he did not do so. The employer as the person providing employment has authority to give an employee reasonable and lawful orders and the employee is expected to obey such orders.

It is our considered view therefore, that the Claimant’s refusal to sign the Health and safety agreement, which was already provided for in his contract and his refusal to report for a new assignment amounted to disobedience of a lawful directive from the employer which is a fundamental breach of his obligation under the contract of service which warranted a dismissal. In **HILDA MUSINGUZI** **VS STANBIC BANK SCCA NO.005/2016,** which was cited with approval in **Babu Miriam vs Barclays Bank (U) Ltd LDC No. 134/2014**, it was held that:

***“… the fact that the law protects employees from unlawful termination of their employment, they are accountable to their employers for acts which in the course of their duties may compromise the interests of their employers.”***

By refusing to commit to abide by the safety measures introduced by the Respondent the Claimant was compromising the health and safety of himself and other workers and that of the Respondent. We are therefore inclined to believe the Respondent that claimant’s refusal to commit to her health and safety measures was a deliberate attempt to expose himself in order to get more compensation from the Respondent.

Section 69 (3) of the Employment Act(supra) an employer has the right to terminate a contract of service of an employee without notice or with less notice than that to which the employee is entitled by any contractual or statutory term, 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.

In the instant case the Claimant was obliged to abide by the Respondent’s health and Safety policy under his contract of service, but he refused to commit to signing the same for no justifiable reason. He further refused to assume a new assignment in a less risky area. He breached a fundamental obligation under his contract.

We therefore have no doubt in our minds that the Respondent was justified to summarily dismiss him. Having given him a hearing albeit in a short space of time, the hearing was done in accordance with sections 66(4) and 69(3) of the Employment Act(supra) therefore the dismissal was done lawfully.

**Issue 2. Whether the Claimant was dully paid his transport allowance as per the contract of service?**

Although the Claimant contended that he was not paid for extra time worked and for transport allowance, he did not adduce evidence to show how the extra time was accrued and how the transport allowance accrued. We did not find any evidence to indicate that the Claimant demanded for the payment of transport allowance during his employment with the Respondent. We therefore have no basis to make an award on this claim, it is therefore denied.

1. **Whether the Claimant is entitled to remedies sought?**

Having found that the claimant was lawfully terminated, he is not entitled to any remedies therefore it was not necessary for the Court to consider both counsels submissions on the issue.

**In conclusion:**

This claimant having been lawfully dismissed; this claim fails with 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. MS. ADRINE NAMARA ……………..**

**2. MS. SUSAN NABIRYE ………………**

**3. MR. MICHEAL MATOVU ………………**

**DATE: 3/10/2019**