

The proceedings and evidence

[2] When the matter was called before this Court on the 25th of October 2023, the Respondent was absent, and we directed Counsel for the Claimant to serve the claim papers afresh. On the 3rd of November 2023, Ms. Kawalya sought time for the Respondent to file their responses under Rule 5(1) of the Industrial Court Procedure Rules. Leave was granted. On the 28th of November 2023, the Respondent did not attend Court. An affidavit of service sworn by Mr. Derrick Kayera on the 24th of November 2023 was filed on the record by which he was deposed to effecting service on the Respondents on the 2nd of November 2023. It was also averred that the Respondent's receptionist, one Shabera Atuhwera, signed and stamped the hearing notice, a copy of which was annexed to the affidavit of service. Satisfied that service had been effected on the Respondent, we granted the Claimant leave to proceed *ex parte*. The Claimant's evidence was led, and written submissions were filed on two issues for determination, viz:

- (i) *Whether the Claimant was unlawfully terminated?*
- (ii) *What remedies are available to the Parties?*

[3] The Claimant's witness statement, made on the 19th day of May 2023, was adopted as his evidence in chief. He testified that he was not given a written contract but had agreed to work for the Respondent as a Security Guard at a monthly salary of UGX 286,000/=. On the 29th of July 2022, one Harrison, with whom the Claimant was deployed at Mbuya, was arrested on allegations of theft of the Respondent's client's television set. The said Harrison was taken to the Bugolobi Police Post. At the same time, the Claimant was asked to remain on duty and report to the Respondent's offices the following morning to make a statement on the theft incident. He duly made the statement. On the 8th of August 2021, he noticed his salary had not been posted. Upon inquiring from the Respondent's Human Resources Manager, he was advised that his salary had been withheld because of the allegations of theft and would only be paid after he made a statement to the Uganda Police. He was later directed to report for a two-week refresher course. After completing the course, the Training Manager allegedly told the Claimant that his salary arrears would only be paid upon the training Manager's saying so. The evidence was not subjected to cross-examination. On closing the Claimant's case, we directed the filing of written submissions.

Analysis and Decision of the Court

Issue 1. *Whether the Claimant was unlawfully terminated?*

- [4] Counsel for the Claimant submitted that the conduct of the Respondent suggested that the Claimant had been terminated. Ms. Kawalya drew this Court's attention to **Section 65(1)(c) of the Employment Act, 2006** (*from now EA*) and the case of **Nyakabwa J. Abwooli v Security 2000 Limited LC No.108 of 2014** for the proposition that the Respondent's conduct was unreasonable and made it impossible for the Claimant to continue working. It was submitted that withholding salary and refusing to give work contradicted **Section 41EA**. Accordingly, we were asked to find that the Claimant was constructively dismissed.

Determination

- [5] The Claimant's evidence was unchallenged, and where evidence stands unchallenged, it is deemed admitted as inherently credible and probably true. However, in **Geoffrey Brown v Ojijo Pascal**,¹ the Honourable Mr. Justice Musa Ssekaana observed that the Court must evaluate the evidence to give it quality and value.
- [6] It is our view that the Claimant's evidence is believable. His identification card was admitted as CEX1. It was issued under the Respondent's name on the 4th of January 2021. The identity card designated the Claimant as a Security Officer and was valid until the 31st of December 2023. He also tendered a payslip for June 2022. It was admitted as CEX2. The said payslip was in the name of the Respondent, detailing the Claimant's name and designation as a guard. It listed the date of joining as the 15th of September 2021, the pay period of June 2022 and the pay date of the 17th of July 2022. It had a P/F A/C Number, an MAG number, and a gross pay of UGX 286,153.85. There were deductions for NSSF UGX 14,307.69 and PAYE of UGX 5,115.38, leaving a total net pay of UGX 266,730.78. These features of the identity card and payslip were consistent with the Claimant's narrative contained in his witness statement. In our view, the Claimant makes a plausible case that he was an employee of the Respondent.
- [7] **Section 65(1)(c)EA** provides that:

"Termination shall be deemed to take place in the following instances

¹ Per Ssekaana J in *Geoffrey Brown v Ojijo Pascal* H.C.C.S No. 228 of 2017

c) where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee; and"

In establishing what amounts to unreasonable conduct, in the case of **Edotun James v Okra Beverages Ltd**², we cited **George Wimpey Ltd v Cooper**³ where it was suggested that unreasonable conduct is of the kind which, by good industrial relations practice, no employee could reasonably be expected to accept. Therefore, in terms of unreasonable conduct, it must be severe, a breach of the employment contract so fundamental that it is once destructive of the employer's implied duty of trust and confidence and destroys the employment relationship. It would be conduct that an employee would not be reasonably expected to tolerate under the regulatory architecture governing the workplace, where the **Employment Act 2006** governs individual employment relationships and connected matters. Such a breach leads to constructive dismissal, where the employee may resign. This may also be regarded as self-dismissal.

- [8] Returning to the dispute before us, **Section 40(1) EA** imposes a duty on the employer to provide work. The Claimant's uncontested evidence in paragraphs 11 and 12 of his witness statement is that he was directed to go for refresher training, and on completion, he was not deployed. **Section 41 EA** entitles an employee to wages except where an employee has been sentenced and imprisoned by a court of law or is absent from work without authorisation or good cause.⁴ In our view, the failure to provide work and the refusal to pay wages were continuous breaches indicating the Respondent's unreasonable conduct towards the Claimant. The Respondent's deliberate acts of denying work and withholding pay did not foster mutual trust and cooperation between itself and the Claimant. What would an undeployed and unpaid worker be expected to do when they are willing to work and the employer declines or refuses to give the employee any work? In our view, the framers of the Employment Act of 2006 had this in mind when enacting a duty on the employer to provide work under Section 40EA. Where contracted, an employer has a duty to provide work to a contracted employee. That is, after all, what the employee was contracted to do in return for his or her wages. Therefore, applying the facts of the present case to the test of whether the Respondent's conduct was reasonable in the circumstances of the present case, we would find,

² LDR 261 of 2021

³ 1977(IRLR) 205

⁴ Section 41(6) and (7) EA. Section 41(6)(a)-(c) EA excepts from the definition of absence without good cause exceptional events preventing attendance to work, court or public authority summons and absence attributable to death of an employee's family member.

inextricably, that the Respondent was in breach of its duty to give work. By this breach, the employment contract was repudiated.

- [9] We are fortified in adopting the above view by the decision of the Industrial Court of Kenya in the case of **Moses Kiplagat Changwony v Tana and Athi Rivers Development Authority**⁵ where it was observed that the employee must show that there has been no actual dismissal, but all the elements of dismissal are present, and that the employer has fundamentally breached the contract by failure to provide work for instance. In our view, by not providing work, the Respondent had fundamentally breached the contract of employment and the statutory duty to provide work.
- [10] There is also the corollary breach in the failure to pay wages. The Claimant's evidence was that he sought an explanation as to why the Respondent was withholding his salary for July 2022. Both the Human Resource Manager and the Training Manager did not, from the evidence on record, offer any plausible reasons for withholding the Claimant's salary. In **Bateisibwa v Lake Victoria Authorities & Anor**⁶ the Industrial Court found that where the employer fails to pay wages to his/her employee, the latter is entitled to either resign or file a claim in courts of law or do both. In the instant case, the Claimant elected to file a complaint before the Labour Officer. When it was not concluded, he had it referred to this Court, and this Court finds that failure to provide work compounded by the failure to pay wages would constitute unreasonable conduct on the part of the Respondent. The cumulative effect of the Respondent's conduct was repudiating the employment contract, which entitles the Claimant to a declaration that he was unlawfully terminated. We are fortified in this holding by the decision of the Industrial Court in **Abraham Wereberi v Tan Telecom**⁷ where Ntengye H.J observed that non-payment of wages to an employee who has performed duties in accordance with the contract is a breach of sections 41 and 43EA and of the contract of service.
- [11] It is, therefore, this Court's finding that the conduct of the Respondent was incompatible with an employer-employee relationship, and we must conclude, as we hereby do, that the Claimant is entitled to a declaration that he was unfairly terminated. The Claimant was constructively dismissed. In the circumstances, issue number one would be answered in the affirmative.

⁵ Industrial Cause No.785 of 2010[2010] LLR 175

⁶ Labour Dispute Claim 192 of 2014 [2019] UGIC 2 (29 March 2019)

⁷ LDR 167 of 2020

Issue II. What remedies are available to the parties?

- [12] Having found that the Claimant was unfairly terminated, he would be entitled to the following remedies sought.

Payment in lieu of notice.

- [13] Under **Section 58(3)(a)EA**, the Claimant sought two weeks' pay in lieu of notice. **Section 58(3)(a)EA** provides for notice of not less than two weeks when an employee has been employed for more than six months but less than one year. The Claimant's submission is that he was employed on the 15th of October 2021 and terminated on the 30th of August 2022. The evidence is that he raised a complaint on non-payment of wages on the 8th of August 2022. He was sent for a refresher course for two weeks. A letter on the lower court record dated the 16th of September 2022 indicates that the Claimant had filed a complaint with the Labour Officer at Nakawa. Therefore, the Claimant may have filed his complaint in late August or early September 2022. He had worked for the Respondent for more than six months but less than one year at the time of his unlawful termination. In the circumstances of **Section 58(3)(a) EA**, he was entitled to not less than two weeks' notice, and we award him the sum of **UGX 286,153.85** as payment in lieu of notice.

Unpaid Wages

- [14] Citing **Sections 41(1) and 43(6) EA**, the Claimant sought unpaid wages for work done in the sum of UGX 286,000/=. We agree that he is entitled to unpaid wages for July 2022 and award the Claimant **UGX 286,153.85** in unpaid wages.

General Damages

- [15] Counsel for the Claimant was contending for **UGX 2,000,000/=** in general damages. The law is that general damages are those damages such as the law will presume to be the direct natural consequence of the action complained of⁸. In **Stanbic Bank (U) Ltd v Constant Okou**⁹ Madrama, JJA (*as he then was*) held that general damages are based on the common law principle of *restituto in integrum*. In the case before us, the Respondent declined to deploy the Respondent and refused to pay wages. The Claimant had served for about ten months when his debacle began. His tour of duty at the Respondent was expected to conclude on the 31st of December 2023.

⁸ *Stroms v Hutchinson* [1950]A.C 515

⁹ Civil Appeal No. 60 of 2020

Considering all circumstances and the claimant's monthly salary, we would grant the Claimant the sum of **UGX 2,000,000/=** in general damages.

[16] The dicta of this Court on costs in employment disputes is that costs are awardable where the losing party has been guilty of some misconduct.¹⁰ The misconduct includes pre-litigation misconduct. In the present case, the Respondent did not answer the Labour Officer's invitation to resolve the dispute amicably. Before this Court and by order of the Court, the Claimant was served with the memorandum of claim and various hearing notices. Mr. Derrick Kayera, the Court process server, swore affidavits of service indicating effective service at the offices of the Respondent on Luthuli Close. Copies of the hearing notices bearing the Respondent's stamp were returned to the Court. Despite effective service, the Respondent chose to remain away from the Court. It would follow from these circumstances that the Claimant would be entitled to costs of the claim, and he is so awarded.

[17] Finally, we make the following orders:

- (i) We declare that the Claimant was constructively dismissed and, therefore, unlawfully terminated from employment by the Respondent.
- (ii) Under Section 61 EA, we direct the Respondent to issue a certificate of service within 45 days from the date of this order.
- (iii) We order the Respondent to pay the Claimant the following sums:
 - (a) **UGX 286,153.85** as payment in lieu of notice.
 - (b) **UGX 286,153.85** as unpaid wages.
 - (c) **UGX 2,000,000/=** general damages,
- (iv) The sums above shall carry interest at 18% p.a. from the date of this award until payment in full.
- (v) The Claimant shall have costs of the claim.

It is so ordered.

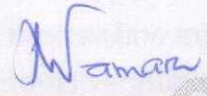
¹⁰ See LDR 190 of 2020 Joseph Kalule v GIZ.

Signed in Chambers at Kampala this 2nd day of February 2024.


Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

1. Ms. Adrine Namara
2. Ms. Suzan Nabirye
3. Mr. Michael Matovu







Date: 2nd February 2024.

Time: 10.08 a.m.

Appearances

1. **For the Applicant:** Ms. Erina Kawalya
The Claimant is in Court
2. **None for the Respondent:**

Court Clerk: **Mr. Samuel Mukiza.**

Ms. Kawalya:

I appear for the Claimant. The respondent is absent.
Matter for award, and we are ready to receive it.

Court:

Award delivered in open Court.


Anthony Wabwire Musana,
Judge, Industrial Court.