**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE APPEAL NO.35/2018**

**ARISING FROM L.D KCCA/CEN/LC/155/2017**

 **PROGRAMME FOR ACCESSIBLE HEALTH**

 **COMMUNICATION & EDUCATION(PACE) …….. CLAIMANT**

**VERSUS**

**GRAHAM NAGASHA …………………. 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. MATOVU MICHEAL**

**AWARD**

This appeal is brought under Section 94 of the Employment Act, 2006, Rule 24 of the Labour Disputes (Arbitration and Settlement) (Industrial Court Procedure) Rules No. 8 of 2012, the Civil Procedure Act and Rules thereunder.

**BACKGROUND**

According to the Appellant the Respondent was her employee from 1/01/2016, on a 2 year fixed term contract, working as an IT specialist. On the 31/05/2017 he was terminated due to restructuring/transition that led to the phasing out of his position. According to the Appellant the Respondent was paid all his entitlements upon the termination of his 2-year contract.

He however lodged a complaint at KCCA labour office, claiming unfair termination and on 7/08/2018, the Labour Officer, Mr. Kassaga Hannington made an award in his favour and ordered the Appellant to pay Ugx. 206,506,773/= for unlawful termination. Being dissatisfied with this award the appellant lodged this appeal and prayed that that the labour officer’s award is set aside.

**GROUNDS OF APPEAL**

The following were the grounds of appeal:

1. **The Labour Officer erred in law when he failed to properly evaluate the entire evidence on record, thereby arriving at a wrong decision that the Respondent had been unlawfully terminated.**
2. **The Labour Officer erred in law by imposing a disproportionately high and irrational Severance fine of Ug.100,124,496/= on the Appellant.**
3. **The Labour Officer erred in law by arbitrarily awarding the Respondent an excessive Severance Allowance of Ugx. 50,062,248/- in total disregard of the law and what was prayed for by the Respondent.**
4. **The Labour Officer erred in law by awarding the Respondent additional Compensation of Ugx. 18,773,343/- without any justification whatsoever, thereby acting in manifest abuse of his discretion.**
5. **The Labour Officer erred in law by awarding the Respondent Ugx. 31,288,905/= being salary for the remainder of his contractual period.**

 **The appellant prayed that the award is set aside and for costs of the appeal.**

 **SUBMISSIONS AND RESOLUTION OF THE GROUNDS OF APPEAL**

1. **The Labour Officer erred in law when he failed to properly evaluate the entire evidence on record, thereby arriving at a wrong decision that the Respondent had been unlawfully terminated.**

It was submitted for the Appellant, that the Labour office based his decision on 2 factors:

1. That there was no actual reason advanced by the appellant to the respondent for the termination.
2. That the letter titled “Collective Termination of Contracts “addressed to the Commissioner Labour was received on 5/06/2017 way after the terminations had already been effected.

He contended that although the letter of termination did not state the reason for termination, it was manifestly wrong for the labour officer to fault the Appellant for that oversight, to rule that the Respondent was unlawfully terminated, without considering key evidence on the record, which proved that he was orally furnished with a reason for termination of his services.

It was his submission that at all material times the Respondent was aware of the impending restructuring which would lead to the phasing out of his position. He insisted that in as much as there was no written reason stated in the letter, the reason was personally communicated to the Respondent a meeting he had with management prior to the termination. He insisted the Respondent he did not dispute in evidence before the Labour Office. He cited Section 2 of the Employment Act which defines “**Termination of employment”** *to mean the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retiring age* etc and **Florence Mufumbo vs Uganda Development Bank- LDC No. 138/2014** in which this court stated that *“It is our firm conviction that in terminating the employment of an employee, there must be circumstances that are justifiable but which may not have a bearing on the fault or misconduct of the employee. Such circumstances include but are not limited to the expiry of the employee’s contract, attainment of retirement age, among others.”*

Counsel contended that the Appellants witnesses testified that the Respondent’s services were terminated as a result of restructuring in the Appellant and therefore the Respondent was furnished with a reason for his termination by a one Hannah Baldwin and the former human resources manager a one Assumpta Kutanwa. According to him the duo sat and explained to the respondent the reason for his termination and presented him with a letter of termination which among other things it laid out the rights that accrued to him after termination.

He argued that restructuring, layoff restructuring or downsizing as used synonymously, occur primarily due to prevailing economic conditions. He cited the definition of layoff as defined in Black’s law Dictionary 6th Edition as “*Termination of employment at the will of the employer and such may be temporary or permanent. (e.g cause by seasonal or adverse economic conditions).*

He contended that Uganda’s legal frame work does not provide elaborate legal procedure for terminating an employee’s contract on grounds of restructuring or redundancy and therefore the procedure to be adopted should be done at the discretion of the employer but with due regard to the statuary provisions in the Employment Act, case law and Principles of natural Justice for purposes of ensuring procedural fairness.

Counsel further argued that in light of Mr. Henry Kuala’s testimony on pages 49-52 of the record of appeal, the restructuring “ … *arose owing to changes in the donor environment that affected the Appellant’s Budget and prompted its board to take the decision to having the Appellant organization split into 2 independent organizations to wit PACE( Programme for Accessible Health Communication and Education and PSI(Population Services International).*  According to him the Appellant communicated to the staff, through; emails, suggestion boxes, social media platforms (what sup groups) and different subcommittees. Change@pace.org.ug was particularly created for this purpose. Therefore the labour officer was informed about the fact that the respondent as a member of the Appellant’s change sub-committee, was always aware of and involved in the dialogue process and in fact he was the one who created the said email platform Change@pace.org.ug.

Therefore, the labour officer erred in making a finding that the Respondent was not aware of the restructuring process, yet the record clearly shows that he was and that he was furnished with the reason for his termination. In any case he was not the only staff who was affected by the restructuring as the labour officer was led to believe.

Counsel further stated that the Appellant notified the commissioner labour, about the restructuring, in its letter dated 29/05/2017 and specifically that out of the 133 employees 82 formerly with PACE would sign contracts with PSI, 46 would continue with PACE and 5 would be terminated including the Respondent. Although the letter was only received by the Ministry of labour on the 5/06/2017,Ms. Hannah Baldwin’s testified that the letter was not an afterthought as alleged. Counsel submitted that it was delayed by the Appellant’s staff a one Jessica Kabugo, who was of the mistaken belief that she had to deliver the letter to the Commissioner in person. According to Him she only delivered it after she realized that she was only required to leave it at the reception. Counsel contended that this evidence was disregarded by the labour officer. He argued this omission notwithstanding, Section 81 of the Employment Act does not render the termination unlawful, because the Respondent’s failure to communicate to the Commissioner only created a criminal liability of 24 currency points. According to him, it was only mandatory to notify the Commissioner Labour, when 10 or more employees were contemplated for termination and given that in the instant case, only 5 employees were contemplated for termination, the Appellant was not obliged to notify the Commissioner labour. He strongly argued that by making a ruling that the Respondent’s termination was unlawful on the ground that the Commissioner Labour was not notified prior to the termination, the Labour Officer acted outside the scope of the law.

It was further his submission that the labour office ignored evidence which was to the effect that the Respondent’s employment was subject to availability of donor funds. He cited clause 2 of the Respondent’s contract on page 65 0r the Appellants record which states that:

*“The duration of the contract shall be two years effective 1/01/2016 subject to availability of donor funds…”*

He argued that the Appellant was an NGO that wholly depended on Donor funds and the Respondent’s employment was subject to availability of funds. Therefore court should consider that his termination was done in good faith.

He also asserted that after the restructuring, the Appellant made various efforts to get the Respondent alternative employment in a position in the newly created organization PSI, but according Ms.Hannah’s testimony, the Respondent declined to apply for alternative employment as Business Systems Administrator at PSI, because he was not interested in the said opening and he was going to pursue and concentrate on his own private businesses. The said position was advertised on 31/05/2017 in the Daily Monitor newspaper on Friday 16/06/2017 and it was eventually filled by a one Semanda, who previously worked with the Respondent in IT department. Therefore, the Respondent cannot claim that he was individually ostracized and treated unfairly by the Appellant’s Management.

Counsel insisted that the labour office erred when he failed to evaluate the entire evidence to arrive at the decision that the Respondent was unlawfully terminated.

In reply Counsel for the Respondent submitted that the labour officer exhaustively and properly evaluated the evidence before arriving at the decision that the Respondent was unlawfully terminated.

According to him the Claimant’s 8 years of service at the Appellant, on 2 year consecutive contracts was correctly taken into consideration by the labour officer before making his award. He refuted the assertion that the Respondent’s termination amounted to collective termination within the meaning of section 81 of the Employment Act because Section 81 would only apply where an employer was contemplating the termination of 10 or more employees and in this case the Appellant only considered 5 people. He also refuted the assertion that the Appellant had no obligation to notify the Commissioner yet Section 81 and Regulation 44 of the Employment Regulations clearly show that, that an employer who contemplates termination of 10 or more employees over a period of 3 months as a result of technological or economic, structural nature shall notify the commissioner had to be notified in the forms provided in the 17th schedule stating the details, reason for termination , the number of workers, their ages, sex occupation duration f services among others, details of terminal benefits to be paid to the affected employee and payment plan . Counsel contended that in this case the termination having been for 5 persons did not meet the threshold provided under Section 81 and the letter to the commissioner did not state the details contemplated in Regulation 44 already referred to above and it dated 29/05/2017 but delivered on 5/6/2017 after the termination had taken effect.

Counsel insisted thats the Section provides for a period of contemplation to terminate within 3 months and the commission should be informed before the termination is affected and in this case the commissioner was notified after the termination had been effected. According to him **“contemplate”** as provided in Section 81 envisaged the dictionary meaning of the word contemplate that is **“look thought fully”** or **“observe deep in thought”** or **“consider as a possibility”** which means that there ought to be prior planning and thinking of the staff to be affected long before the restructuring. He was of the opinion that the legislation intended that the Commissioner ensures that affected employees are not merely notified about their termination, but that he or she takes measures to verify the termination and where possible ensures that they get alternative employment. According to Counsel the Labour officer applied the provisions of section 81 and found that the Appellant had not followed them to justify the termination of the Respondent and he found that the termination was effected before notifying the commissioner therefore she could not rely Section 81. Counsel asserted that the Respondent’s termination was unfair termination within the meaning of Sections 71, and 73 and 75(2) of the Employment Act. Counsel insisted that the Respondents termination was done contrary to Section 66, 73(2)(d) and the Appellant did not act with justice and equity because the Respondent was not given a fair hearing and because no reasons were given as provided under Section 68 and the requirement that he is issued with a certificate of service as provided under section 61 of the employment act was not followed. Counsel argued that whereas the Appellant stated that there were open channels of communication the e mail marked “C” at page 51 of the record did not mention anything about the staff that were contemplated for termination or its consequences thereof. It was his submission that in the circumstances if there was indeed a restructuring it did not contemplate termination.

He insisted that if the Appellant had contemplated the Respondents termination, she should have done so 3 months prior to the termination, and the commissioner labour would have been notified 3 months prior to 31/05/2017 when the termination was effected. He contended that the rush to serve the respondent with a termination 2 days before the commissioner received the notification was a clear indication of a sinister motive. He cited **Alex Methodious Bwayo Vs DFCU Bank Ltd CS N0.78/2012** in which Lady Justice Elizabeth Musoke held *“ Suspension and indeed termination of employment is a very serious matter which an employer should take seriously and be very sensitive about as it renders an employee jobless with reduced or no income at all. A lot more people are affected especially the employee’s immediate dependants …”*

He further refuted the argument that the Respondent’s employment depended on donor funds because the restructuring was not due to reduction or non- availability of funds and even if it were the principles of equity and fairness under Article 42 and the Employment Act applied but they were not followed by the Appellant, therefore court should confirm the Labour officers decision on ground 1.

**DECISION OF COURT.**

1. **The Labour Officer erred in law when he failed to properly evaluate the entire evidence on record, thereby arriving at a wrong decision that the Respondent had been unlawfully terminated?**

Section 94(3) of the Employment Act 2006, provides that:

*“…*

*(3) the Industrial Court shall have power to confirm, modify or overturn any decision from which an appeal is taken and the decision of the Industrial Court shall be final…”*

We shall therefore invoke Section 94(3) to re-evaluate the evidence on the record as an appellate Court to resolve this Appeal.

With regard to ground 1, the labour officer is being faulted for not properly evaluating evidence adduced before making the finding that the Respondent was terminated unlawfully.

It is indeed the legal position under section 2 of the Employment Act, a termination of employment is the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retiring age etc. The Employer therefore has a right to terminate an employee and this right cannot be fettered, however it must be exercised justifiably. The Appellant contended that labour officer based his finding on the grounds that:

1. That there was no actual reason advanced by the appellant to the respondent before the termination.
2. That the letter titled *“Collective Termination of Contracts*” to the Commissioner Labour was received on 5/06/2017 way after the terminations had already been effected.

According to Counsel for the appellant reliance on these 2 grounds was erroneous. He submitted at great length that the Respondent was terminated because of restructuring and this reason was communicated to him in a meeting with some members of management, on the day he was terminated. He argued that besides the Respondent was part of the restructuring process. He asserted that given that Section 81 which provides for restructuring is silent on the procedure the employer had the discretion to institute its only procedure.

Section 81 of the employment Act provides that:

*“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.”*

Our interpretation of this section is that for a termination to amount to Collective termination it must be due to economic, technological structural or reasons of a similar nature, and not less than 10 employees should be contemplated for termination. The section makes it mandatory for the 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.

We are therefore , inclined to agree with counsel for the Appellant that the word “contemplate” as applied in Section 81, cannot be ignored. It requires thoughtful, careful consideration and therefore justification before making the decision about which of the employees will be terminated as a result of the restructuring. Even if the employer had the discretion to decide his or her procedure, the section requires him or her to give a reason why the employee was contemplated for termination. Therefore simply stating restructuring as a reason is not enough otherwise, subsection 2 of Section 81 of the Employment Act would not provide that the reasons for the termination are stated for emphasis subsection2 provides that:

1. *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.*

Therefore, whether the reason for restructuring was economic, structural, technological, the reason why the employee was affected in our view must be stated. As envisaged under section 2, the reason need not be related to the employees conduct or performance but should be the result of the restructuring. Such reasons in our view should relate to the employee’s job becoming redundant or because the employer no longer desires it to be performed. In the **R vs Industrial Commission of South Australia, Exparte Adelaide Milk Supply Co.Ltd (1977, 16, SASR 6) Bray J** had this to say:

*“The concept of redundancy in the context we are discussing seems to be simply that, the job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal not on account of personal acts or default of the employee dismissed or any consideration peculiar to him but because the employer no longer wishes the job the employee has been doing to be done by anyone.”*

In the instant case the Respondent’s letter of termination dated 31/05/2017 stated that:

*“…*

*Re: Notice of Termination of contract with PACE*

*This is to notify you that your current employment with pace has come to an end with effect from 31/05/2017.*

*In accordance with section 16.8 of the PACE Employment manual, the following payments will be paid to you subject to….”*

The letter did not make any reference to the restructuring process nor did it state that his position was no longer required. It did not even mention the fact that an alternative equivalent position had been created for him and he could apply for it. It simply terminated his services with no reason. It is not in dispute that it was issued to him on the same 31/05/2017 at about 5.30pm and the termination to effect on the same day. It was also not disputed that the letter was written 2 days before the termination took effect. Therefore, the requirement under section 81(1) , to notify him 4 weeks prior to the termination was not complied with.

We are convinced that the letter to the Commissioner labour was an afterthought, because it stated the number of staff who were contemplated for termination as 87 and in the same vain it went ahead to state that; ***“…Out of 133 employee of PACE eighty two(82) employees formerly of PACE will sign new employment contract with PSI Uganda under new terms under new terms , forty six(46) employees will continue with PACE, while (5) employees will have their terms of employment terminated...”***

It did not state the reasons for terminating the 5, nor did it state their particulars as required under section 81 and regulation 40 of the Employment Regulations. The letter reads in part as follows:

 *“ Re: Notice for collective termination of contracts*

*In accordance with section 81 of the Employment Act of 2006, I wish to bring to the notice of your good offices that our organization is going through a transition that shall involve termination of contracts of 87 employees.*

*The termination of the contracts has been necessitated as a result of reorganization that lead to the registration of a new entity PSI Uganda.*

*Out of 133 employee of PACE eighty two(82) employees formerly of PACE will sign new employment contract with PSI Uganda under new terms , forty six(46) employees will continue with PACE while (5) employees will have their terms of employment terminated.*

*The employees will be given notice as mandated by section 58 of the employment Act and shall …”*

It did not state whether jobs of the 5 employees had been rendered redundant or that they had ceased to exist or that they were no longer required by the Appellant, for the termination to qualify to be a termination resulting from restructuring. The termination further failed to meet the criteria for collective termination because the threshold under the section is not less than10 people.

Although we hasten to say that notwithstanding how many employees are affected, what should be emphasized is that the affected employees must be given a justifiable reason why they were contemplated for termination following the restructuring.

We have not found any evidence on the record, indicating that the 87 staff who contemplated for termination were notified about the impending termination, either through their representatives or directly nor were there their identities stated, save for email marked “C” which was a response to staff concerns regarding the transition process. Noteworthy was the answer to the question:

**Will I retain my position /job after the transition?** And the response was : *“Retaining a position whether in PACE or PSI is strictly based on need, budget, and performance. Nearly all positions will be the same or very near to the current positions*

It seems that the restructuring was not intended to cause the loss of any of the employees jobs, therefore the Appellant had to explain why given this situation the Respondent had to be terminated notwithstanding.

The argument that his job was defendant on the availability of funds in our view is an afterthought because it was not stated to him at the time of his termination. The fact that an alternative position of Business Systems Administrator which in essence replaced his old job clearly showed that funding for the position was an issue. Even then if it was indeed the reason for his termination it should have been stated as such.

We also do not agree with the assertion that various efforts were made to cause him to apply for an alternative position, because no evidence was adduced to show the said efforts nor was evidence adduced to indicate that Semanda who took up the alternative position of Business Systems Administrator, was also terminated from his previous position, as a prerequisite to apply for the alternative.

We do not believe that it was an oversight on the part of the Appellant not to state the reason or reasons for the Respondent’s termination, in his letter of termination and particularly to state that he was terminated because of restructuring. The fact that he was part of the transition process is not enough to assume that he was aware he would be terminated , especially given the response to all staff, in email marked “C” already cited above.

We are therefore inclined to agree with Counsel for the Respondent that the Respondent’s termination was done in violation of Sections 66 and 68 of the Employment Act 2006, which requires that before an employer can terminate an employer he or she must give the employee a reason why he or she is contemplating terminating the employee, an opportunity for the employee to respond to the reason and proof that the reason was justified, respectively. We have already established that Section 81 requires that the reasons for the termination under collective termination must be given to the employees contemplated for termination and to the Commissioner labour therefore it is in tandem with Section 66 and 68 (supra).

It is our finding therefore, that the Appellant failed to meet the criteria under Section 81, when she failed to notify the Respondent 4 weeks prior to his termination and she did not state the reason why he was terminated.

In the circumstances, the Labour officer was correct to find that the Appellant failed to comply with sections 66, 68 and 81 of the Employment Act 2006(supra) , before terminating the Respondent, therefore his termination was unlawful. We therefore confirm his finding that the Respondent was unlawfully terminated. Ground 1 therefore fails.

We shall now consider grounds 2 and 3 concurrently.

**2. The Labour Officer erred in law by imposing a disproportionately high and irrational Severance fine of Ug.100,124,496/= on the Appellant and he erred in law by arbitrarily awarding the Respondent an excessive Severance Allowance of Ugx. 50,062,248/- in total disregard of the law and what was prayed for by the Respondent.**

Counsel for the Appellant contended that the labour officer disregarded section 87 of the employment Act and the Appellants employee manual which provides for the calculation of severance pay. He cited Section 87 of the Employment Act, which 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. Counsel argued that although the Respondent claimed for severance as provided under the Appellant’s HR manual, which provides under clause 16.8(f) that:

*“Severance pay is an allowance due to an employee who has been in his continuous service for a period of six months or more and the employment is terminated in the following circumstances:*

1. *Physical incapacity not occasioned by the employee’s own serious and willful conduct.*
2. *Death0 not occasioned by employee negligence or willful misconduct.*
3. *If the employee proves that they were unfairly dismisses.*
4. *As provided for by the Employment Act, 2006.*
* *Rate of severance pay: Severance pay shall be at the rate of two(2) weeks for every year of service(e.g an employee who will have served five(5) years will be entitled to 10 weeks net pay as severance allowance).*

According to Counsel the Labour officer in his ruling on page 16 of the record made the award for severance pay based on the holding in Donna Kamuli vs DFCU Bank to the effect that the Respondent would be entitled to 1 month’s salary per year worked. He cited **Charles Abigaba vs Bank of Uganda (LDC Claim No. 142/2014** in which this courts holding is to the effect that an aemployer would only be obliged to pay the equivalent of 1 months salary year per year worked only in circumstances where there is no method of calculation. Counsel argued that the labour officer erred in applying this method when the Appellant had an elaborate method of calculating severance allowance as reflected in its employee manual at 2 weeks pay per year worked. Besides the Respondent had also prayed for severance allowance and calculated at 2 weeks per year worked.

He further argued that it was because of malice that the Appellant did not pay the Respondent severance allowance because it had paid him other payments and benefits including 2 months’ salary in lieu of notice, salary through to the last day of employment, payment in lieu of annual leave and his retirement benefits.

He also refuted the award of the fine to pay twice the amount of severance allowance because it only applies where it is proved that an employer willfully and without good cause fails to pay it. He argued that the fine is punitive in nature and therefore it should not be applied arbitrarily. He argued that there was no evidence to indicate that the Appellant willfully withheld severance pay in disregard of the law. It was his submission that the award of severance allowance of Ug.50,062,248/= and severance fine of Ugx.100,124,496/= are both disproportionately high and irrational.

In reply Counsel for the Respondent admitted conceded that the Labour officer erred to award severance according to the holding in Donna Kamuli(supra) and not in accordance with the Appellant’s employee manual. He conceded that given the Appellants formula the Respondent would be entitled to 2 weeks salary per year served for 8 years. In this case given that his gross salary was Ugx. 6,257,781/- he would be entitled to half of this which is Ugx.3,128.890/- multiplied by 8 years amounting to 25,031,124/- which was the Respondents prayer.

Having found that the Respondent was unlawfully terminated, indeed he is entitled to payment of severance pay of 2 weeks salary per year served in as provided under clause 16.8 of the Appellants employee manual(supra) and as pleaded before the Labour officer. Therefore, he is entitled to **Ugx. 25,031,124/- as severance allowance** The labour officer therefore erred to award him severance allowance amounting to Ugx. 50,062,248/- calculated at 1 months’ salary for every year worked. We therefore set aside and it is substituted with **Ugx. 25,031,124/- as severance allowance.**

Section 92(2) provides that:

 *Failure to pay severance allowance*

1. *An employer who is liable to pay severance allowance and who willfully and without good cause fails to pay the allowance in the manner and within the time provided under this Act commits an Offence.*
2. *An employer whi commits an offence under this section shall pay a fine calculated at to times the amount of severance allowance payable and the fine shall be payable to the same person and in the same way as the severance allowance is payable.”*

In our considered opinion the intention of the legislators was ensure that severance allowance once established, it was paid. The fine is therefore intended to apply where the Employer in issues willfully and without good cause fails and or refuses to pay the severance allowance. The Employer must therefore prove the refusal.

We found nothing on the record to indicate that the Appellant willfully and without cause failed to pay the Respondent severance pay therefore the payment of a fine for failure to pay the severance pay is not applicable. The labour officer therefore erred to award the fine. We therefore set aside his award of Ugx. 100,124,496/- as a fine for failing to pay severance allowance.

Ground 4. **The Labour Officer erred in law by awarding the Respondent additional Compensation of Ugx. 18,773,343/- without any justification whatsoever, thereby acting in manifest abuse of his discretion.**

Counsel for the Appellant contended that in addition to an award of compensation at the rate of four weeks, wages (Ugx. 6,257,781/- ) he awarded additional compensation of Ugx.18,773,343/- calculated at the rate of 3 months’ pay without any justification. According to counsel this award was made arbitrarily because the labour officer was under strict obligation to take the requirements under section 78 into consideration before making additional compensation. The fact that he merely restated the law pertaining to additional compensation without any factual basis was illogical.

Section78 provides as follows:

 *“Compensatory order*

1. *An order of compensation to an employee who has been unfairly terminated shall, in all cases, include a basic compensatory order for four weeks’ wages.*
2. *An order of compensation to an employee whose services have been unfairly terminated may include additional compensation at the discretion of the labour officer, which shall be calculated taking into account the following-*
3. *The employee’s length of service with the employer;*
4. *The reasonable expectation of the employee as to the length of time for which his or her employment with the employer might have continued but for the termination;*
5. *The opportunities available to the employee for securing comparable or suitable employment with another employer.*
6. *The value of any severance allowance to which an employee is entitled under part IX;*
7. *the right to press claims for any unpaid wages, expenses or other claims owing to the employee;*
8. *any expenses reasonably incurred by the employee as a consequence of the termination.*
9. *Any conduct of the employee which , to any extent caused or contributed to the termination;*
10. *Any failure by the employee to reasonably mitigate the losses attributable to unjustified termination;*
11. *Any compensation, including exgratia payments, in respect of termination of employment paid by the employer and received by the employee*
12. *The maximum amount of additional compensation which may be awarded under subsection (2) shall be three months’ wages of the dismissed employee and the minimum shall be one month’s wages.*

*Counsel cited* ***Netis Uganda Vs Charles Walakira -LDAppeal No 022/2016,*** in which according to Counsel, this court’s holding was to the effect that Section 78(2) is intended to limit the power of the Labour Officer in the award of compensation in respect to complaints which they handle, by detailing circumstances under which compensation is awardable and the factors that the Labour officer should take into account before he makes the award. Counsel contended that in this case, the Labour officer did not take into account the fact that he had already awarded the Respondent severance allowance of Ugx.50,062,248/-, basic compensation of Ugx.6,257,781/-, and salary until December 2017, before making additional compensation amounting to Ugx.18,773,343/=. Counsel submitted that the most check against arbitrary exercise of discretion is the well-recognized legal principle that orders can only be made after proper evaluation which brings reasonableness to both the exercise of power and the ultimate conclusion. He argued that evaluation is best demonstrated by disclosure of reasons behind the decision or conclusion which was not done in this case was not done. He therefore prayed that the additional compensation should be set aside.

In reply Counsel for the Respondent argued that the Labour officer acted within his power to award compensation at the rate of 4 weeks at Ug. 6,257,781/=. According to him section 78(1) is worded in mandatory language and 78(2) provides scope for additional compensatory order for 4 weeks wages. Therefore the labour officer did not err when he made an award for additional compensation notwitstanding that in his judgement he did not state which of the considerations he relied on. Counsel argued that given that the Respondent had a good track record and he had worked for 8 years he deserved the additional compensation; therefore, it was correct to award it to him. Without prejudice and in the alternative, he prayed that if court finds the amount excessive it should invoke its powers to vary the amount within the confines of the law that is within 1 to 3 months.

**DECISION OF COURT**

Section 78 provides the scope within which the Labour officer can determine the amount to compensate an employee who has been unfairly/unlawfully terminated from employment. It provides that a Labour officer shall mandatorily make a compensatory order of 1 months’ wages of the dismissed employee and may include additional compensation of a maximum of 3 months wages of the dismissed employee granted at the discretion of the labour officer. In **Edace Micheal vs Watoto Child Care Ministries LDAppeal No.016/2015,** this court held that section 78 *“… in our view covers whatever damages that could have arisen from illegal termination although section 78(3) provides for maximum amount of additional compensation which in our view is equivalent to damages.*

*Unlike the Industrial Court, the discretion of the Labour officer to award such damages under section 78(3) is limited to 3 months wages of the dismissed employee’s salary…”*

Although it is important to state the reasons or what he considered before arriving at the decision to award additional compensation, the section gives the Labour Officer discretion to make the decision and it does not strictly require him or her to voice the basis of exercising this discretion. Given that this Court equates the award under Section 78 to an award of damages, and the Labour officer made the award within the scope of the law, we do not agree with counsel for the Appellant that his failure to state what he considered before invoking his discretion should nullify the award of additional compensation of 3 months’ wages of the Respondent amounting to Ugx. 18,773,343/- therefore in accordance with section 94(3) we shall accordingly confirm the Labour award.

**5.The Labour Officer erred in law by awarding the Respondent Ugx. 31,288,905/= being salary for the remainder of his contractual period**.

Counsel for the Appellant contended that Section 65(1) of the Employment Act, deems a contract of employment terminated where it is ended by the employer with notice and section 58(1)(c) of the same Act entitles an employee who has served an organization for more than 5 years but less than 10 years to 2 months’ or payment of 2 months salary in lieu thereof and in the instant case , the Appellant paid the Respondent 2 months salary in lieu of notice. Therefore the labour officer was not entitled to salary for the remainder of his contract which was ending on 31/12/2017. He cited **Rosemary Nalwadda vs Uganda Aids Commission (HCCS No 67/2011 which cited Ahmed Bhaku vs Car and General Ltd SCCA 12 of 2002,** tothe effect that where an employee’s fixed employment is terminated, they will be entitled to payment in lieu of the notice provided for in their employment contract as compensation and only where the fixed contract does not provide for termination of services and the services are unlawfully terminated , will an employee be entitled to the equivalent monetary compensation for the remaining contractual period. Counsel asserted that the Respondent’s contract provided for 1 months notice of termination by either party therefore the Labour officer erred to award Ugx. 31,288,905/= being salary for the remaining part of his contract.

In reply Counsel for the Appellant insisted that award of Ugx.31,288,905/-as salary of the remainder of the contract was in done in accordance with the law and **Angella Birungi vs NLS Waste Services LDC 067 /2014 and Uganda Commercial Bank vs Deo Kigozi( 2002) 1EA 293,** in which Court found that the Claimant was entitled to the amount claimed for the salary for the remaining part of the contract, therefore court should confirm this award. He also prayed that Court considers the Labour officer’s reference to this Court for the determination of damages and costs.

This court has since departed from awarding an employee who was unlawfully terminated or dismissed the remaining part of the salary because it is contrary to sections 40 and 41 of the Employment Act which entitles an employee to be given work and to be paid for the work done respectively. It is our considered opinion that awarding salary for the remaining period of the contract is speculative given that the employee will not have rendered services to warrant the earning of a salary and he or she may not necessarily serve the full period of the contract for other reasons not related to poor performance or misconduct, but to circumstances such as; resignation by the employee, death of the employee or employer, winding up of the business, lawful termination etc. The holdings in **Kapio Simon vs centenary Bank LDC No. 300/2015 and** the recent Court of Appeal decision in **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017** are to the effect that a claim for prospective earnings can is speculative because the employer/employee relationship ceases between the parties when the employment contact is terminated. We believe that an award of general damages is sufficient as compensation for an employee who is unlawfully terminated, however it happens.

Therefore the Labour officer erred to award the Respondent Ugx. 31,288,905/- as salary for the remaining period of his contract. This award is therefore set aside.

**General Damages:**

We have already stated that an award of compensatory order is equivalent to an award of damages and it is limited to 4 months. This restriction only applies to the labour officer and this court has discretion to award general damages in addition to other statutory remedies established under the Employment Act.

We already confirmed that he was unlawfully terminated, therefore he is entitled to an award of general damages. However the Labour officer already made a compensatory order in his favour amounting to 4 months wages, however given Respondent worked for the Appellant for 8 years and there was no evidence that he worked with a bad track record, earning Ugx. 6, 257,781- per month, we think the compensatory order was insufficient and therefore award him additional Ugx. 20,000,000/- as general damages, for his unlawful termination.

**Costs**

Costs are awarded at the discretion of court and although costs follow the cause, it is our considered opinion that employment relationships/contracts are unequal with the employee being subordinate costs should not abide, and should only be awarded in exceptional circumstances and where it is absolutely just to do so. Therefore, no order as to costs is made in the instant case.

In conclusion the Appeal partially succeeds as follows:

1. Ground 1 fails.
2. Ground 2 succeeds, the fine of Ugx.100,124,496/= for failure to pay severance allowance is set aside.
3. Ground 3 is modified, by setting aside the award of severance allowance of Ugx.50,062, 248/- is substituted with Ugx.25, 032,124/- as severance allowance.
4. Ground 4 is confirmed, the award of Ugx.18,773,343/=, in addition to the 1month salary of Ugx.6,257,781/=, as additional compensation is confirmed.
5. An award of Ugx. 20,000,000/- as General Damages
6. The award of Ugx.31,288.905 being salary for the remainder of the Respondent’s contract is set aside.
7. Interest of 16%s hall accrue on 3, 4and 5 from the date of this award until payment in full.
8. No order of General damages and 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. ADRINE NAMARA ……………**

**2. MS. SUSAN NABIRYE …………….**

**3. MR. MATOVU MICHEAL ……..…..**

**DATE: 28TH NOVEMBER 2019**