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THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA,
LABOUR APPEAL NO. 002 OF 2023
(Arising from Labour Dispute No. MGLSD/LC/520/2020)

BEN RHAEIM AIMEN ::APPELLANT

VERSUS

GRANADA HOTELS (U) LTD:::RESPONDENT

Before:

1. The Hon. Justice Anthony Wabwire Musana

The Panelists:

1. Hon. Adrine Namara,
2. Hon. Suzan Nabirye &
3. Hon. Michael Matovu.

Representation:

1. Mr. Mark Kizza of M/s. Origo Advocates, for the Appellant.
2. Ms. Sheila Nabbale of M/s. Shonubi, Musoke & Co Advocates, for the Respondent.

AWARD

Introduction

[1] This is an appeal against the decision of Mr. Apollo Onzoma, Labour Officer at the Ministry of Gender, Labour, and Social Development (MGLSD), who found that the Appellant had been lawfully terminated and was not entitled to any of the remedies sought. He also declined to refer a question of damages to this Court.

The Appellant's case at the Labour Office

[2] The Appellant sought a declaration that he had been unlawfully terminated. He had been recruited from Tunisia as a Cost Controller on a one-year contract with effect from 10th May 2021. His contract contained a six-month probation clause. He contended that on the 28th of October 2021, he was terminated for poor performance without a fair hearing. It was his case that there were no appraisals for confirmation, an extension of probation, or termination. He was not paid his meal privileges and terminal benefits and was evicted from the Respondent's hotel. He was put to untold suffering. He had a legitimate expectation that his contract would subsist until its end, as there had been no complaint of underperformance.

The Respondent's case at the labour office

[3] The Respondent opposed the claim, suggesting that the Appellant did not have a cause of action. It was contended that the Appellant was on a one-year fixed-term contract with a six-month probationary period under which the Respondent reserved the right to terminate with two weeks' notice. An audit was conducted in October 2021, and the Appellant's performance was unsatisfactory. He was terminated with notice and paid all his terminal benefits. The Respondent contended that there was no requirement for a disciplinary hearing.

The Labour Officer's award

[4] The Labour Officer overruled two objections regarding the Appellant's cause of action against the Respondent and the jurisdiction to hear and determine a labour complaint arising from a termination of a contract during a probationary period. In determining the main complaint, the Labour Officer found that the probationary clause of the employment contract sufficed as a probationary contract and that, therefore, the Appellant was serving probation at the time of his termination. The Labour Officer also found that the Respondent had followed the procedure as required under **Section 67 of the Employment Act, 2006(*from now EA*)**.

[5] As to remedies, the Labour Officer found that the settlement form executed between the parties amounted to an agreement limiting the Appellant's right to bring a complaint against the employer. The Labour Officer determined that the Appellant was not entitled to compensation for lack of a fair hearing under **Section 67EA**. The Labour Officer also found that the Appellant was not entitled to leave pay, having not adduced any evidence to show that he applied for leave, which was denied. It was also found that he was not entitled to payment for working on public holidays and weekends or severance pay. The Labour Officer observed that the Appellant had acknowledged receipt of the certificate of service and declined the prayer for issuance. Having found that the termination was lawful, the Labour Officer refused to refer the question of damages to this Court.

The grounds of appeal

[6] Dissatisfied with the decision of the Labour Officer, the Appellant filed this appeal on seven grounds, hereafter following:

(i) The Labour Officer erred in law when he misapplied the principle of law relating to evidence, thereby refusing to admit the Respondent's Human Resource Manual as part of the Appellant's evidence, thereby causing a miscarriage of justice.

(ii) The Labour Officer erred in law when he held that the Appellant at the time of termination was serving under a probationary contract and, as such, was lawfully terminated.

(iii) The Labour Officer erred in law when he held that the Appellant was not entitled to four weeks net pay for failure to be accorded a fair hearing.

(iv) The Labour Officer erred in law when he did not make a determination regarding the Appellant's prayer for basic compensatory wages of 4 weeks and additional wages of 3 months, thereby occasioning a miscarriage of justice.

(v) The Labour Officer erred in law when he misapplied the principles of law relating to annual leave, public holidays, and weekends, thereby arriving at the erroneous decision that the Appellant was not entitled to monetary compensation for the said days.

(vi) The Labour Officer erred in the law in holding that the Claimant had not worked for six months nor unfairly dismissed and, as such, did not qualify to claim for severance allowance.

(vii) The Labour Officer erred in law when he refused to refer the issue of general damages and interest to the Industrial Court.

[7] When the appeal came up for mention on the 12th day of June 2023, we invited Counsel to address the Court through written submissions. The Court notes that it gave directions on the format of written submissions, which Counsel might have found limiting. Directions are made for economy and optimal use of scarce resources. That notwithstanding, the Court is grateful for the arguments, authorities cited and attached, and the industry of Counsel.

Analysis and decision of the Court

The duties of a First Appellate Court

[8] Sitting as the first appellate Court, we have a duty to re-evaluate or reappraise the evidence adduced before the Labour Officer in full and arrive at our conclusions. [1] In considering the appeal, we would also be concerned with the merits of the decision of the Labour Officer. Counsel submitted on the grounds of appeal independently. We propose to dispose of the first two grounds in the manner in which they were raised. Our resolution of grounds one and two of the appeal dispose of grounds three to seven of the appeal as the latter grounds relate to remedies.

Ground One: Refusal to admit evidence.

[9] Mr. Mark Kizza, appearing for the Appellant, argued that under Section 55 Evidence Act Cap.6, formal proof of a document is waived when a Court has taken judicial notice of a document. The Respondent had produced a Human Resource Manual *(from now "HRM")* in the case of **Tayssir Zerrelli v Granada Hotel Ltd MGLSD/LC/520/2020**, which was discredited. The Labour Officer was faulted for not admitting the HRM. Counsel cited **Buryahika Stephen & Anor v Hoima Sugar Ltd & Ors H.C.C.S No. 2015** to support the proposition that the HRM should have been admitted in evidence.

[10] In reply, Ms. Nabbale, Learned Counsel for the Respondent, raised, as a starting point, an objection to the attempt by the Appellant to introduce new evidence of the Tayssir matter

[1] See Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga [2004] KALR 236 and Kifamunte Henry V Uganda, S.C Criminal Appeal No. 10 of 1997

without leave. Counsel relied on **Abdallah Kimbugwe v Kiboko Enterprises Ltd LDA 13 of 2021** to support the prayer for this Court to uphold the objection. It was also the Respondent's case that the Labour Officer rightly found the HRM sought to be adduced did not apply to the Claimant. Counsel suggested that the evidence in the case of **Taysiir Zerelei v Granada Hotels Limited Labour Complaint MGLSD LC /520/2020** had not been tendered on the record. Counsel argued that the case of **Buryahika Stephen and Anor v Hoima Sugar Limited and others H.C.C.S No. of 2015** was not applicable. It was argued that a Labour Officer is not a Court within the meaning of Section 1 of the Evidence Act.

[11] In rejoinder, the Appellant suggested that they had not adduced new evidence. They referred this Court to pages 64-121 of the Record of Appeal (*from now ROA*) and page 14 ROA, where the Labour Officer marked the HRM for identification. It was suggested that the Labour Officer failed to take judicial notice of the admission of the HRM in the Tayssir case. It was submitted that the HRM gave better terms and under **Section 27(2) EA**, parties were at liberty to incorporate more favourable terms in the employment contract.

Decision of the Court

[12] The chief complaint on this ground of appeal relates to the law of evidence and procedure before a Labour Officer. The powers of a Labour Officer in the disposal of complaints are set out in **Section 13 EA**. To fully appreciate the import of the powers of the Labour Officer's, we think it necessary to employ the full text of the provision. It reads;

> *"13. Labour Officer's power to investigate and dispose of complaints.*
>
> *(1) A Labour Officer to whom a complaint has been made under this Act shall have the power to—*
>
> *a) investigate the complaint and any defence put forward to such a complaint and to settle or attempt to settle any complaint made by way of conciliation, arbitration, adjudication or such procedure as he or she thinks appropriate and acceptable to the parties to the complaint with the involvement of any Labour Union present at the place of work of the complainant; and*
>
> *b) require the attendance of any person as a witness or require the production of any document relating to the complaint after reasonable notice has been given;*

[13] From the above provision, a Labour Officer to whom a complaint is made elects to resolve the dispute through conciliation, arbitration, adjudication, or such procedure as he or she thinks fit. Such election means that the Labour Officer is at liberty to determine the method and procedure for disposal of the complaint. What stands out in **Section 13 (1)(c) EA** is that it gives the Labour Officer discretion to set the procedure for disposing of the complaint or dispute. The provision permits the Labour Officer to:

(c) hold hearings in order to establish whether a complaint is or is not well founded in accordance with this Act or any other law applicable and the Labour Officer shall, while conducting the hearing employ the most suitable means he or she considers best able to clarify the issues between the parties;"

Therefore, this discretion is within the ambit and wisdom of the Labour Officer. What is most suitable for the Labour Officer remains within the Labour Officer's discretion. In the case of **Mbogo v Shah and Anor(1968) EA 93**[2], it was held that in an appeal against the exercise of discretion, the appellate court should not interfere with the exercise of discretion unless satisfied that the lower court misdirected itself on some matter and thereby arrived at a wrong decision or it is manifest from the case as a whole that the lower court made a wrong decision.

[14] The other significant provision in respect of these powers, is set out in **Section 93(2) EA**, which provides;

"(2) A Labour Officer shall have jurisdiction to hear, and to settle by conciliation or mediation a complaint—

(a) by any person alleging an infringement of any provision of this Act; or

(b) by either party to a contract of service alleging that the other party is in breach of the obligations owed under this Act."

***Section 13(2)EA** provides for the Labour Officer to state the reasons for his or her decision on a complaint.".*

From these provisions, it is derived that the jurisdiction of a Labour Officer is to hear, and settle by conciliation or mediation, a complaint brought to the labour office. The Labour Officer may also determine a labour complaint through adjudication or arbitration and can adopt a procedure best suited to the proceedings before them.

[15] In the matter before us, on the 1st of November 2021, M/s. Origo & Co. Advocates filed a complaint with the Directorate of Community Development at the Wakiso District Labour Office. The Senior Labour Officer, Celestine Muhumuza, organized a mediation session. The Respondent did not appear. Counsel requested that the matter be referred to the Commissioner for Labour, Employment, and Industrial Relations (*from now CLEIR*). The CLEIR allocated the file to Mr. Onzoma, who adjudicated the matter on the 26th of May 2022, took evidence on the 14th of July 2022 and 28th of August 2022, and directed the parties to file written submissions. The proceedings culminated in an award on the 28th of February 2023. In our view, the mediation and adjudication proceedings were well within the law as the Industrial Court frowns upon a single Labour Officer mediating the matter and then adjudicating the same. By referring the matter to another adjudicator after the failure of mediation, the Commissioner adhered to the law.

[2] Cited in High Court Civil Appeal No. 51 of 2013 Obululu Martin & 2 Ors v Ogaram John Chrisostom

[16] The more salient aspect of the Appellant's complaint is that Mr. Onzoma, who adjudicated the matter, admitted the HRM for identification but declined to take judicial notice of the manual as it had been produced in the Taysir case. On page 5 of the record of proceedings (ROP) found on page 14 of the record of appeal (ROA), the Labour Officer admitted the HRM as ID1. It was, therefore, admitted for identification. In the ROP, it does not appear that matters relating to the HRM were raised in cross-examination or re-examination of the Respondent. The HRM was also not tendered during the examination in chief and does not appear in the Appellant's final submissions to the Labour Office. It only arises during the prosecution of this appeal and not through any formal application. But we shall first dispense with the primary complaint.

[17] It is established that a labour officer is not a Court. In the case of **Engineer John Eric Mugyenzi v Uganda Electricity Generation Co. Ltd,**[3] the Court of Appeal, in considering a question of jurisdiction of a Labour Officer, observed that the expression *"Court"* within the Employment Act means a Court of judicature or a subordinate Court and does not refer to a Labour Officer or the Industrial Court, which is separately defined. Further, in his submissions before the Labour Officer on an objection to the cause of action, Counsel for the Appellant made the point, surprisingly, that the rules of civil procedure did not apply to the Industrial Court. That is the position of the law under Section 18 of the LADASA, which provides that the Industrial Court is not bound by the rules of evidence in civil proceedings. By making the argument now, Counsel for the Appellant is attempting to make applicable what he thought was inapplicable before the labour officer.

[18] Therefore, we are unpersuaded by the Appellant's contention that the law of evidence would apply to proceedings before Mr. Onzoma, sitting as a Labour Officer. We would agree with the view taken by Ms. Nabbale to the extent that the Labour Officer is not a Court, as precedent has set out. Section 1 of the Evidence Act Cap. 6 restricts the application of the Act to the Supreme Court, the Court of Appeal, the High Court, and all Courts established under the Magistrates Court Act (*MCA*). This excludes the Labour Officer as this is not a Court established under the MCA or any other law. It would be impossible to fault the Labour Officer for not admitting the HRM.

[19] We are emboldened in this persuasion by further jurisprudence on the point. In an expansive discourse on the jurisdiction of Labour Officers *vis a viz* the Magistrates Court in the case of **Ozuu Brothers Enterprises v Ayikoru Milka**[4], Mubiru J. makes several important and significant observations, and this decision is still good law. On page 19 of the ruling, His Lordship opines that in creating the Labour Officer, Parliament intended to create a forum for resolving employment disputes between workers and their employers quickly, inexpensively, and effectively. His Lordship traces this intention to the Indian case of **Rajasthan State Road Transport Corporation v Krisjan Kant, 1995 AIR 1715, 1995 SCC(5)75,** where the policy underlying the Industrial Disputes Act was laid out in some detail;

> *".....At the same time we must emphasise the policy of law underlying the Industrial Disputes Act on a host of enactments concerning the workmen*

[3] C.A.C.A No. 167 of 2018
[4] High Court Civil Revision No. 0002 of 2016

made by Parliament and State legislatures. The whole idea has been to provide a speedy, inexpensive and effective forum for resolution of disputes between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of Civil Courts with their layers upon layers of appeals and revisions and elaborate procedural laws, which the workmen can ill afford. The procedures followed by civil Courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the Courts and Tribunals created by the Industrial Disputes Act are not shackled by these procedural laws, nor is there award subject to any appeal to the revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and re-make the contracts, settlements, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extra-ordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil Court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weight with the Courts in interpreting these enactment and disputes arising under them."

[20] Following these dicta, His Lordship observes that there are many employment disputes amenable to the informality of proceedings before Labour Officers, where the workmen and their representatives can themselves prosecute or defend their cases. For the above reasons. His Lordship was of the considered opinion that the primary intention of creating district-level officers as a forum for employment civil dispute resolution is to provide a speedy, inexpensive, and effective forum for the resolution of disputes arising between workmen and their employers. We agree with these dicta and find it expanded in the enactments on the procedure of the Industrial Court Approach towards flexibility and informality. Section 18 of the LADASA provides that the Industrial Court is not bound by the rules of evidence in civil proceedings. Rule 8 of the LADASA (IC) Procedure Rules permits a party to appear by themselves. Therefore, as far as labour justice is concerned, the statutory intent is more toward flexibility and informality at least before the labour officer who is not considered a Court where rules of procedure are predominant.

[21] In the final analysis, not being a Court, the Labour Officer would not be bound by the strict rules of evidence and would not be faulted for not taking judicial notice of the human resource manual in the complaint of **Taysiir Zerelei v Granada Hotels Limited Labour Complaint MGLSD LC /520/2020**. We take this view because the complaint was not before a judicial officer or a Court of record. The labour office is not a Court. To this extent, the principle enunciated in **Buryahika & Ors v Hoima Sugar Ltd(supra)**, as cited by the Appellant, is inapplicable to the present case's circumstances. The Labour Officer cannot take judicial notice of a decision or otherwise of another Labour Officer in another complaint by any stretch of statutory, legislative, or legal interpretation. We would,

therefore, be unable to fault the Labour Officer for admitting the human resource manual for identification but not taking judicial notice of an earlier complaint. He did not err in not admitting the HRM as an exhibit. As a result, ground one of the appeal fails.

Ground two: Probationary Contract

[22] On the authority of **Maudah Atuzarirwe v Uganda Registration Services Bureau & others H.C.M.C No 249 of 2013** and **Abdallah Kimbugwe v Kiboko Enterprises Ltd LD 13 of 2021,** Counsel for the Appellant argued that a probationary contract must be entirely for probation and a term not exceeding six months. The Labour Officer was faulted for subjecting the said contract to **Section 67EA**. The Labour Officer was criticized for finding that the Appellant had been terminated and not dismissed. Having been charged with poor performance, the Appellant was entitled to a fair hearing under **Section 66EA,** and the Labour Officer erroneously found the Appellant to have been terminated under a probationary contract. Relying on **Heydon's** case(1584) 3 Re 7a, it was argued that **Section 67(1) EA** does not extinguish the right to a fair hearing provided for under **Sections 66(1)** and **(2)** because the legislature intended to preserve the right to a fair hearing. Counsel cited **Monica Munira Kibuchi & Ors v Mount Kenya University Constitutional Petition No. 64 of 2016 EA** in support of the proposition that the right to a fair hearing was available to an employee on a probationary contract.

[23] It was also contended for the Appellant that the HRM provided better procedural safeguards for a probationary employee than the Employment Act and should have been applied in the instant case. Counsel cited particularly clause 3.4 of the HRM that provided for a basis for confirmation, extension, or termination of an employee on probation.

[24] It was submitted for the Respondent that the Labour Officer rightly applied the **David Wangi v People Performance Group Ltd LDC 05 of 2018** and considered the **Atuzairwe** case (supra), which had been decided before the operationalization of the Industrial Court. Counsel cited **Mbonyi Julius v Appliance World Limited LDR 103 of 2016,** where the Industrial Court referred to a probationary period of 6 months in a fixed term contract of two years as a probationary contract. It was submitted that the Kimbugwe case(supra) was distinguishable. Counsel also submitted that the literal rule of statutory interpretation required words to be given their natural and ordinary meaning.[5] **Section 66 EA** did not apply to probationary contracts. Counsel submitted that the reference to the common law position before the enactment of the Employment Act was unnecessary as Section 14 of the Judicature Act permitted the application of common law in the absence of express law. It was submitted that **Heydon's** case was inapplicable in the circumstances.

Decision of the Court

[25] The Appellant's chief complaint on this ground was the Labour Officer's finding that the Appellant was on probation at the time of his termination. In paragraph 2 of his witness statement dated the 4th day of November 2021, the Appellant testified that he had been employed on a one-year contract. He attached a copy of the contract. The bone of

[5] Counsel relied on Charles Onyango Obbo & Anor v A.G Constitutional Petition No.15 of 1997 and Nyamuchoncho & Anor v A.G & 2 Ors M.C No. 241 of 2017

contention is whether this is a probationary contract. The relevant portion of the contract term reads as follows:

> *"1. **Contract***
> *We are pleased to offer this One (1) year term contract of employment with six (6) months' probation in the position of **Cost Controller** for Lake Victoria Granada Hotels in Entebbe, Uganda. "*

[26] From this clause, it is quite clear that the Appellant agreed to a one-year fixed-term contract with a six-month probation period. The Appellant contended on the authority of the **Atuzarirwe** case*(supra)* that a probationary clause in the employment contract does not amount to a probationary contract. The Respondent countered, citing the case of **Wangi** case*(supra)*where the Industrial Court had found a probationary clause in a contract of employment to amount to a contract of probation. Counsel for the Respondent argued that the **Atuzarirwe** case was decided before the operationalization of the Industrial Court, implying that the position of the law after the decision of Musoke J. *(as she then was)* had been clarified by the Industrial Court in the latter cases of **Wangi** and **Mbonyi***(supra).* In our view, it is necessary to delve into the decisions on these points in some brief detail.

[27] In the **Wangi** case, the Claimant had a fixed-term contract of one year with a six-month probation period. The contract provided that either party had a right to terminate the contract by giving two months' notice or upon payment of two weeks' salary in lieu after probation but before one year and one day's notice while on probation. The Claimant was terminated four months into employment, and the Industrial Court found this to be a probationary contract to which **Section 67EA** applied.

[28] In the **Mbonyi** case, the Industrial Court considered a fixed-term contract of 2 years with a three-month probationary period. The Claimant was summarily dismissed after the expiry of the probation period. The Respondent had not communicated any extension of probation. The Industrial Court found that he was entitled to consider himself confirmed and allowed to enjoy benefits and privileges accorded to an employee under the Employment Act, including termination only after due process of the law.

[29] In the **Atuzariwe** case, the High Court considered a three-year contract with a probationary clause. The Court found that a probationary contract is exclusively for probation and strictly for six months, renewable up to not more than another six months. In the Court's view, such a contract was outside the ambit of **Section 67 EA**.

[30] In **Mark E. Kamanzi v National Drug Authority and Another,**[6] the Applicant had been appointed on a fixed term effective from 4th January 2016. He was terminated on 7th June 2017. There was a variation in his contract when he was confirmed in his position on 15th August 2016. Wamala J. agreed with the dicta in the **Atuzarirwe** case, observing that including a term of probation in a full-term or fixed-term contract does not make the contract a probationary one. His Lordship also observed that a confirmation does not amount to a new contract.

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[6] H.C.M.A 138 of 2021

[31] In our view, the decisions of the High Court in both **Atuzarirwe** and **Kamanzi** correctly state the law regarding a probationary contract. Under **Section 2EA**, a probationary contract means a contract of employment of not more than six months duration, is in writing, and expressly states that it is for a probationary period. It would be separate and distinct from a fixed-term contract, as postulated in the Kimbugwe case. The probationary contract would be extendable for a further six months only. In the **Wangi** case, the Industrial Court found that while the contract did not mention the period of probation, the maximum period of probation would be six months, and the mention of probation in the contract permitted for a cutoff date of six months from the date of commencement. In the Court's view, this was a probationary contract. In the **Mbonyi** case, the Industrial Court was considering a two-year contract, which commenced on 15th June 2015 with a probation period of three months. The Court found that because the Respondent did not extend the probationary period beyond three months, the employee was entitled to consider himself confirmed. While the High Court considered a probationary period not to amount to a probationary contract, the Industrial Court considered probationary clauses to amount to a probationary contract to which Section 67EA would be applicable.

[32] It would appear to us that in the **Wangi** case and other decisions of the Industrial Court, the meaning of a probationary contract was interspersed with the purpose of a probationary period. The ambit and provisions of **Section 2EA** and **Section 67EA** are quite distinct. A probationary contract features six months, is exclusively for probation, and is renewable once for not more than six months. On the other hand, a probationary period or clause in a contract of employment does not mean that the entire contract is for probation. As seen from the **Atuzarirwe, Kamanzi,** and **Wangi** cases, a fixed-term contract for more than one year can have a three- or six-month probationary period or any other period. And we think that the underlying explanation for this distinction rests in the purpose of probation. According to Black's Law Dictionary 11th Edn, a probationary employee is a recently hired employee whose ability and performance are evaluated during a trial period.[7] A probationer is a person who is being tested for on-the-job suitability and competence.[8] Probation is a period of checking the employee's suitability for the job. It is a competency test, seeking the right fit between the employee and the job requirements. It is for the employer to assess the employee. During the probation period, the employer can determine if he or she wishes to be bound to the employee for a longer term. Similarly, an employee could assess the work environment and decide whether to commit longer.

[33] According to the International Labour Organisation,[9] the probationary or trial period is a minimum employment period during which an employee is not fully covered by employment protection legislation. Convention No. 158 provides that *"workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration,"* may be excluded from all or some of the provisions of the Convention[10]. As an illustration of the point, while the convention requires a reason for

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[7] Black's Law Dictionary 11th Edn by Bryan Garner at page 662
[8] Ibid at page 1456
[9] https://eplex.ilo.org/probationary-trial-period last accessed 6.11.2023 at 5.56 am.
[10] Article 2(2)(b) of Convention 158

termination in every case, member states are permitted to enact exemptions to these general rules concerning workers serving probation or casual workers.

[34] The exemptions from the restrictions imposed by the convention are rooted in the employer-employee relationship. The employer is the owner of capital and is at liberty to arrange his or her business in a manner that best suits the business. The employee, as the provider of labour, is interested in their pay. This relationship requires a balance. The law and the Industrial or Labour Relations Court attempt to balance these competing interests. In that regard, an employee serving a probationary period or under a probationary contract would not be entitled to all the rights of a confirmed employee. A few cases from other jurisdictions provide some illustrative and quite persuasive guidance on the point;

(i) In **St. Giles Medical Rehabilitation Centre v Patsanza**[11] , the Supreme Court of Zimbabwe noted that the main reason for having a period of probation is now generally accepted. A probationary period is designed to function as a time when an employer can evaluate a "potential" employee before opting to accept him or her as a full-time employee. During this period the employee is assessed and evaluated to determine his suitability for permanent employment. The Court cited Professor Lovemore Madhuku in his book "*Labour Law in Zimbabwe*" on page 44, where it is stated as follows with regards to the purpose of probation: "A probationary employee is one who is in the initial period of his or her employment where his skill and abilities are being assessed. **The probationary employment contract is separate from the second employment contract,** which is conditional on successfully completing the probation ...." The Court also cited Chinhengo J in **Madawo v Interfresh Limited 2000 (1) ZLR 660 at 882,** where it was observed that "Probation is defined in the New English Dictionary as "The action or process of testing or putting to the proof ... the testing or trial of a person's conduct, character, or moral qualification; a proceeding designed to ascertain these ... for some position or office. I think these words very well describe the process of probation as commonly undergone by accepted candidates ...." Probation was expressed by NDOU J in the case of ***Commercial Bank of Zimbabwe v Kwangwari* HH79/2003** as follows: "Probationary clauses provide for a trial period during which the reciprocal periods of notice required for termination are shorter, and which purportedly give both parties the right either to confirm or not to confirm the contract at the conclusion of the probationary period."

(ii) The South African case **Ubuntu Education Fund v Paulsen N.O and Others**[12] supports this view. In that case, it was stated that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of "fit" – aspects of demeanour, diligence, compatibility, and character.

[11] Case SC 668 of 2015; Ref Case LC/H/ 116 of 2013; SC 59 of 2018) [2018] ZWSC 59 (23 September 2018)
[12] (PA12/17) [2019] ZALAC 56; [2019] 11 BLLR 1252 (LAC); (2019) 40 ILJ 2524 (LAC)

(iii) In **Simeon O. Ihezukwu v University of Jos & Others** [13], the Supreme Court of Nigeria observes that the essence of a probationary appointment is that the employer retains the right not to confirm the appointment until after a specified period. Where the contract of employment provides that the appointment is subject to a probationary period of a certain length of time, this does not give the employee a legal right to be employed for that length of time, and the employer may lawfully dismiss him before the expiry of that period.

(iv) Finally, according to the Learned Author Janice Nairns,[14] probationary workers are classed as employees even though they are on probation. The only difference here is that often, the employer has the right to dismiss the employee at the end of the probationary period if he or she is not impressed with the employee's work.

[35] The decisions and texts cited above are consistent with the purpose of probation as a testing period. Permanent employment only occurs once an employee has successfully completed the probation period. The shorter notice periods and ease of entry into and exit from the contract are reciprocal. In other words, an employer may terminate by giving notice or paying for notice in lieu. If an employee is dissatisfied with the employer, he or she may also terminate the employment by giving the requisite notice. In effect, probation is a trial period, regardless. In our view, that may have been the rationale for the decisions of the Industrial Court in the **Wangi** and **David Akonye v Libya Oils LDC 082 of 2014** cases. We are of the persuasion that the decisions in the **Atuzazirwe** and **Kamanzi** cases accurately articulate the law in **Section 67EA**. We think the purpose of probation is material in interpreting a probationary clause in an employment contract and determination of rights arising therefrom. **Sections 67(2)** and **(4) EA** provide for a probationary period in a contract and would, therefore, apply to a probationary clause in a fixed-term contract. Sections 67(1) and (3) speak to a probationary contract and a probationary clause or period. It is, therefore, quite possible, as in the present case, that there is a probationary period in a fixed-term contract, which is longer than the statutory probationary contract. While it does not entitle the employee to the full rights of a confirmed or permanent employee, the purpose of the probationary period is to determine reciprocal suitability and enable ease of disengagement and, therefore, the shorter notice period and the exclusion of some employment rights that would otherwise be available to permanent employees. In effect, a probationary period ends upon confirmation of employment or non-confirmation. If confirmed, the employee enjoys the rights of a full-time employee, and if not, then the employee would be entitled to the benefits agreed upon in the contract or none if that were the agreed position.

[36] For emphasis, certain protection available to a full-time employee may not be available to an employee on probation primarily because this is a testing or trial stage. The employee has not yet been confirmed, hence the Employment Act limiting the scope and application of various sections of the Act to employees on probation, temporary or casual workers. This approach would align with a thesis that an employer, as an owner of capital, is entitled to check an employee's suitability before committing to a full term of

[13] (SC 165/1987) [1990] NGSC 49 (12 July 1990)

[14] **Employment Law for Business Students** 3rd Edition Pearson Longman at page 119

employment. Exiting such a contract does not require a reason under the ILO Convention 158.

[37] Returning to the matter before us, it would be our view that the Respondent employed the Appellant on a fixed-term contract of one year with a six-month probation period. This was not a probationary contract but a fixed-term contract with a probationary period or clause. To this extent, we would fault the Labour Officer for finding that the Appellant was serving a probationary contract. While we agree with the Labour Officer on the applicability of **Section 67 EA** to any contract with a probationary period, we hold the view that a contract with a probationary clause or period does not amount to a probationary contract. A fixed-term contract such as the one in the present case may have a probationary period to which **Section 67(2)** and **(4)EA** apply. It does not necessarily amount to a probationary contract but has a probationary period. This view would be consistent with the conclusion of Wamala J in the Kamanzi case, where His Lordship sums it up thus, "a probationary clause does not make it a probationary contract."

[38] Therefore, accounting for the rationale for and reason for probation, our view is Section 67EA would apply to any contract providing a probationary period. We would fault the Labour Officer for concluding that a probationary clause in a contract renders it a probationary contract. **Section 67EA** applies to any contract containing a probationary clause for a probationary period. Thus, under **Section 94(3) EA**, we would modify the decision of the Labour Officer by finding that the Appellant was serving a probationary period at the time of his termination and was not on a probationary contract.

[39] This would leave the Court with the question of termination. The letter read as follows:

"

28th October 2023

Mr. Ben Rhaiem Aimen
C/O Lake Victoria Granada Hotels,
P.O.Box 15,
Entebbe.

Dear Ben,

RE: TERMINATION OF PROBATION PERIOD

This is to inform you that your probation period is being terminated effective 28th October 2021. We have observed that your performance is unsatisfactory. As per the terms given in your contract letter, signed by you, the Company has a right to terminate your probation by giving you two weeks' notice.

You will ensure proper handover of Company property in your possession and an exit clearance form for this purpose can be obtained from the Human Resource Office.

By copy of this letter, the Accounts Office is requested to make computations and payments of all outstanding dues, less any indebtedness to the company. Dues owed as advances, if any, will be deducted. This payment will only be effected upon receipt of a copy of your exit clearance form duly filled.

You will receive an Air Ticket (Economy Class) to your home country, expenses for your COVID-19 PCR Tests will be provided by the Company.

We wish you success in your future endeavours.

Yours sincerely

The Company
LAKE VICTORIA GRANADA HOTELS....."

[40] Mr. Kizza invited us to consider the question of whether an employee under a probationary contract would be entitled to a hearing. Counsel for the Respondent suggested that the Appellant's reference to **Heydon's** case was inapplicable in the circumstances as the ordinary meaning of the words in **Section 67EA** was quite clear. It was submitted for the Respondent that **Section 66EA** did not apply to a dismissal in a probationary contract. Counsel for the Appellant relied on **Heydon's** case for the proposition that the mischief intended to be cured under **Section 66EA** was to entrench the right to a fair hearing in all circumstances of dismissal for poor performance or misconduct under the EA. It was the Appellant's view that the use of the expression *"Notwithstanding any other provision of this part"* in **Sections 66(1) and (2) EA** were qualifying phrases protecting the right to a hearing from exclusion. Counsel for the Appellant argued that the right to a fair hearing is a constitutional and non-derogable right. That the mischief intended to be cured by the enactment of the **Employment Act, 2006** was to entrench a right to a hearing in all cases of dismissal.

[41] In a very plain manner, **Section 67EA** states that **Section 66EA** does not apply where a dismissal ends a probationary contract. Put otherwise, an employee on probation may be dismissed without a hearing. For a fuller appreciation of these provisions, we think it useful to employ the full text:

> *"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 any 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 four weeks' net pay.

(5) A complaint alleging a failure on the part of the employer to comply with this section may be joined with any complaint alleging unjustified summary dismissal or unfair dismissal, and may be made to a Labour Officer by an employee who has been dismissed, and the Labour Officer shall have power to order payment of the sum mentioned in subsection (4) in addition to making an order in respect of any other award or decision reached in respect of the dismissal.

(6) A complaint under subsection (5) shall be made within three months after the date of dismissal."

[42] The rights enshrined under **Section 66EA** have been laid out well by Musoke. J(*as she then was*) in the oft-cited case of James Ebiju v Umeme Ltd.[15] The decision, in this case, can well be regarded as a golden standard of the right to a fair hearing in employment disputes. It is indubitably clear that the right to a fair hearing is mandatory. More importantly, **Section 66 (1) & (2)EA** opens with the expression **"Notwithstanding any other provision of the part".** It is this provision that Mr. Kizza refers to as qualifying phrases, which we think merits some elaboration.

[43] The qualifying clauses have also been called notwithstanding provisions. There is some illustrative jurisprudence in the United States of America where the Courts have held the notwithstanding provision to 'trump' other conflicting provisions. In **Re Gulf Oil/Cities Serv. Tender Offer Litig., 725 F. Supp. 712, 729-30 (S.D.N.Y. 1989),** a contract provision containing language *"notwithstanding any other provision"* was held to explicitly override contrary provisions. In **Veneto Hotel & Casino, S.A. v. German American Capital Corp., 2018 NY Slip Op. 02414,** it was held that a "notwithstanding" clause trumped a conflicting provision in the contract under review. In effect, a notwithstanding clause has an overriding and overarching effect on other provisions in an enactment or a part thereof. In the present case, it would mean that in terms of PART VII of the **Employment Act 2006**, which deals with DISCIPLINE AND TERMINATION, Section 66 would take precedence. It would be the most central provision of that part of the Act.

[15] H.C.C.S No.133 of 2012

[44] The difficulty we now face is that **Section 67EA** introduces an exception to the application of Section 66. It reads:

> *"67. Probationary contracts*
> *(1) Section 66 does not apply where a dismissal brings to an end a probationary contract."*

[45] Following from the principle in the Re Gulf Oil case, Section 67(1)EA reads contrary to the provisions of **Section 66(1)** and **(2) EA**, which mandate an employer to conduct a hearing before dismissing an employee on the grounds of misconduct and poor performance. In our view, the use of the expression notwithstanding, the framers of the Employment Act intended to give **Section 66EA** an overriding and overreaching effect on the entire PART VII of the Employment Act. In all matters of discipline and termination, a hearing for misconduct and performance is mandatory, notwithstanding what other provisions of PART VII, including **Section 67(1)EA**, might provide. It is this meaning that we derive from the law.

[46] And there is no gainsaying of this thesis in reading the constitutional provision on non-derogation of the right to a fair hearing. Under **Article 44(c)** of the Constitution of the Republic of Uganda, there is a prohibition of derogation from particular human rights and freedoms. **Article 44(c)** reads as follows:

> *"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms.....*
>
> *(c) the right to fair hearing....."*

We note that the Constitution, which is the supreme law of the land, employs the "notwithstanding" clause to entrench the inalienable, non-derogable, and sacrosanct right to a fair hearing. The Constitutional right to a fair hearing is unassailable and an integral part of our legal system.

[47] Returning to the termination letter, we observe that this was a dismissal during the probationary period. In the Respondent's pleadings and evidence, the Respondent states that it conducted an audit and found that the Appellant was not doing his job well. The Respondent observed that the Appellant's performance was not satisfactory. It would follow that this was a fault termination. It was a dismissal for poor performance, which would bring it under the ambit of Section 66EA. Any termination of the employment contract for an employee's fault requires the employer to follow procedure. That is, the dicta of the Supreme Court of Uganda in **Hilda Musinguzi v Stanbic Bank(U)Ltd SCCA 05/2016** is that the right of an employer to terminate an employee cannot be fettered provided the employer follows the procedure.

[48] Our view is that a probationary contract or a probationary period ends in one of several ways: the employer may confirm the employee, the employer may not confirm the employee, the probationary term may expire, or there being no extension, the employee will be presumed to be confirmed, fourthly, the employer or employee may give notice,

and finally, like in the present case, the employer may choose to dismiss the employee. The thesis presented by Mr. Kizza for the Appellant is that even an employee under probation would be entitled to a fair hearing, and we agree. Under **Section 66(1)** and **(2),** an employer seeking to dismiss an employee for misconduct or poor performance must give the employee a hearing. In the present case, the Respondent found the Appellant's performance unsatisfactory. It conducted an audit. By this, it means the Appellant was considered an underperformer. His future employability would be questioned if he had not been given an opportunity to defend himself. The right to a fair hearing here preserves the employee's rights to present his or her side of the equation, to answer the allegation of poor performance, to dispel any veneer of incompetence, and for the employer to prove his or her opinion of the employee's competence. Therefore, **Section 66(1)** and **(2)EA** would "trump" the restriction in **Section 67(1)EA.** Indeed, in the **Atuzarirwe** case, Musoke J. held that even a probationer has a right to a hearing. The Appellant was on a fixed-term contract; the procedure for dismissal for misconduct or poor performance requires a hearing under **Section 66 EA.** There was no hearing in respect of the Appellant's termination.

[49] We would find that the Labour Officer erred when he concluded that a probationary contract could be ended without recourse to procedures of a hearing under **Section 66 EA.** This was not a probationary contract but a fixed-term contract with a probationary period. In keeping with the dicta of this Court in **Nicholas Mugisha v Equity Bank Ltd**[16], the failure to hold a hearing renders the termination unlawful. In the present case, we would overturn the Labour Officer's finding that the termination was lawful and substitute the same with a finding that the Appellant was unlawfully terminated.

[50] Mr. Kizza also suggests that **Section 67(1)EA** is unconstitutional. He invited us to determine the constitutionality of **Section 67EA** as far as it delimits the right to a hearing. Counsel relied on the Kenyan case of **Monica Munira Kibuchi & Others v Mount Kenya University Petition No 94 of 2016,** which was considering **Section 42(1)** of the **Kenyan Employment Act.** Counsel contended that **Sections 41 and 42(1)** of the **Kenyan Employment Act** were similarly worded to **Sections 66** and **67EA.** The Employment and Labour Relations Court of Kenya first determined the question whether it had jurisdiction to determine a constitutional question. Relying on the case of **United States International University v The Attorney General & 2 others**[17] the Court found labour and employment rights to be part of the Bill of Rights and as such the ELRA or Industrial Court of Kenya had jurisdiction to hear and determine a constitutional petition. In this regard, Mr. Kizza makes an undeniably attractive argument.

[51] In **Kyamanywa Simon v Uganda**[18] it was observed every Court in Uganda is vested with jurisdiction to construe, apply and enforce provisions of the Constitution about the dispute before it. Adopting the approach in the **Re Gulf** case and construing **Section 67 (1)EA** in the manner advised in the Kyamanywa case, we would conclude that **Section 66 EA** entrenches the right to a fair hearing in every case where an employer seeks to dismiss an employee for misconduct or poor performance including an employee on probation.

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[16] LDR 281 of 2021
[17] [2012] eKLR
[18] S.C. Crim Appeal No. 16 of 199 Per Kanyeihamba JSC (*as he then was*) dissenting.

Under Article 40 of the Constitution, parliament is mandated to pass laws to ensure workers' economic rights are respected. Parliament enacted the Employment Act of 2006 by delimiting the right to a fair hearing in **Section 67(1)EA**. The right to fair hearing is sacrosanct and non-derogable. **Section 67(1)EA** erodes the right to a fair hearing where a dismissal ends a probationary contract. Reading the provisions of **Section 67(1)EA** as it is, denies a probationer the right to a hearing, and such a construction of **Section 67(1)EA** would not conform with the Constitution. This Court cannot, in good conscience, construe **Section 67(1) EA** in any form or manner that derogates a non-derogable constitutional right.

[52] In sum, for the reasons advanced above, we fault the Labour Officer for concluding that the Appellant was employed on a probationary contract by the Respondent at the time of his termination. The Appellant served a six-month probationary period in a one-year fixed-term contract. Under **Section 94(3)EA**, we would modify the Labour Officer's finding to the effect that the Appellant was serving a probationary period under a fixed-term contract. And because he was not given a hearing to defend what was regarded as unsatisfactory conduct, we would find that he was unlawfully dismissed. We would vacate the Labour Officer's finding that the Appellant was lawfully terminated.

[53] Therefore, ground two of the appeal succeeds with the necessary modifications to the Labour Officer's finding regarding the probationary period.

Grounds three to seven

[54] In our view, grounds three to seven of the appeal relate to remedies for unfair dismissal. Remedies flow from infringements of rights under the Employment Act and would not be independent of a defaulting employer's culpability. Having found, as we have, regarding ground two of the appeal substantially succeeding, we will now consider each of grounds three to seven of the appeal as far as they relate to remedies for unlawful dismissal.

[55] On ground 3 of the appeal, it was argued that the Appellant had been terminated for poor performance without a hearing and was entitled to four weeks net pay. The Respondent supported the Labour Officer's finding the Appellant was not entitled to compensation for lack of a fair hearing under **Section 67(1)EA**. Counsel cited the **Wangi** case(supra) in support of this contention and added on the authority of **Geogas SA v Tranno Gas Ltd(the Baleares) 1993 1 Lloyds Rep 215 at 228** that this ground was a matter of fact for which leave to appeal ought to have been sought under **Section 94(2)EA**. Given our finding regarding an unlawful dismissal during the probation period, we agree with Counsel for the Appellant that he is entitled to compensation in the sum of US$ 1500 as four weeks net pay under **Section 66(4)EA,** which we hereby award to the Appellant.

[56] On ground 4 of the appeal, the Labour Officer was faulted for not complying with Order 21 Rule 4 CPR by not making a finding on the prayer for compensatory and additional compensation. In the Appellant's view, the Labour Officer was required to determine whether the employer acted justly and equitably when dismissing the employee. It was submitted for the Respondent that the CPR did not apply to proceedings before a Labour Officer. The Appellant was fairly terminated, and on the authority of the Geogas

case(ibid), no leave was sought to argue this ground. We have observed that the CPR and Evidence Act Cap. 6 does not apply to the proceedings before a Labour Officer. In the matter before the Labour Officer, Counsel for the Appellant made a similar argument, contending on the authority of the Mugyenzi case that the CPA and CPR were not applicable. The idea that the Labour Officer would now be faulted for not complying with the CPR does not gain much purchase. We would not fault the Labour Officer for not making a finding for compensatory and additional compensation. He is not obliged to do so under the provisions of law relied upon by the Appellant. He had not found the termination unlawful to award any additional compensation. Similarly, while we have found the dismissal to be unlawful, **Section 78(2)EA** grants discretion to the Labour Officer to make orders for additional compensation. The province of the Court is to award general damages.[19] In the circumstances, we decline to make any order for additional compensation.

[57] On ground 5 of the appeal, the Labour Officer was faulted for holding that the Appellant had been paid for public holidays worked. It was the Appellant's case that the formula for the computation of pay for work on public holidays was double the rate for work on a day that is not a public holiday as provided under **Section 54(2) EA**. It was contended that the Appellant had worked 6 hours of extra time per day for six months and was therefore entitled to US$ 8,143. It was argued that it was erroneous for the Labour Officer to hold that the Appellant had not adduced evidence to prove that he had worked on weekends and that the Appellant was entitled to US$ 3,341 as compensation for work on weekends. The Respondent supported the findings of the Labour Officer that the Appellant was not entitled to payment for public holidays under **Section 54(2)EA,** and the Appellant was duly paid. Counsel for the Respondent argued that the Labour Officer rightly found that the Appellant was not entitled to payment for weekends[20] or annual leave, having worked for less than six months. On annual leave, it was argued that the Appellant adduced evidence of working more than 16 hours a day. Counsel cited **Ugafode Microfinance v Mark Kyoribona LDA No. 034 of 2019** for the proposition that the Appellant was entitled to accumulated leave not taken, totaling US$ 750.

[58] In our view, the short point is the computation of overtime payments, work on weekends, public holidays, and leave. The Respondent adduced the final dues settlement form, which detailed the Appellant's entitlements as follows:

(i)	Salary October 2021	$1500
(ii)	Salary November 2021	$ 493
(iii)	Lieu of notice	$ 690
(iv)	Public Holidays	$ 345
(v)	Pending off days	$ 690
(vi)	Annual leave days pending	$ 592

[19] See **Peter Waiswa Kityaba v African Epidemiology Network LDR 84 of 2016**

[20] We were referred to **Insight Management Ltd v Anguyo Ronald LDA No. 13 of 2020**

Public Holiday Pay

[59] Counsel cited **Section 54(2)EA** for the proposition that an employee who works on a public holiday is entitled to either a day off with full pay or double the rate payable for work on a day that is not a public holiday. The Appellant provisioned seven public holidays at the rate of US$ 345. This is US$ 49.2 per day. At a salary of US$ 1500 per month, the Appellant was earning US$ 48.3 per day. He would be entitled to US$677.4 for the seven public holidays at double the daily rate. Given that he received US$345, we would award him the sum of US$ 332.4 as the difference between what he was paid and what was due to him for public holidays.

Overtime and work on weekends

[60] It was the Appellant/s testimony that he worked 16 hours a day and weekends. Counsel suggested that this evidence was not controverted by submissions of attendance sheets by the Respondent. We do not think this to be very accurate. In the record of proceedings on page 6 ROP and page 16 of the ROA at line 2, it is recorded thus:

"C.R: Confirm your working hours were from 8 to 5.
CW1: Yes..."

In our view, under cross-examination, the Appellant conceded to working an eight-hour day shift, and this was not clarified in re-examination. Therefore, we cannot accept the assertion that he was working a sixteen-hour day to require revisiting the computation of overtime and work on weekends. We decline to set aside the Labour Officer's finding that the evidence was not adduced. In our view, the concession cements the idea that the Appellant was working a regular eight-hour shift.

Leave pay

[61] The Respondent computed and paid for 12 leave days. Under **Section 54(4) EA**, an employee who has worked for a minimum of six months and more than sixteen or more hours a week is entitled to leave. In the case before us, the Appellant was appointed on 10th May 2021 and was terminated on the 28th of October 2021. He worked until the 10th day of November 2021, which is exactly six months from the commencement date. This implies that he would be entitled to annual leave under **Section 54(4)**. Under **Section 54(1)(a)**, an employee is entitled to seven days' leave for every continuous four months of service. This would mean that the Appellant was entitled to 1.75 days per month, totaling 10.5 days over six months. Under **Section 27(2) EA**, parties to an employment contract are not precluded from terms more favourable than the Act. In other words, the Employment Act provides for irreducible minimums. At a rate of $48.3 per day, he would be entitled to US$ 580.6. In the circumstances of this case, we are not persuaded to interfere with the assessment and payment of US$ 592 as pending annual leave days.

Severance pay

[62] On ground 6 of the appeal, the Labour Office was faulted for misinterpreting the law and holding that the Appellant had not worked for six months and was not entitled to

severance pay. The Respondent supported the finding of the Labour Officer disentitling the Appellant from severance pay. The law on severance pay is settled. Under **Section 87EA**, severance pay is payable where an employee has served for six months or more and is unfairly dismissed, dies in service, or terminated due to physical incapacity, death or insolvency of the employer, or inability to pay wages. In the present case, the Appellant had served the Respondent for six months. We have found the circumstances of his dismissal to be unlawful and fall within the provisions of **Section 87 (a) EA.** He is, therefore, entitled to severance pay. We, thus, overturn the Labour Officer's finding and substitute it with an award of **US$ 750**. We derive this sum from the case of **Donna Kamuli v DFCU Bank Ltd**[21]

General Damages

[63] On ground 7 of the appeal and on the authority of **Francis Dominic Meru v Nakasero Hospital LDR 223 of 2019**, the Appellant faulted the Labour Officer for not referring the issue of general damages and interest to the Industrial Court. On the question of general damages, it was submitted that having been recruited from Tunisia; he sacrificed his life to work for the Respondent because of his unlawful dismissal; he was entitled to general damages in the sum of UGX 100,000,000/=. Counsel for the Respondent submitted that the Labour Officer rightly declined to refer the matter of damages to the Industrial Court because he had found the Appellant to have been lawfully terminated. Counsel distinguished the **Meru** and **Nazziwa** cases relied on by the Appellant.

[64] First, the position of the law is that the Labour Officer did not have jurisdiction to award general damages. Secondly, general damages are those damages such as the law will presume to be the direct natural consequence of the action complained of[22]. In **Stanbic Bank (U) Ltd v Constant Okou**[23] Madrama, JA (*as he then was*) held that general damages are based on the common law principle of *restituto in integrum*. Applying these principles to the case before us, having found that the Appellant was unlawfully dismissed and would have served the Respondent for a further six months at most, we award US$ 1500 as general damages.

Interest

[65] Counsel for the Appellant relied on Section 26(2)CPR for interest on the monetary awards. He argued that this Court has the discretion to award interest to cushion the Appellant from the inflationary nature of money. We were asked to award 21% per annum from the date of delivery of the award until payment in full. On the monetary awards herein, and to cushion the Appellant against inflation, we award the Appellant interest at 21% from the date of judgment until payment in full.

Costs

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[21] LDC 002/2015
[22] Stroms v Hutchinson [1950] A.C 515
[23] Civil Appeal No. 60 of 2020

[66] Regarding costs, we have ruled in the case of **Joseph Kalule v GIZ**[24] that whereas costs follow the event, in labour disputes, the award of costs is the exception rather than the rule. The exceptions include some form of misconduct by the unsuccessful party. We have found no such misconduct on the part of the Appellant, and there shall be no order as to costs.

Final decision

[67] As a result, after objectively considering the evidence before us, the appeal substantially succeeds. Exercising the power under **Section 94(3) EA**, we modify the Labour Officer's decision thus:

(i) We set aside the Labour Officer's finding that the Appellant was serving a probationary contract and declare that the Appellant was serving a probationary period under a fixed-term contract.

(ii) We declare that the Appellant was not given a fair hearing and was, therefore, unlawfully dismissed.

(iii) We would set aside the Labour Officer's order that the prayer for payment on public holidays fails and substitute it with an award of US$ 332.4, being the difference between what the Respondent paid and what was due to the Appellant.

(iv) We overturn the Labour Officer's finding that the Appellant was not entitled to severance pay and substitute it with an order for the Respondent to pay the Appellant US$ 750 as severance pay.

(v) We award the Appellant US$ 1500 as compensation for failure to grant a fair hearing.

(vi) We award the Appellant US$ 1500 in general damages.

(vii) The monetary awards above shall attract interest at the rate of 21% from the date of this award until payment in full.

(viii) There shall be no order as to costs.

Signed in Chambers at Kampala this 13th **day of November 2023**

Anthony Wabwire Musana,

[24] LDR No. 109/2020(Unreported)

Judge, Industrial Court

THE PANELISTS AGREE:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

13th November 2023

11.15 a.m.

Appearances

1. For the Appellant: Mr. Mark Kiiza
2. For the Respondent: Ms. Sheila Nabbale

Parties absent

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

Mr. Mark Kizza: Matter is for the award, and we are ready to receive it.

Ms. Nabbale: That is the position.

Court: Award delivered in open Court in the presence of Mr. Mark Kizza for the Appellant and Ms. Sheila Nabbale for the Respondent.

Anthony Wabwire Musana,
Judge, Industrial Court