**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE No. 100 OF 2014**

**ARISING FROM HCT CS No. 282/2014**

 **DIANA CAREY NAMUBIRU …………………………. CLAIMANT**

**VERSUS**

 **UNITED BANK OF AFRICA ………...………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. ROSE GIDONGO**

**2.MS. HARRIET MUGAMBWA NGANZI**

**3. MR. JACK RWOMUSHANA**

**AWARD**

**BRIEF FACTS**

The Claimant was employed by the Respondent Company from 1/07/2008, on a 6 months’ probationary contract, earning Ugx. 16, 371,000/- per annum. She was confirmed in employment and rose through the ranks to the position of Relationship officer, earning Ugx. 20,463,750/-per annum. According to her, on 12/11/2012, 2 days to the end of her leave, she was diagnosed with acute Malaria. She informed the Human Resources officer one Andrew Kananura about it, and he, in turn informed the 2nd line Manager about her illness. She reported back to work after 4 days, although she was still on treatment. On the day she returned to work, she was diagnosed with another ailment which required 5 days treatment. Her doctors later established that she was actually pregnant. However, when she returned to work, she was asked to resign from her job, for being absent from work and efforts to discuss her situation with the 2nd line manager, the Human Resources officer and the Legal officer were futile.

On 30/11/2012, she was issued with a termination letter, but it did not state the reason for her dismissal. She contends that the dismissal was unlawful and had she not been dismissed, she would have been in the Respondent’s employment for at least 31 years.

**ISSUES FOR RESOLUTION**

1. **Whether there existed a contract of employment and if so which kind?**
2. **Whether the Claimant’s contract was lawfully terminated?**
3. **Whether the Claimant was entitled to the remedies prayed for?**

**REPRESENTATION**

The Claimant was represented by Mr. Edwin Tabaro of KTA Advocates, Kampala and the Respondent was represented by Andrew Kabombo and Ariho Kenan of Kateera and Kagumire Advocates.

**SUBMISSIONS**

**1.Whether there existed a contract of employment and if so which kind?**

It was submitted for the Claimant that the basis of her contract was the Respondent’s Human Resource Hand book, which was exhibited on the record as P5/R5. According to Counsel, the Handbook under clause 1.2 provides for the different categories of employment and their grading. Permanent employees are defined as staff on the payroll and on indefinite pensionable employment with UBA and they are graded as executive management/ GGM-ED, Senior Management /AGM-GM, Middle Management/SBO-Mgr., Officer ETOP-BO and FSS/ST-SSO. The staff hand Book also defines non-permanent employees as staff on a temporary basis and these include individuals engaged directly on contract with the Respondent Bank or under contract with approved service providers and students on Industrial attachment at the Respondent.

Counsel submitted that, the Respondent did not dispute the fact that the Claimant was employed on a 6 months probationary contract from 1st July 2008 or that she was promoted to the position of Retail marketing Officer, and then Relationship officer, as is evidenced by exhibits P1/R1 and P6/R6, respectively.

It was further his submission that RW1 Judy Wambaire, the Head of legal confirmed that the Claimant was employed as a graduate trainee on 6 months’ probation and after the 6 months elapsed, she was confirmed as a ***“permanent employee.”***  Wambaire, described a permanent employee as one who works with the Bank for an indefinite period and it was not in dispute that, the Claimant was confirmed in her employment and she received a letter of confirmation once the probationary period was over.

 According to Counsel, on 11/10/2011, the Claimant was employed as a permanent employee, which meant that she had a permanent contract with the Respondent. Therefore, the Claimant had a contract of employment with the Respondent Company.

It was further his submission that; since the probationary contract lapsed after 6 months and she was confirmed as a permanent employee her employment was now governed by the terms set under the employee staff hand book and not the probationary contract. Therefore, the first issue should be answered in the affirmative.

In reply Counsel argued that the contract governing the relationship between the parties was the contract they entered into in May 2008. He refuted the assertion by counsel for the Claimant that the contract executed by the parties is the Human Resource Handbook because the hand book only provided a general framework to govern the terms of employment and is not meant to be the primary contract.

It was his submission that the claimant signed the employment contract at her own free will and replacing these terms of employment would be contrary to the holding in **Asante Aviation Ltd vs Star of Africa Air Charters Ltd & 3 Ors HCCS No.431 of 2014**, where **Wangutusi J**, stated that contracts concluded by parties should be respected by court. He also cited **Stockloser vs Johnson (1954) ALLER** **630**, for the same Legal proposition.

He argued that the Claimant was an employee on contractual basis and her employment only existed under the terms of the same contract and insisted that Judy Wambaire’s testimony was to the effect that the only thing that changed was the Claimant’s position and salary which was increment but all the other terms of the contract of 20/05/2008 remained the same.

He refuted the assertion that, the claimant was pensionable and stated that it was misconceived because the Handbook under clause 2.3, clearly states that the pension referred to is in line with the National Social Security Fund as established under the NSSF fund Act.

**DECISION OF COURT**

It is trite that the basis of an employment relationship is a contract of employment whether oral or written, whether express or implied, where a person known as an employee, agrees in return for remuneration, to work for another person known as an employer and includes a contract of apprenticeship. (See section 2 of the employment Act, 2006).

Section 2 of the same Act also defines a probationary contract as a contract of employment, which is not of more than six months duration, is in writing and expressly states that it is for a probationary period.

Section 67 (2) and (3) of the Employment Act provide that:

*“…*

*(2) The maximum length of a probationary period is six months, but it may be extended for a further period of not more than six months with the agreement of the employee.*

*(3) An employer shall not employ an employee under a probationary contract on more than 1 occasion.*

*…”*

It was the Respondent case that the Claimant’s contract was the contract signed on 20/05/2008 and the terms of the contract had not varied. When RW1 was referred to paragraph 1 of the Claimant’s contract of employment during cross examination, she said that; *“Yes probation is 6 months… yes 1/07/2008 to 1/12/2008…”* she also said that … *she was confirmed as permanent staff… she was terminated at the level of Relationship manager … she was permanent staff. … conditions in employment dated 2008 remained the same only designated to a different role….* When referred to paragraph 6 of her statement she also said that,: “*… yes, it is a contradiction, her employment was permanent and pensionable after probationary period and confirmation… yes, I have seen confirmation…. Contract did not lapse she was confirmed on the same terms.”*

This court in **Akonye David vs Libya Oil LDC No. 082/2014,** held that:

*“…The burden of preparing a contract is placed on the employer because it is the employer who sets the terms and conditions of the employment. The burden of proving the provisions of any allegations regarding the terms of the employment contract therefore remain on the shoulder of the employer. The employer is expected to keep written records of all employees employed by him or her, even for a number of years after they have been terminated….”*

The first 2 paragraphs of the Claimant’s contract dated 20/05/2008 states as follows:

*“CONTRACT OF EMPLOYMENT*

*Following your recent interview with us, we are pleased to offer you employment with our institution as a* ***Graduate trainee*** *with effect from 1st July 2008, subject to a satisfactory medical certificate of fitness which is to be produced by the Banks’ approved medical personnel.*

*You should note that your appointment with the bank will only be confirmed upon satisfactory performance after 6 months probationary period, renewable once…”*

Our interpretation of the contract is that the probation of 6 months would be renewed only once. The only evidence indicating that the claimant’s contract was renewed is RW 1’s testimony that she saw the confirmation. She said: “*yes I have seen the confirmation… I was not aware that court ordered that the confirmation is brought to court…”* In any case as already pointed out above, section 67(2) provides that probation can only be extended for a maximum period of 6 months. Therefore, where the employer is silent about the renewal of probation and the maximum period of probation as prescribed under section 67(2) lapses, the contract is automatically confirmed. We have no reason to doubt RW1’s, the head of legal of the Respondent, when she stated that, she saw the Claimant’s confirmation. In the absence of any evidence to the contrary we hold that the Claimant’s probationary contract was confirmed.

**Having established that the Probationary contract was confirmed the next issue is to determine what kind of contract it was?**

Counsel for the Respondent insisted that the Contract dated 20/5/2012, was the basis of the Claimant’s employment and not the staff handbook as the Claimant in this case wanted court to believe.

A perusal of the first 2 paragraphs of the claimant’s Employment contract (supra), showed that her employment was with effect from 1st July 2008 and it was subject to her successfully completing a 6 months’ probation period. We have already established that after the expiration of the 6 months’ probation, the contract was automatically confirmed. In **Akonye vs Libya oil** (supra) which we shall quote again for emphasis, this court held that, *“…the burden of preparing a contract is placed on the employer because it is the employer who sets the terms and conditions of the employment. The burden of proving the provisions of any allegations regarding the terms of employment contract therefore remain on the shoulder of the employer…”*

The probationary contract, in the instant case, did not prescribe the duration of the contract, it only stated the commencement date of 1st July 2008. This in our considered opinion created ambiguity as to the kind of contract it would become after confirmation. We are persuaded by the holding in the Kenyan case of **Mwangi Ngumo vs Kenya Institute of Management Industrial Cause No, 851 of [2009],** which is to the effect that where the employer has drawn the contract and even if the contract was not drawn by the employer and it can be shown that the employer entered into it without duress or coercion, any ambiguities in the contract should be construed against the party which drew the contract. In this case the contract was drawn by the Respondent. A careful perusal of the Respondent’s staff hand book, established that under section 1 of the Handbook, the Respondent had 2 categories of employees as follows: permanent employees are described as staff on the payroll and on indefinite pensionable employment with UBA, graded as executive management/ GGM-ED, Senior Management /AGM-GM, Middle Management/SBO-Mgr., Officer ETOP-BO and FSS/ST-SSO and non-permanent employees are described as staff on a temporary basis and these include individuals engaged directly on contract with the Respondent Bank or under contract with approved service providers and students on Industrial attachment. The hand book also defines contract employees as *“… an employee engaged by UBA to provide a specific set of services over a period of time. Such employees shall be recruited and/or accepted by UBA in line with the approved qualifications required for the contract job…”*

We have already established that the Claimant’s probationary contract did not prescribe the period within which the Claimant was expected to provide her Services to the Respondent, it was open ended which in our considered opinion, meant that the Respondent intended that on its confirmation, it would become an indefinite and pensionable contract as prescribed under Clause 1.2 of the staff Hand Book.

We however do not agree with the argument by Counsel for the Claimant, that after confirmation, the probationary contract lapsed and the Claimant’s contract became the staff Hand book. In fact after the probationary period the contract was automatically confirmed therefore the terms thereunder were nt changed save for the fact that after confirmation it now fell within the ambit of the Respondent’s staff handbook. Although the handbook is a general framework to govern the terms of employment in an organisation, in our considered opinion it is an integral part an employee’s contract. It would only not apply to an employee serving under a probationary contract. Therefore, when a probationary contract lapses or is confirmed by the employer, the staff handbook and or any other policies governing employment in an organisation become part of the specific terms of the employee’s contract. (see **Augustine Kamagero vs Rwenzori Bottling Co. Ltd HCCS No. 027/2012).**

It was not disputed that, the claimant in the instant case, did not sign another contract, although her designation and emoluments were later in October 2011, varied in her favour. The terms of her contract under the probation remained the same, save for the fact that after the lapse of the probation period it was automatically confirmed to and it became indefinite and pensionable. Therefore, the assertion that the contract was replaced by the staff hand book after confirmation as stated by counsel for the Claimant is not correct. The staff handbook only became an integral part of the contract after it was confirmed and therefore it did not replace it. We are fortified by the 3rd paragraph of the Respondent’s staff hand book, in the instant case provides that:

*“… The purpose of this Handbook is to set out some of the terms and conditions of employment and provide answers to some of the questions you might have concerning your employment. …”*

In our understanding the handbook provides general terms and conditions in addition to the job specific terms and conditions stipulated in the individual contracts. In the circumstances, **Asante Aviation Ltd vs Star of Africa Airs Charters** (supra) is not applicable to contracts of employment whose terms could be varied in favour of the employee, without the participation of the employee. In any case, Section 27(2) of the Employment Act, 2006, provides that;

*“(2) Nothing in this section shall prevent the application by agreement between parties, of terms and conditions which are more favourable to the employee than those contained in the Act.*

We therefore, have no doubt in our mind that, by the time of the Claimant was terminated, she was an indefinite and pensionable employee, as prescribed by clause 1.2 of the Respondent’s Staff Handbook and not a contract employee as Counsel for the Respondent would like court to believe.

**2.Whether the Claimant’s contract was lawfully terminated?**

Citing section 2 of the Employment Act which defines termination of employment and dismissal from/of employment, Counsel for the Claimant contended that the Respondents assertion that the Claimant was terminated in accordance with her 2008 contract could not stand because this contract expired when she became a permanent employee. He argued that she should have been terminated in accordance with section 9 of the Staff handbook which was not the case. According to him, the Respondent was desperate to get rid of the Claimant as demonstrated by the insensitive manner in which her sickness was treated and the acrimonious relationship between her and the Executive Director. It was his submission that, the Claimant was summarily dismissed without just cause and unlawfully terminated from work. He cited the holding in **Barclays Bank of Uganda Ltd vs Godfrey Mubiru SCCA No. 1 of 1998**, which was to the effect that an employee could be summarily dismissed without notice if he or she is guilty of sufficient misconduct, which was defined to mean; *“bad, improper or unprofessional behaviour*.” Counsel cited section 69 of the Employment Act which entitles an employee to summarily dismiss an employee where the employee has by his or her conduct indicated the he or she fundamentally breached his or her obligations under the contract of service. He also relied on **Akello Beatrice vs world Vision Uganda, CS 72/2007**, which defined fundamental breach as a serious repudiation by the employee of his or her obligations under the contract such as disobedience, lawful orders, misconduct, drunkenness, immorality and neglect of duty, among others.

He contended that no evidence was led to prove that the Claimant committed verifiable misconduct but according to the Claimant’s testimony, her dismissal was orchestrated by the Personal misgivings the ED had against her and this was confirmed by RW1, therefore her summary dismissal was wrong. In any case, it was a requirement under section 66 of the Employment Act, for the employer to explain to the employee the reason for termination in a language which the employee understands, the reason why the employer is considering the dismissal and the employee is entitled to have another person of his or her choice present during the explanation. The employer is also expected to give the employee and the person of his or her choice reasonable time to respond to the reason and an opportunity to actually respond to the reason, whether the dismissal is a summary dismissal or otherwise.

He also cited **Ebiju James vs UMEME Ltd CS No. 0133 of 2012,** which laid down the tenets of a lawful termination as follows:

1. *“Notification of the allegations against the plaintiff was served on him and sufficient time for the plaintiff to prepare a defence.*
2. *The notice should set out clearly what the allegations against the plaintiff and his rights at the oral hearing were. Such rights would include the right be accompanied at the hearing, the right to cross examine the defendants witness or call witnesses of his own.*
3. *The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of the disciplinary issues of the defendant.”* ….

He also cited **Barclays Bank vs Godfrey Mubiru** (supra) whose holding was to the effect that where a written contract governed the employment relationship, the terms set thereunder and the law applicable should be the basis of the termination.

He argued that given that the Probation contract had lapsed, the staff handbook which governed the Claimant’s employment did not provide a procedure for termination. However, the assertion that the Respondent relied on the law and the staff handbook to terminate the claimant, in light of section 66 would have required that she was given notice of termination, an opportunity to be heard, which was not the case.

In reply Counsel for the Respondent insisted that the claimant was lawfully terminated in accordance with clause 7 of her contract and clause 9.41 of the Human Resources Manual which provided that either party could terminate the contract by giving notice, which the Claimant did not deny.

Counsel refuted the argument by Claimant that, the contract of 2008 was varied and therefore she did not understand the terms of her employment and she did not prove her confusion during the hearing.

 He also refuted the allegation that there was an acrimonious relationship between the claimant and the ED because this was equally not proved and in any case, she was working at one of the Respondent’s branches and not at the head office. He argued that she did not deny that her work had ever been found to be unsatisfactory and there was no record to that effect, there was no basis for the allegation that the entire management want her out of the Respondent bank.

He invited Court to consider the contradictions raised by the claimant regarding initial denial of the existence of a contract and later retracted that the 2008 contract was the basis of her employment and her relationship with the ED. He relied on **Makau Nairuba Mabel vs Crane Bank Ltd HCCS No. 380 of 2009 and Akugizibwe Francis & anor vs Nyamahunge Kotido HCT 01-lD Ca 0032/2016,** where the Appellants evidence was disregarded for having contradictions. Therefore, the Claimants evidence should be similarly disregarded for having several contradictions.

He insisted that the letters which appointed the Claimant to the position of marketing officer and relationship officer respectively clearly stated that the terms of service remained the same as those under the contract of employment. He insisted that the claimant was terminated in accordance with the contract of employment as stated by RW1 and she was not summarily dismissed as alleged. He argued that the facts of this case were distinguishable with **Godfrey Mubiru**(supra) which was cited to define summary dismissal. In the instant case, the Respondent submitted that she exercised her rights under the contract of employment and the Claimant was given notice, therefore the issue of summary dismissal does not arise. He relied on **Gulabali Ushilini Vs Kampala Pharmaceuticals Ltd CA No 6/1999,** to support of his argument.

He insisted that the Respondent performed its obligations in accordance with the contract of employment therefore the issue of summary dismissal is misplaced. Under the circumstances the claimant was rightfully dismissed and she has no cause of action before this court.

**DECISION OF COURT**

It is well settled that an employer can dismiss/terminate an employee as long as the procedure for termination/dismissal as provided under Sections 66, 68 and 70(6) of the Employment Act, 2006, are followed. The sections of the law make it a requirement for an employer to explain to an employee the reason for dismissal/termination, and require the employer to give the employee an opportunity to respond to the reason/s in the presence of a person of the employee’s choice, before the dismissal/termination. The employer is also required to prove the reason for dismissal/termination, although the proof need not be beyond reasonable doubt, but on the basis of facts known to the employer at the time of the decision to dismiss /terminate is made. Therefore, in cases of dismissal or termination on grounds of poor performance or misconduct, it is the expectation that, the employer, will depend on evidence from a reasonable investigation into the alleged poor performance or misconduct.

It is clear that the Respondent did not act in accordance with the provisions for terminating employment under the Employment Act as stated above. The Respondent only gave her notice. Counsel raised contentions about the basis of her employment and therefore her termination. Although Counsel for the Respondent vehemently argued that she raised inconsistencies regarding the existence of the contract of employment, we have already resolved that it is the responsibility of the employer to provide a contract of employment and in the instant case, the Respondent did not clearly spell out the Claimant’s terms after the lapse of the probationary period. We already established that having not pronounced a confirmation after the lapse of the probationary contract the contract automatically became confirmed. We also established that given that the probation contract only stated a start date, the Respondent intended it to become indefinite and pensionable after its confirmation and therefore the staff handbook would become an integral part of it.

We therefore do not associate ourselves with the assertion by Counsel for the Respondent that there was no evidence of confusion regarding the contract which governed the claimant’s employment. There was. Be that as it may, the issue for resolution is whether the claimant was unlawfully terminated?

It was the Respondent’s case that, the Claimant’s was *“lawfully dismissed by the Respondent under the contract entered by the parties in 2008. There were no disciplinary issues against the claimant at the time of her dismissal. The claimant was not summarily dismissed….”*

Section 2 of the Employment Act defines “termination of employment” as *the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc.…”*

Clearly the Respondent violated the provisions for terminating employment as provided under the Employment Act as stated above because, It is not disputed that the Claimant was not given any explanation or a reason for her termination, she was not given an opportunity to be heard as laid down in **Ebiju James Vs UMEME Ltd(supra)**. *S*ection 73 (1) (b), of the employment Act provides that:

 ***“73. Criteria for unfair termination***

1. ***A termination shall be unfair for purposes of this part where-***

***(b) it is found out that in all circumstances of the case, the employer did not act in accordance with Justice and equity in terminating the employee from service…”***

The holding of this court in **Kasingye Genevive vs Housing Finance Bank LDR No.115/2016,** was to the effect that, an employee cannot be terminated basing solely on giving notice. “…*The proper procedure should be; in addition to giving notice, the employee must be given a reason for the termination, an opportunity and reasonable time to respond to the reason (to be heard) and the reason must be justifiable…”*

Clearly by giving notice alone, the Respondent did not act in accordance with justice and equity in terminating the Claimant’s employment therefore her termination was unlawful.

**3.Whether the claimant was entitled to the remedies prayed for?**

Having found that the claimant was unlawfully terminated she is entitled to some remedies.

1. **Special damages**

She prayed for special damages of Ugx. 648, 151,120/- for basic unpaid salary for the remaining 31 years of her contract had she not been dismissed at Ugx. 20,463,750/=per year, amounting to Ugx. 643,376,250/-.

It is well settled that the only remedy to a person who was unlawfully dismissed is damages and any other remedy claimed under the Employment Act, 2006. A This Court has however resolved that a claim for prospective earnings is not one of the remedies that can stand. It is speculative in nature, because it is not a guarantee that an employee will serve or complete his or her term of employment. The employment could be lawfully terminated, he or she could die, the organisation could become insolvent, the employee could resign or seek alternative employment elsewhere, among many other circumstances. In any case an employee can only be paid wages or salary for services rendered. In the circumstances, the prayer for the 31 years remaining of her contract fails, it is denied.

1. **Accumulated leave**

She prayed for accumulated annual leave for the remaining 31 years of her contract, at the rate of Ugx. 4,774, 870/- amounting to Ugx. 648,151,120/=.

This court has held that although Section 54 of the Employment Act entitles an employee to rest days, the rest days cannot be taken at the whims of the employee. The employee must apply for and be granted the period within which to take leave. Therefore, a claim for accumulated leave will only succeed when an employee can demonstrate that he or she applied for leave but it was denied. secondly section 54 clearly provides that an employee’s entitlement to leave shall be 7 days for every 4 months of continuous service, therefore the employee must be working. Having already established that a claim for future/prospective earnings cannot stand, equally a claim for annual leave for the remaining 31 years, on the contract has no basis therefore it cannot hold. This claim is therefore denied.

1. **General damages**

Damages are awarded at the discretion of Court and are intended to return the Claimant to as near as possible in monetary terms to the position he or she was in before the injury inflicted by Respondent occurred. We take cognizance of the fact that the loss of a person’s employment amounts to a loss of a source of livelihood. Having established that the Claimant was unlawfully terminated she suffered loss and is therefore entitled to an award of general damages. We think that, **Ugx. 52,000,000/-** is sufficient as general damages.

1. **Aggravated damages**

We did not find any aggravating circumstances to warrant the grant of aggravated damages. They are therefore denied.

1. **Interest**

An interest of 15% per annum will accrue on the award for damages from the date of this Judgement until payment in full.

No order as to costs is made.

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.MS. HARRIET MUGAMBWA NGANZI ………….**

**3. MR. JACK RWOMUSHANA ………….**

**DATE: 26/02/2021**