THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT GULU

LABOUR DISPUTE REFERENCE NO. 014 OF 2021

(Arising from Kotido District Labour Dispute No. CB/KT 01/01/2021)

APORO GEORGE GOLDIE::CLAIMANT

VERSUS

MERCY CORPS UGANDA:::RESPONDENT

Before:

The Hon. Mr. Justice Anthony Wabwire Musana,

Panelists:

1. Hon. Jimmy Musimbi,
2. Hon. Robinah Kagoye &
3. Hon. Can Amos Lapenga.

Representation:

1. *The Claimant appeared pro se.*
2. *Mr. Alexander Kafero of M/s. Okecha Baranyanga & Co. Advocates for the Respondent.*

AWARD

Introduction

[1] From the 15th of October 2018 until the 25th of October 2020, when he was terminated for redundancy, the Claimant was employed as the Respondent's Apolou Programme Governance and Advocacy Team Leader. He appealed against the termination which the Respondent upheld. Aggrieved, the Claimant brought this action for unfair, malicious, wrongful, and unlawful termination, tortious interference with the formation of an employment contract with a prospective employer by way of negligent referral, violation of the right to a fair hearing, privacy, and the Whistleblower's Protection Act (*from now WPA*), discrimination, workplace bullying, retaliation, non-issuance of certificate of service in a form required by law and non-payment of terminal benefits.

[2] The Respondent opposed the claim, contending that the Claimant was neither dismissed nor terminated but that his contract was ended for justifiable reasons on the grounds of redundancy. It was suggested that following the COVID-19 Pandemic, the Respondent underwent a restructuring, and the Claimant was rendered redundant. He was notified and paid his terminal benefits. Alternatively, Counsel for the Respondent argued that the Claimant had been a poor performer and, as such, his termination was justified and lawful.

[3] By their joint scheduling memorandum dated 20th February 2022 and with the Court's approval under Order 15 r 3 of the Civil Procedure Rules S.I 71-1 *(from now CPR)*, the following issues were framed for determination;

(i) Whether the Respondent validly filed a memorandum in reply?
(ii) Whether the Claimant was unfairly and unlawfully dismissed?
(iii) Whether the Claimant's rights have been infringed on by the Respondent?
(iv) Whether the Claimant is entitled to the remedies sought.

The Proceedings and evidence of the parties.

[4] The Claimant called two witnesses, while the Respondent called one witness.

The Claimant's evidence.

[5] The Claimant (CW1) filed a lengthy testamentary disposition of 489 paragraphs. In it, he testified to having joined the Respondent on 15th October 2018 as Governance and Advocacy Team Leader on a one-year contract. On 25th November 2020, he received notification of redundancy because of a restructuring dictated by COVID-19. He felt that the reason for termination was non-existent, not real, or did not take place, and his termination was in retaliation for initiating a complaint against a senior member of the Respondent's staff and her accomplices. His termination was against the Respondent's Human Resources Policy on retaliation, notice, discrimination, harassment, bullying and Equal Opportunities Policies. He told this Court that during his employment, he suffered constant racial discrimination. His termination, denial of a certificate of service, pay statements, closure of his official email address, and failure to give him a copy of the investigation report were examples of this discrimination. He alleged that an investigation report into his complaint was shared with those against whom the complaints had been made. He was denied a right to appeal against the handling of the complaint. He also referred to the differential

treatment of Tania Culver Humphreys, who had made a similar bullying complaint. He testified that he was the only one terminated out of 200 staff members.

[6] He told us that following his termination, he had depended solely on his wife and faced embarrassment from the community. That this had hurt his feelings and caused him mental anguish. He had also been deprived of income to service a bank loan, which deprived him of the opportunity to increase the number of years of working experience. He said his three-day notice of termination, lack of notice of redundancy, and the Respondent's refusal to settle the matter before the Labour Officer were aggravating circumstances. He was also callously locked out of the digital office space, violating his right to work; his private email account was blocked, making it impossible to complete his handover and collect his final pay. He also testified that the Respondent delayed paying his repatriation allowance to Karamoja, and all his pleas to have this paid together with his final pay were ignored. He was asked to apply for the position that remained unfilled 17 months after his termination. His dismissal was in breach of the Respondent's Human Resource Policy.

[7] He also felt his immediate supervisor, Beatrice Okware, bullied him by way of verbal aggression, discounting his performance, sabotaging his work, shifting of goal posts, isolation, arbitrarily taking away responsibilities, ignoring his opinions, public humiliation, and witch-hunting. In November 2019, he complained to the Respondent's headquarters, which contracted OSACO Group to investigate the complaints, and the report was shelved. He testified that the investigator described this shelving as a shame, and he was given the silent treatment when he made a follow-up with the Respondent's Headquarters. This, together with a refusal to give him a copy of the report, caused him depression and his Doctors, Dr. Isaac Orec and Dr. Joel Kiryabwire, advised him that his ill-health, feelings of depression and mental distress were a result of and associated with workplace bullying and that he believed he was likely to remain on medication for the remainder of his natural life.

[8] He also testified that his rights as a whistleblower had been violated. Having made protected disclosures, the Respondent committed retaliatory acts, including his summary dismissal, retaliatory responses to his prospective employers, CARE International Uganda (*from now CARE)*, isolation from the PREP-making process, non-response to complaints about discriminatory

filling of vacancies and bullying, and failure to take action for retaliatory termination of employees.

[9] He was denied a fair hearing, was not given an investigation report arising from his complaint, was deprived of his right to an appeal and review of the unfair and unlawful termination, was ignored, and an external lawyer arbitrarily delegated to handle his appeal neglected or refused to do so. He claimed a repatriation allowance, a pension of UGX 13,029,668/=, payment in lieu of untaken leave of UGX 4,423,000/=, payment in lieu of notice of UGX 4,423,000/=, gratuity of UGX 9,767,457/=. He conceded that he was paid a lump sum of UGX 22,383,171/=, and this sum was fraudulently underpaid by UGX 9,259,954/=. He asked for back wages of UGX 44,230,000/=, consequential benefits of NSSF and gratuity of UGX 3,685,833/= and alleged that he was denied the pay statement and severance pay of UGX 9,767,457/= which was disguised as gratuity.

[10] He has also told us that he was entitled to exemplary and punitive damages for the highhanded, abusive, and malicious violation of his rights when he was denied a certificate of service, pressured into signing an agreement excluding the Respondent from liability and for blanket confidentiality, failure to pay terminal benefits within seven days, failure to provide a pay statement and failure to pay severance and repatriation allowance.

[11] Regarding tortious interference, he testified that his attempts at alternative employment were unsuccessful. The Respondent was vindictive and malicious when prospective employers made background checks. He got an open-ended contract with CARE and expected to work with CARE for 15 years. Still, because of the Respondent's malicious interference, CARE rescinded the job offer where he would earn UGX 77,034,685 per annum, hold the job for 15 years and earn UGX 924,416,220 over 12 years and UGX 92,441,622 as an NSSF contribution. He said he had not had any adverse dealings with his former employers. He had assured CARE officials of his reservations regarding the Respondent's unfavourable references. He also testified to Ms. Nabudere, Ms. Okware, and the Respondent's Country Director, who enticed him to remain at the Respondent and blocked his movement to CARE. CARE rescinded the job offer, which caused him a loss.

[12] He testified that the Respondent violated his right to privacy by maliciously and unlawfully disclosing private information to CARE. The Respondent asked prospective employers not to disclose the same to the Claimant, such as the

the Claimant from many technical and managerial activities, did not invite him to workshops, refused to delegate him, ignored approval of certain activities, maliciously transferred activities under the Claimant's docket and isolated the Claimant from certain projects. CW2 also testified that OSACO Group contacted him while investigating the bullying complaint. Because of his evidence, he was also affected by the restructuring together with Rebbeca Acheboi.

[16] He told this Court that the Claimant blind copied him in on emails following up his complaint. He testified of his knowledge of racial discrimination within the Respondent, and of the protection of one Elizabeth Robertson, who had sexually molested Lokuda Modesta and was wrongfully terminated. When he was terminated in July 2020, the Claimant's health had deteriorated due to bullying. The Respondent's officials did not believe that the Claimant was unwell, lived under extreme fear, and did not speak at meetings or attend team-building events. That Ms. Okware refused to approve the Claimant's sick leave.

[17] CW2 also testified that the Respondent paid gratuity and severance allowance to all its departing staff. The Respondent declined to pay the Claimant his rightful severance pay and only paid the fraudulently disguised gratuity.

[18] He also knew that the Claimant had interviewed with UNO, Oxfam, ActionAid, DGF, Saferworld and CARE because he was the Claimant's referee. He told us that the Claimant told him he failed because he suspected the Respondent's officials of giving malicious feedback to prospective employers. He also testified to having seen the offer from CARE and the rescinding of the offer on failure to pass background checks. He knew of the Respondent's wicked and criminal culture of often malicing its current and former employees' chances of getting alternative employment. He said Mr. Edward Simiyu's had threatened to publish errant employees' names in the annals of international development. He testified to Mr. Paul Kilama's wrongful termination and a subsequent suit under which the Respondent paid huge damages. He said he knew the Respondent's unfair labour practices in the cases of Otto Samuel, Sunday Betty, Oryem Galdin Ojok, Okello Jimmy Ayen, Olet Boniface, Albert Odorie and Ochola Johnson Dida and malice in their searches for alternative employment. It was CW2's evidence that the Claimant was entitled to all the reliefs claimed.

[19] In cross-examination, he confirmed that he had left the Respondent in November 2020 and that the events between July and November 2020 had been narrated to him. He confirmed that he was not the Claimant's supervisor. While the Claimant reported to him as head of office, Ms. Okware supervised the Claimant. He conceded that the Claimant complained about Ms. Okware verbally for six months and that he did not respond to the Claimant in writing. He also confirmed that his evidence was based on what the Claimant had told him.

[20] In re-examination, he confirmed the Claimant's complaints about bullying in 2018, 2019 and 2020. He also confirmed having been contacted by OSACO Group.

The Respondent's evidence.

[21] **Mr. Elijah Kisembo**, the Respondent's People and Culture/Human Resource Manager, filed a witness statement and corrected paragraph 2(x) to read December 2020 and March 2023, respectively. He testified that based on the information he found in the files he reviewed, there was an Apolou Program Review in September 2019. The organogram showed that the Respondent was highly fragmented and had hierarchical team structures and a duality of roles. The program review report recommended changes in strategy and proposed interventions that required significant reorganization of the team and roles. As such, the Claimant's position as Governance and Advocacy Team Leader ceased being on the Apolou organogram, and the position was rendered redundant. It was his evidence that at the end of December 2020, about 40 staff left and that by March 2023, another 50 employees would leave. COVID-19 made restructuring unavoidable following reduced funding, and the Claimant was aware of Section 8.6 of the Respondent's Staff Handbook 2016, which provided for restructuring. He concluded that the Claimant was not unlawfully dismissed as his position was restructured, he has not been replaced, and he was paid all his entitlements.

[22] Under cross-examination, he admitted that he joined the Respondent in January 2023 and was not working for the Respondent when the Claimant was terminated. He clarified that the Respondent followed a process informing the Claimant's redundancy and exit. On being shown CEX3, he stated it was not a poor performance rating and exceeded expectations. He clarified that the Claimant's exit was not for poor performance but a redundancy process. He was not sure why the advice of the Labour Officer at Kotido was not followed to issue the Claimant with a certificate of service. He

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clarified that based on the documents he reviewed, the restructuring process began in 2019 and was accelerated by COVID-19. The 1st phase was in 2019-2020, and there were different updates in December 2020, which left 44 staff redundant; February 2023 to shed 50 staff, and another was scheduled for June 2023. That there was a need to flatten the structure of the Respondent and the position he held be scrapped off. He also told us that he was unaware that the Country Director was supposed to meet the Claimant in person in the appeal process or that an investigation was supposed to be carried out. It was his evidence that the Respondent had been fair and paid the Claimant his full terminal benefits. That severance is not paid in all circumstances, and he was unaware that it was disguised as gratuity. He said he did not find any evidence of a complaint of bullying on the Claimant's file, and he was not privy to the Claimant seeking psycho-social support. He was also not privy to communication between the Respondent and CARE.

[23] In reexamination, RW1 clarified that the business case for restructuring was that the Apolou programme was not working and that one of the recommendations was to flatten the organisation. He suggested that the position held by the Claimant was deemed unwanted and that restructuring is an ongoing process driven by different forces and donor demands in the NGO world.

[24] At the close of the Respondent's case, the parties were invited to address the Court on the issues through written submissions.

Analysis and Decision of the Court.

Issue 1. Whether the Respondent's memorandum in reply was properly before the Court?

Claimant's submissions.

[25] The Claimant submitted that the Respondent had smuggled its reply onto the Court record and served it on the him after one year without complying with Rules 5(4) and 6(1) of the Labour Disputes (Arbitration and Settlement)(Industrial Court Procedure) Rules, 2012 ***(from now IC Rules)***. We were asked to strike out the reply.

Respondent's submissions.

[26] In reply, Mr. Kafero, appearing for the Respondent, made two arguments: first, that Rules 5(4) and 6(1)IC Rules did not specify the time for effecting service for as long as service was effected before hearing of the case.

Secondly, that service was ineffective under Order 5 Rule 7 CPR as it was not received by someone authorised by law. Counsel asked this Court to invoke Article 126(2)(e) of the 1995 Constitution to enable the Court to investigate the substance of the dispute without undue regard to technicalities. For this proposition, Counsel relied on **Ssenyonjo Dick v Delta Petroleum(U)Ltd**[1]

Rejoinder

[27] In rejoinder, the Claimant distinguished the Ssenyonjo case because in that case the Applicant sought an extension of time before filing his memorandum and provided sufficient reason for the delay.

Determination

[28] On late filing, the provisions of Rule 5(2)IC Rules require the Claimant to serve a copy of the memorandum of claim on the Respondent. Under Rule 5(3) IC Rules, the memorandum is accompanied by an affidavit of service. The purpose of the affidavit of service is to ensure and prove that the Respondent has been served with a copy of the memorandum of claim. There is no time limit within which the memorandum should be served. The Claimant filed an affidavit of service dated 19th January 2022 indicating that one Emmy Look Adiaka, the Acting District Implementation Team Leader of the Respondent, accepted service on 19th January 2022. The summons to file a memorandum in reply was issued on the 10th day of January 2022, requiring the Respondent to file its reply within seven days of service. Given that the Respondent was served on 19.01.2002, this would be consistent with Rule 5(4) IC Rules, which requires a Respondent to file a reply within seven days after receipt of the memorandum.

[29] The Respondent filed its memorandum in reply on the 2nd day of February 2022. This would be some 14 days after it was served and outside the statutory timeframe. Counsel for the Respondent's argument that there is no statutory timeframe within which service should be effected is correct, but that is not the essence of the Claimant's assertion. The Claimant, if we understand him correctly, contends that the memorandum in reply was filed outside the statutory time frame of seven days after service had been effected on it. That is correct. The Claimant makes a valid and appreciable point. Timelines set by statute are to be observed. If service was effected on the Respondent on the 19th day of January 2022, the Respondent had until

[1] Court of Appeal Civ. Appn No. 325 of 2017.

the 26th day of January 2022 to file a response. Indeed, in the case of **Dr. James Bunoti V AAR Healthcare Uganda Ltd & AAR Healthcare Holdings Ltd** [2] where the Respondents filed their memorandum in reply 15 days after service and without leave, this Court struck out the memorandum in reply.

[30] Ordinarily, we should strike out the Respondent's memorandum in reply. However, this matter proceeded to full trial. A scheduling conference was held, and evidence was provided before the preliminary point could be resolved. We think the Claimant has suffered no prejudice, as submitted by Mr. Kafero. Unlike the **Bunoti** case, the parties in this matter have presented their respective cases. The interests of justice would require that this Court considers the entire case holistically before arriving at a final decision. We are fortified in adopting that approach by the decision of Musota J.(as he then was) in **The Ramgarhia Sikh Society and 2 Others v The Ramgarhia Sikh Education Society Limited**,[3] where his Lordship, in considering a question of late filing of affidavits, agreed with the decision of Madrama J(as he then was) in **Stop and See (U) Ltd v Tropical Africa Bank**[4] for the dicta that in the interest of justice an affidavit in reply filed out of time could be admitted to allow Court to finally and effectively dispose of a matter. This legal position is best explained in **Hon. Jesca Ababiku v Eriyo Jesca Osuna**[5] where Mubiru J. was considering procedural irregularities resulting in delays in filing applications and pleadings and a resultant application for dismissal. His Lordship observed:

> *"I consider this to be a proper case in which the court should invoke the letter and spirit of Article 126 (2) (e) of The Constitution of the Republic of Uganda, 1995, such that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. In modern times, courts do not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts."*

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[2] LDMA 140 of 2022
[3] H.C.M.A No. 352 of 2015
[4] H.C.M.A no. 333 of 2010
[5] Consolidated H.C.M.A Nos. 004,0031 and 0037 of 2015

We agree with and adopt this dictum. The Industrial Court is statutorily required[6] to adopt a less formalistic approach to labour dispute resolution. This does not mean that the rules of procedure should be suspended but that some flexibility, in deserving cases, should be permitted. Considering that this matter went to full trial, we, therefore, in the interests of justice, validate the Respondent's memorandum in reply filed out of time to enable this Court to determine the claim on its merits.

Issue No. II Whether the Claimant was unfairly and unlawfully dismissed?

Submissions of the Claimant.

[31] The Claimant submitted that he was terminated in breach of **Sections 66, 68, 69(2)** and **73(1)(b), (2)(b)** and **(d) the Employment Act, 2006** (*from now "**EA**")* for a non-existent reason, without a hearing, was denied a certificate of service and his appeals were arbitrarily rejected.

Submissions of the Respondent.

[32] Mr. Kafeero argued that the Claimant's termination was justified and lawful because the redundancy was a business reorganization carried out in the interest of and for the efficiency of the Respondent. He suggested that the Claimant's job had been scrapped and the reasons had been explained to him. Counsel relied on **Adam Kafumbe Mukasa & 2 Others v Uganda Breweries Ltd**[7] for the definition of redundancy and **Mr. Trevor Hampson v Man Energy Solutions UK Ltd**[8] for the procedure for redundancy set by the UK Employment Tribunal. We will return to the principles in these cases in some detail because they, in our view, aid in resolving the issue.

[33] Counsel argued that the procedure in **Hampson** (*ibid*) had been followed when the Respondent consulted its employees, warned them of the impending redundancies and specifically advised the Claimant to apply for the new job of Governance Systems Officer. He dispelled the idea that the organogram (REX 6) was a work in progress, contending that Clause 8.6 of the Respondent's Human Resource Manual permitted retrenchment and suggested that REX7 represented research into restructuring the Respondent's Apolou program.

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[6] See Section 18 of LADASA that suspends the rules of evidence applicable before Civil Courts.

[7] LDR 191 of 2015

[8] Mr. Kafeero did not provide a citation. The full text of Judge Abigail Holt's decision can be found at https://www.gov.uk/employment-tribunal-decisions/mr-t-hampson-v-man-energy-solutions-uk-ltd-2415746-slash-2020 last accessed on 20.02.2020 at 9:17 EST.

Submissions in rejoinder

[34] In rejoinder, the Claimant argued that the Respondent's alleged restructuring did not follow the steps set out in Hampson as there was no assessment of his hard and soft skills before his abrupt termination.

Determination

[35] The Supreme Court of Uganda has laid a standing dictum for terminating the employment relationship. It is trite that the employer's right to terminate a contract of employment cannot be fettered if the employer follows the procedure. Put otherwise, the first proverbial Chinese step is to establish whether the employer followed the procedure. Further, the Industrial Court has held that for a termination to be lawful, it must be procedurally and substantively fair[9]. We will return to these twin concepts later in this award.

[36] First, it is essential to revisit the manner of the Claimant's termination. For this purpose, it is necessary to employ the full text of his termination letter, whose anatomy is as follows:

" MERCY CORPS

Employer
Mercy Corps Uganda
Plot 1085 Tank Hill By-Pass Kiwafu
Muyenga
Kampala, Uganda

Employee
George Goldie Aporo
Contact Number:

Date issued: November 24th, 2020

Dear George,

Re: Termination of Employment by Reason of Redundancy

With effect from 27th November 2020, your position as Governance and Advocacy Team Leader with Mercy Corps Uganda will be terminated by reason of redundancy. The redundancy is based on a recent Apolou programme strategy review over the recent COVID-19 pandemic effects on the programme arising in factors that have led Mercy Corps to experience significant difficulty in sustaining your position in its

[9] See Nicholas Mugisha v Equity Bank Uganda Ltd LDR 281 of 2021

current state, as it no longer fits within the programme structure. As a result, the organisation is compelled to redefine the position to Government Systems Team leader, a role that now requires a different set of skills from the previous role. As such the position will be advertised, for which you are free to apply.

Mercy corps will ensure that all rights enjoyed by employees under the current contract of service, the internal HR policies and the relevant labor laws are complied with.

Accordingly, the following Terminal Pay and Benefits have been provided pursuant to benefits in line with the Employee Terms and Conditions:

FINAL PACKAGE
1. *Final Salary for days worked in November 2020*
2. *Outstanding Leave Days Monetized*
3. *Payment in Lieu of Notice Period(1 month)*
4. *Severance Pay(1 Month Salary for each completed year of service)c*
5. *Pension Benefits*

Payment of your terminal pay and benefits are subject to applicable statutory deductions and will be effected upon receipt of your final timesheet, complete exit clearance form, full handover report with all Mercy Corps assets that are in your possession to your supervisor or designated authority.

Please acknowledge receipt of this letter and sign your acceptance of the terms of severance in the space provided below.

Yours Sincerely,

.....(Signed and Dated) MERCY
Joan Makayi *CORPS*
Human Resource Director *Uganda*
Programme

I hereby acknowledge receipt of the letter of termination by reason of redundancy and my acceptance of the terms of the severance package offer. By signing this letter, I confirm that I have no further claims against Mercy |Corps and that I will adhere to Mercy Corp's rules on Confidentiality.

.....

George Goldie Aporo

[37] The above letter spelt out the reason for the Claimant's termination. It was because the position of Governance and Advocacy Team Leader had been made redundant. Therefore, we disagree with the Claimant's assertion and submission that there was no reason for his termination. Conversely, there was. His position as Governance and Advocacy Specialist was scrapped. This reason was spelt out in the termination letter. It was because his position had become redundant.

[38] But what is redundancy? In the employment sphere, redundancy means a situation in which an employee is laid off from work because the employer no longer needs the employee.[10] There is also judicial concurrence that redundancy is an acceptable means of severing the employment contract. In **Zte(U) Ltd V Sseyiga Hermenegild and 6 Others**[11] the Industrial Court observed that it was a settled position of the Law that termination because of restructuring or reorganization is acceptable and is in conformity with the ILO Termination of Employment Convention No. 158 of 1992, which Uganda ratified and domesticated in the Employment Act, 2006. Further, in **Dr. Elizabeth Kiwalabye vs Mutesa 1 Royal University**[12] it was held that the employer reserves the right to determine the requirements of his or her business to improve its efficiency, and the Courts cannot fetter his or her discretion to increase or decrease the number and or quality of staff required for the business. The Court's only role is to ensure that the reorganization or restructuring is carried out according to the law or that the subject of the Court's inquiry is whether such termination for redundancy is fair and, therefore, lawful.

[39] **Section 81 EA** provides for the collective termination of ten or more employees for reasons of an economic, technological, structural, or similar

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[10] Black's Law Dictionary 11th Edn by Bryan Garner at page 1531
[11] Labour Dispute Appeal No. 24 of 2019
[12] Labour Dispute Claim No. 005 of 2017

nature. Termination for redundancy falls under this provision. **Section 81 (1)(a)EA** requires the employer to notify the Union representing the employees at least four weeks before the first of such terminations commenced. The law, therefore, provides for termination for redundancy with notice.

[40] In examining the lawfulness of such termination, this Court has held that a termination for circumstances under **Section 81EA** consists of procedural and substantive fairness. In **Okumu Godfrey & Ors v Shreeji Stationers Ltd**[13], we held that a question of procedural fairness relates to the termination process, while substantive fairness interrogates the reason for termination.

[41] Starting with procedural fairness, did the Respondent follow the procedure to effect termination because of redundancy? **Section 81EA** envisages the termination of at least ten employees and does not expressly provide for the termination of a single individual for redundancy. However, the Industrial Court has provided guidance. In **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha** [14] it was held that an employer would have the right to terminate less than ten employees or even one employee for the same reasons of economic, technological, structural, or similar nature for as long as the same conditions expounded in **Section 81 of EA** were complied with. The Court also held that a redundancy can never be a summary termination and cannot be done without a justifiable reason. The employer is expected to comply with the law by preparing employees for redundancy by giving them one month's notice. It is, therefore, lawful for an employer to terminate a single employee for redundancy; it is an acceptable reason for termination (**See Sure Telecom Uganda Limited v Brain Azemchap**[15]). So, the outstanding question is whether this Court should fetter the Respondent's right to terminate for redundancy.

[42] Termination by redundancy is not a summary termination and must abide by the procedure in **Section 81EA**. The first such requirement is issuing at least four weeks' notice. [16] In the matter before us, the Respondent issued the notice of termination on the 24th of November 2020. The termination was to take effect three days later, on the 27th of November 2020. This was insufficient notice against the standard set in **Section 81EA** and as applied in

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[13] LDR 138 of 2021 See also Kabanza David v Great Lakes U Ltd LDR 031 of 2019
[14] Labour Dispute Appeal No. 035 of 2018 as cited in Kabanza David v Great Lakes University LDR 031 of 2019
[15] LDA 005 of 2017
[16] Sure Telecom Ltd v Azemchap*(op cit)*

PACE (supra). Accordingly, we find that the Claimant's termination with three days' notice was procedurally defective.

[43] On substantive fairness, **Section 81EA** lists the possible reasons for termination. These are economic, technological, structural or of a similar nature. The extent of the Court's inquiry into whether the employer has been substantively fair is not well laid out in the EA. However, in **Okumu** (supra), we drew from Rule 23 (2) of the Tanzanian Code of Good Practice Rules, 2007(*from now the Code*), which is somewhat similar to **Section 81 EA**. In "Employment and Labour Law Relations in Tanzania"[17] economic, technological, and structural reasons for termination are described. In the present case, the redundancy would be categorized as structural based on a flattening of the Respondent, which led to the position of Governance and Advocacy Team Leader being rendered redundant. In their book, Rutinwa *et al.* observe;

> *"structural needs arise from a restructuring of the business as a result of a number of business-related causes such as the merger of business, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business"*

[44] From the above, the extent of our inquiry into whether the reason for termination was substantively fair would be how reasonable the decision was. For these purposes, we indicated a return to the **Hampson** case (supra), as cited by Mr. Kafero, for the Respondent. The Hampson case provides some valuable and persuasive jurisprudence on a mix of procedural and substantive fairness in redundancy terminations, and we propose to examine the case briefly. First, the facts. In that case, Mr. Hampson had been employed for about three years and was terminated for redundancy, which he thought was unfair. Judge Abigail Holt(*sitting alone)* laid out the guidance from the Employment Appeal Tribunal in **Williams & Others v Compare Maxam Limited**[18] on redundancy dismissal to be,

> *"In general terms, employers acting reasonably will seek to act by giving much warning as possible in impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the*

[17] Edited by B. Rutinwa, E.Kalula and T.Ackson Law Africa 2014 at page 128.
[18] [1982] IRLR 83

undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so."

[45] What emerges from this decision is that where the employer finds that it must sever an employment relation due to redundancy, there ought to be a consultative process. A consultative process promotes fair labour practices. The termination is not at the fault of the employee. The fairness of the decision to terminate a given employee calls for transparency in declaring a given position redundant. Fairness makes for justice in a case and not for the employee whose position has been declared redundant to feel victimized. It is all about fairness. Under **Section 81EA**, the employer must notify the labour union where the employees are unionized. The idea is to protect the rights of employees declared redundant. Article 13 of the ILO Termination of Employment Convention No. 158 of 1992 provides that:

"...when the employer contemplates termination for reasons of an economic, technological, structural, or similar nature, the employer shall:

a) provide the workers' representatives concerned in good time, with relevant information, including reasons for the termination contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment...."

[46] Comparative jurisprudence provides some further insight and guidance on the point. The Employment and Labour Relations Court of Kenya has been much more expansive on the steps an employer must take in declaring a redundancy before termination for redundancy. In **Veronica Mkiwa**

Mwalwala v Faiza Bhanji t/a Villa Kalista Enterprises [2020] [19] Rika J found that there must be a notice of intention to declare a redundancy, followed by consultation involving either the union or the unrepresented employees and then a notice of termination after the consultation. The Court held that the notice of intention to declare a redundancy was different from the notice of termination. Further Kenyan cases hold judicial concurrence on notice and consultation before declaration of redundancy.[20]

[47] In the matter before us, it was common to both parties that in September 2019, the Respondent reviewed the structure of its Apolou programme. The Respondent produced REX1, which a review team wrote regarding the staffing structure. The report made some recommendations, including flattening the organization's structure and merging and creating cross-cultural teams. The report suggested an action plan be developed and discussed, job descriptions examined, and adjustments made when an employee resigned. The report also contained the Apolou organogram, which did not indicate the position held by the Claimant, that is the Governance and Advocacy Team Leader position had or would be declared redundant.

[48] The Claimant's employment history was that the Respondent employed him on 15th October 2018. It is not in dispute that he was a high performer. On the 1st day of November 2019, his one-year contract was extended for a second year. It is also not in dispute that a restructuring exercise commenced in January 2020 as per exhibit CEX5. By an email dated 4th June 2020, Faheem Khan, Chief of Party, informed the Respondent's employees of the Apolou's evolved structure. The structure was admitted in evidence as CEXH6, effective August to September 2020. In the Governance Team Organogram, the Claimant was listed as the Team Leader responsible for six governance officers and reporting to the Governance Manager. In an email to a long list of the Respondent's staff, which email admitted as CEXH 7, Ms. Elizabeth Robertson, Acting Chief of Party, communicated the outcome of the restructuring process. She made three prominent announcements: the appointment of Beatrice Okware as Apolou Implementation Director, Sagar Pokharel's adjustment from Resilience Director to Technical Director and Raphael Longoli's assumption of the role of MCG Manager. There was no mention of the merger of or transitioning of the roles of Apolou Governance

[19] ELRC Cause No. 843 of 2017[2020]eKLR See also dicta of Onyango J in **Wilson Waweru Ndungu v Ingredion Holding LLC-Kenya Branch ELRC Petition 90 of 2020 [2021]eKLR** where the Learned Judge found a redundancy unlawful for want of notice.
[20] Per Onyango J in **Amalgamated Union of Kenya Metal Workers v Kenya Coach Industries[2021] eKLR**

and Advocacy Team Leader to Government Systems Team Leader or of any intention to declare the position redundant.

[49] Then, in a letter dated August 12, 2020, Ms. Robertson and Ms. Esther Musoke, the Respondent's Acting Human Resource Director, advised the Claimant of the restructuring outcome, by which the Claimant had been retained as Governance and Advocacy Team Leader. The Claimant acknowledged receipt of this letter and undertook to abide by the Respondent's terms and conditions. The Claimant signed this letter on September 14, 2020.

[50] We note that the Respondent commenced a restructuring exercise in 2019. During this restructuring exercise, there appears to have been an initial effort in consultation, and a report was issued (REX1). Indeed, Mr. Khan communicated the evolved structure to the staff in June 2020. At this point, this was a legally acceptable and correct approach that was well within the law. It considered the need to inform the employees in keeping with the ILO Termination Convention No. 158 principles and as laid out in the various dicta in the cases cited above. However, the intermediate communication to the Claimant (including REXH 7) did not indicate that the Respondent intended to declare the Claimant's position redundant. The email also welcomed Henry, Josephine, Authur and Abijah, Arno Bratz and Boniface Labeja in various positions within the Respondent. When the restructuring exercise was concluded, the Claimant was retained in the same position in August 2020. What, then, prompted a declaration of redundancy for the Governance and Advocacy Team Leader position on the 24th of November 2020?

[51] Mr. Kafeero suggested that the organogram retaining the Claimant's name and position was a work in progress and could not be a basis for his retention. We do not accept this argument because CEXH 6, dated 12th August 2020, retained the Claimant. At no point during the restructuring or before the issuance of the termination letter did the Respondent reach out to the Claimant to discuss his intended redundancy. Instead, the Claimant was terminated for redundancy without notice.

[52] In REX7, the Respondent suggested, "*As a result, the organisation is compelled to redefine the position to Government Systems Team leader, a role that now requires a different set of skills from the previous role*". The basis of what compelled the Respondent to redefine the position was not given. It is not that this Court has assumed to determine the reason for the

redundancy declaration but that there was no evidence laid before this Court to justify termination by redundancy.

[53] **Section 68EA** requires an employer to justify the reason for termination. As previously observed, there were documents supporting the overall restructuring of the Apolou programme, but only a three-day termination notice was issued to the Claimant, declaring the position redundant. The letter also encouraged the Claimant to apply for this new job, but there was no evidence of a discussion on alternative deployment. If the Respondent genuinely believed that the Claimant had the requisite skill set to apply for the position of Government Systems Team Leader, it could have, while restructuring the position of Governance and Advocacy Officer, enlisted the views of the Claimant on his suitability for the new position in good time. It would have given the Claimant notice. Further, the Respondent could have offered the Claimant the Government Systems Team Leader position instead of terminating him summarily and encouraging him to apply after termination.

[54] This would conform to the **Hampson** approach. In terms of meaningful consultation, we think there was none. The Respondent did not issue a report on the merging of the role of the position of Governance and Advocacy officer into the new role of Government Systems Team Leader. Additionally, no evidence of the job description of the new position and the key result areas was presented.

[55] For the preceding reasons, we would find that the reason for termination was not substantively fair.

[56] As an alternative argument, Mr. Kafeero also suggested that Clause 8.6 of the Respondent's Human Resource Manual provided for retrenchment and redundancy and that the Claimant had signed up for this. The Respondent National Team Handbook September 2016 was admitted as CEXH11. Clause 8.6 provided as follows:

> ***"8.6 Retrenchment/Termination of a Program, In Part or in Full***
> *Retrenchment is defined as non-prejudicial termination of employment initiated by Mercy Corps for reasons including but not limited to:*

1. *Restructuring of a project, office, or activity, resulting in the elimination of a position or reduction in the work force.*
2. *The ending of a project or activity resulting in the elimination of a position.*
3. *The suspension or reduction of donor funding.*
4. *The withdrawal of MercyCorps from Uganda for any reason.*

In the event of termination as a result of retrenchment, Mercy Corps Uganda is obligated to provide a minimum of thirty(30) days' written notice. In lieu of such notice, Mercy Corps Uganda, as allowed by law, may pay wages for the period of notice.

Mercy Corps Uganda will pay severance according to the policy as outlined in Section 9.8 and will pay the owing leave balance (as applicable)"

[57] The policy itself envisages principles of fair labour practices and is in tandem with the dicta in **Musinguzi**. It provides first that retrenchment is non-prejudicial termination. It is not a termination for the fault of the employee. The policy also provides for notice of retrenchment in parity with **Section 81(2)EA** viz at least 30 days' notice. We have already found that the Respondent did not give the Claimant the requisite statutory notice, nor did it respect its rules in the National Handbook. It gave the Claimant only 3 days' notice, effectively summarily terminating him. Therefore, even by reference to its own internal rules of procedure, the Respondent was procedurally unfair. It did not give the Claimant at least 30 days' notice. Therefore, Mr. Kafeero's alternative argument that the Claimant's termination was by the Respondent's Human Resource Manual is neither credible nor persuasive. This argument does not pass both the procedural and substantive thresholds.

[58] In the final analysis, having communicated the outcome of the exercise and then retained the Claimant, it is not plausible that the Respondent was motivated to terminate the Claimant because his position was rendered redundant. There was a longstanding complaint of bullying and discrimination. At least from the Claimant's stead, it stood as unfairly attended to and unresolved, and the Claimant continued to press for its

conclusion. In **Andrew Muholo Teyie v Nation Media Group Ltd**[21] Abuodha J found that the failure to comply with the statutory requirement of written notice, giving credence to the Claimant's allegation that his separation from employment may have been a result of the discomfort over some of the stories he was following as an investigative reporter.

[59] If the Respondent found that the Claimant's office had been rendered redundant, the Respondent would have kept to its documentary tradition for this proposition to be believable. It communicated the commencement of restructuring, the progress of restructuring, and the outcome of the restructuring. By the Hampson case and standard, the Respondent departed from the rules on declaration of redundancy and did not give good reasons to do so. The declaration of redundancy of the Claimant on the 24th of November 2020, which was the termination letter, was not in keeping with the Respondent's tradition of making decisions known, very well in advance.

[60] In these circumstances and for the reasons above, the Claimant would be entitled to a declaration that his termination was procedurally and substantively unfair, and we hold so. Issue number two is answered in the affirmative.

Issue III: Whether the Claimant's rights have been infringed on by the Respondent?

Submissions of the Claimant.

[61] The Claimant submitted that the Respondent did not specifically challenge his claims for wrongful dismissal, workplace bullying, discrimination, violation of whistleblowers protection rights, tortious/wrongful interference with contract of service, negligent referral, violation of the right to privacy, fraud and various violations of the EA and the Respondents policies. We were invited to invoke Order 6 Rule 30(1) CPR to consider these admitted and enter judgment in favour of the Claimant.

Submissions of the Respondent.

[62] Mr. Kafeero preferred the argument, on the authority of **Engineer John Eric Mugyenzi v Uganda Electricity Generation Company Limited**[22] that the

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[21] [2019] 1eKLR

[22] C.A.C.A No. 167 of 2018

Industrial Court did not have jurisdiction to handle and/or determine all the claims in tort raised by the Claimant.

Determination.

[63] Jurisdiction is a matter of law, a creature of statute. It cannot be assumed even with the parties' consent. Proceedings made by a Court lacking competent jurisdiction are illegal and amount to a nullity.[23]

[64] In terms of the jurisdiction of the Industrial Court to consider issues of tort, we think Mr. Kafeero's extract of the decision in the Mugyenzi case was limited. The case at the Court of Appeal was partly concerned with jurisdiction over claims and remedies prescribed under Section 93EA. Section 93EA provides for the jurisdiction of a Labour Officer over infringements of any rights under the EA. In the fullness of his judgment on the jurisdiction of this Court, Kakuru J.A(as he then was) observed.

> *" We also find it disturbing for litigants to be subjected to uncertainty as to which forum to file an action in.....The Industrial Court should use its jurisdiction to adjudicate on issues of fact or law under Section 8(1)(b) and 8(2) of the Labour Disputes(Arbitration and Settlement) Act to handle all disputes such as that referred to it by the Labour Officer in this appeal. The claim of the appellant which included a claim for general, special, and punitive damages comes under any other law and could be adjudicated upon by the Industrial Court."*

[65] Therefore, while Mr. Kafero.preferred to suggest that the judgment limited the jurisdiction of the Industrial Court, the Court of Appeal found the expression **any other law** in Section 8(1)(b) LADASA to expand this Court's jurisdiction to include claims for general, special, and punitive damages which are known to arise from any other law including the law of tort. Following this dictum, in **Mutono Laban v Kampala International University**[24] this Court observed that the legislature enacted a restriction on the jurisdiction of the Labour Officer but left it open for the Industrial Court to entertain matters ancillary to the employment relationship or arising therefrom including tortious matters. Indeed, in **Kyaka Fred & Others V Attorney General**[25] it was

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[23] The term jurisdiction is defined in **Owners of Motor Vessel Lillian "s" v Caltex Oil Kenya Limited [1989] KLR 1** as cited in the case of **Ozuu Brothers vs Ayikoru Milka H.C.C.R 006 of 2016**

[24] Labour Dispute Reference No.335 of 2017

[25] Labour Dispute Reference No. 128 of 2016

held that the Industrial Court is a specialized Court dealing with matters concerning employees and employers regarding the employment relationship between them. And in **Joseph Matovu and 4 Others v Stanbic Bank (U) Ltd**[26] the Industrial Court considered a claim of defamation arising from defamatory statements in the letters of dismissal and the allegation of publication of reasons for dismissal in the Uganda Banking Council register. From these dicta, this Court has jurisdiction to hear and entertain matters of tort arising out of the employment relationship. These matters are under the broad umbrella of *"any other law"*. We are well minded that it has been observed that Courts must guard jealously and not dispense too lightly[27] with their jurisdiction. It is an observation with which we abide.

[66] To put a fine point on jurisdiction and to illustrate the point, specific provisions of the EA require the Industrial Court to eliminate discrimination. **Section 6(1)** and **(2) EA** bestows on the Industrial Court the duty and responsibility to eliminate any discrimination in employment. Where the statute requires this Court to attend a given duty, it cannot be said, as Mr. Kafeero now suggests, that the Court has no jurisdiction to consider questions of discrimination. That argument begs the question of where disputes of discrimination and other tortious claims arising out of the employment relationship should be consigned. To this Court's collective mind, this is an already resolved question. The Industrial Court exercises jurisdiction over matters of discrimination in the workplace and claims to apportion of liability in tort or contract arising out of or from the employment relationship. Therefore, the Court is not assuming jurisdiction.

[67] We also think that the legislature has since the enactment of the LADASA in 2006, clarified the jurisdiction of the Industrial Court. Under Section 8(2a)(d) of the Labour Disputes(Arbitration and Settlement) (Amendment) Act, 2021, it is enacted thus:

> *"(2a) In the performance of its functions, the Industrial Court shall have the powers of the High Court, and in particular shall have powers-*
> *(d) to make orders as to costs and other reliefs as the Industrial Court may deem fit, including an order for reinstatement of an employee subject to such conditions as the court may impose"*

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[26] Labour Dispute Claim No. 159 of 2016
[27] Per Mulenga JSC in Habre International Co Ltd vs Kassam and Others [1999] 1 EA 125 cited with approval in the Ozuu case(opcit)

[68] In our view, this provision imbues the Industrial Court with powers and character of the High Court in exercising its functions. The provision is expressive of the Mugyenzi decision and a move to improve the administration of justice. It is to administer justice effectively and to avoid a multiplicity of proceedings where a claimant in a labour dispute would otherwise be required to file a disjointed dispute in one or more courts claiming relief for the labour dispute before the Industrial Court and having to seek relief on other claims ancillary, arising from or associated with the employment relationship and labour dispute in another Court. An approach favouring multiple filings increases the risk of conflicting, contradictory, and dichotomous findings and decisions. This proposition is anchored by the Supreme Court of Uganda in **Mohan Musisi Kiwanuka v Asha Chand** [28] where Mulenga J.S.C (as he then was) most poignantly observed;

> *"It is a cardinal principle in our judicial procedure, that courts must, as much as possible, avoid multiplicity of suits."*

which observation is reechoed in **Asaba Aisha and Another v Kizza Stephen**[29] where Wagona J. concludes, in an application for a stay of proceedings,

> *"There is a possibility that the courts will end up making conflicting decisions over the same subject matter that features in both courts."*

Conflicting decisions create considerable possibilities of uncertainty and affect consistency and uniformity. Therefore, we consider that the Industrial Court retains jurisdiction to determine varied questions arising in tort and under any other law connected to or arising from the employment relationship between the Claimant and Respondent, as we have in this award.

[69] Returning to the matter before us, the Claimant submitted that since the Respondent did not challenge his claims for wrongful dismissal, workplace bullying, discrimination, violation of whistleblowers protection rights, tortious/wrongful interference with contract of service, negligent referral, violation of the right to privacy, fraud, and various breaches of the EA, we should enter judgment in his favour by invoking Order 6 Rule 30 CPR. The

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[28] S.C.C.A No. 14 of 2002

[29] HCMA 060 of 2023 The High Court of Uganda holden at Fort Portal was considering an application for stay of proceedings where there was a suit for trespass to land and another for breach of a sale agreement all in relation to the same piece of land.

order provides for striking out of pleadings where the pleadings do not disclose a reasonable cause of action or answer or if the pleadings are frivolous or vexatious.

[70] He did not apply to strike out the memorandum of reply and we are not inclined to do so at this stage of the proceedings. We will consider whether the Claimant's rights were infringed upon individually and collectively, where it is more efficient to dispose of them collectively.

Wrongful dismissal

[71] The Claimant suggested that wrongful dismissal is distinct from unlawful termination and that he was wrongfully dismissed by dismissing him ten months before the end of his contract and for reasons that lacked a factual basis. This distinction between wrongful dismissal and unlawful dismissal was addressed in **Richard Ndemerweki v MTN(U)LTD**[30], where the Industrial Court held that:

> *" The question is whether a prayer for wrongful dismissal is different from a prayer for unlawful dismissal and whether therefore the remedies in each are different? The Black's Law dictionary defines these terms as follows:*
>
> - ***Wrongful:*** *as "characterized by unfairness or injustice, contrary to the law,*
> - ***Unlawful:*** *"not authorized by the law, illegal; criminally punishable.*
>
> *From these definitions it is clear that there is no difference between unlawful and wrongful, both mean "contrary to the law". The claimant claimed for a declaration inter alia that the dismissal was wrongful and in our opinion this prayer neither contradicts his pleadings nor the issue framed under the joint scheduling memorandum as stated above."*

[72] On appeal[31], the Respondent formulated the ground that the Industrial Court had erred in that holding that wrongful dismissal is the same as unlawful dismissal but abandoned it, leaving the matter unattended and still mired in uncertainty.

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[30] LDA 101 of 2014

[31] C.A.C.A No. 291 of 2016 MTN(U) LTD v Richard Ndemirweki at page 12

[73] In legal history, an action for wrongful dismissal was obtained as a common law cause of action. It is not expressly enacted into the Employment Act, 2006. It is about a breach of the contractual rights under the employment contract. However, it is understood that statutes supersede common law. Therefore, the Employment Act typically supplants common law. The long title of the Employment Act 2006 is **"An Act to revise and consolidate the laws governing individual employment relationships, and to provide for other connected matters".** In the codification of the employment law, the EA now provides for unfair and unlawful termination or dismissal. These are statutory actions under **Sections 65, 66, 68, 69,70** and **71EA.** The Act also provides for the criteria for unfair termination under **Section 73EA** and remedies under **Section 77EA**. In each of these instances, the remedy for infringement of rights under the Act is a form of compensation. We also note that many of the elements of a claim under wrongful dismissal are now codified. In **David Massa v National Housing and Construction Corporation**[32] the Plaintiff was found to have been wrongfully summarily dismissed because it had not been established that he had committed any offence. Wrongful dismissal also consisted of failure to give notice, now codified under **Section 58EA.**

[74] Under Section 14(2)(b) (i) of the Judicature Act(Cap. 13), the jurisdiction of the High Court is exercised subject to any written law and insofar as the written law does not extend or apply, in conformity with the common law and the doctrines of equity. Therefore, in our view, it is still possible for an employee to found his or her action on a breach of the contract of employment *(wrongful dismissal)* under and with the varied claims for infringement of rights under the EA. That would have to be in a case before the Industrial Court, as the Labour Officer's jurisdiction is limited to infringements under the Act[33].

[75] Having found that we have jurisdiction, our disposal of the claimant's claims is under the distinct heads of claim below.

Fraud

[76] Under this head of the claim, the Claimant submitted that under cross-examination, RW1 admitted that the claimant's entitlements included payment in lieu of notice, last month's salary, untaken leave days monetized,

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[32] H.C.C.S No. 274 of 2001

[33] See Ozuu Brothers v Ayikoru Milka(supra)

pension, gratuity, repatriation allowance, and severance allowance. The claimant argued that he was paid only UGX 22,383,171 and not UGX 51,386,582, and the Respondent's fraud was in declining to give the Claimant a pay statement.

Determination

[77] Fraud is a conclusion of law. In **Shaban Mukasa and another v Lamba Enterprises and another**[34] Honourable Lady Justice Florence Nakachwa holds that allegations of fraud are of a serious nature and must be specifically pleaded and strictly proven on a balance higher than that of probabilities. In **Frederick Zaabwe v Orient Bank Ltd & Others**[35] it was defined as;

> *"an intentional perversion of the truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging to him to surrender a legal right. A false representation of a matter of fact whether by words or conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury."*

[78] According to the Claimant, the particulars of fraud were set out in his claim paragraph73 above. The standard of proof of fraud is higher than the balance of probabilities. Fraud must be strictly proven.[36] In the matter before us, it was suggested that RW1 admitted the claimant's entitlements as payment in lieu of notice, last month's salary, untaken leave days monetized, pension, gratuity, repatriation allowance and severance allowance. However, there was a pay statement REX6 adduced in evidence, which contained a breakdown of the Claimant's entitlement. No evidence was led to show which specific truth as to the Claimant's terminal benefits was perverted and by whom REX6 detailed the total amount of UGX 22,383,171/=, which the Claimant admitted he received under cross-examination. This amount was detailed to be untaken leave of 15 days, NSSF on untaken leave, payment for one day, PAYE, pension, severance accrued, NSSF on severance and payment in lieu of notice. Therefore, we are unpersuaded that the Claimant has proven fraud and decline to so find.

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[34] High Court Civil Suit 287 of 2021
[35] SCCA No. 4 of 2006
[36] See Patel v Makanji (1957) EA 314 as cited Mukiibi H.C "The Law of Evidence in Uganda" page 55.

Workplace bullying and discrimination

[79] Regarding these complaints, the Claimant's evidence was that he was bullied throughout the two years of his employment. That there was verbal aggression, unwarranted and unfair discounting of his performance, persistent sabotage, isolation, public humiliation, and witch-hunting that had caused him health challenges and for which he sought general, special, aggravated, and punitive damages. He cited the case of **Naidu v Group 4 Securitas Pty Ltd and Anor [2006] NSWSC 144,** where the Supreme Court of New South Wales was considering submissions and assessing damages against a contractor and its employer for psychiatric illness caused by intentional intimidation and humiliation by an employee of a contractor in support of his claim for damages. The law report annexed by the Claimant was not the principal judgment laying out the Adams J's considerations in concluding that both the employer and contractor were liable in damages.

[80] Regarding discrimination, the Claimant alleged racial discrimination entrenched within the Respondent's policies, the failure to give a certificate of service, dismissal on the grounds of restructuring, failure to give him a pay statement, disablement of his official email, failure to give him a copy of the investigation report as opposed to the treatment of other employees. He cited particularly the treatment of Tania Culver Humphrey as having been different. The Claimant relied on **Ms. Anne Giwa-Amu v Department for Work and Pensions Case No. 1600465/2017,** where the Employment Tribunal granted several remedies under the Equality Act 2010 in damages for discrimination.

Determination

[81] The International Labour Organisation under the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) defines discrimination in employment as

> *"Any distinction, exclusion or preference made based on race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."*

[82] Under Article 21 of the Constitution of the Republic of Uganda 1995, all persons are equal before and under the law in all spheres of political, economic, social, and cultural life and shall not be discriminated against on grounds of sex, race, colour and ethnic origin inter alia. Discriminate means

to give different treatment to different persons attributable mainly to their respective descriptions. Under **Section 6(3)EA**, discrimination in employment is unlawful. It includes any distinction, exclusion or preference made based on race, colour, sex, religion, political opinion, national extraction, social origin, HIV status or disability. In **Hassan Lwabayi Mudiba and Another v Attorney General**[37] the Constitutional Court cited the case of **Caroline Turyatemba and Others vs Attorney General and Others**[38] where it was held:

> - *"To discriminate for the purpose of Article 21 is to give different treatment to different persons attributable only or mainly to their respective description by sex, race, colour, ethnic origin, tribe, creed or birth, religion, social or economic standing, political opinion or disability".*

In the case of **Mariam Akiror v International Food Policy Research Institute**[39] we also cited a passage from the **Caroline Turyatemba** (supra) where the Constitutional Court held that the prohibition against discriminatory conduct is based upon the universal principle of equality before the law. Humanity as a family is characterized by the attribute of oneness in dignity and worthiness as human beings. Therefore, there ought not to be one group of human beings entitled to privileged treatment regarding the enjoyment of basic rights and freedoms over others because of perceived superiority. Likewise, no group of human beings should be taken as inferior and not entitled and treated with hostility regarding the enjoyment of the fullness of fundamental rights and freedoms.

[83] What, then, is the threshold for proof of discrimination? In **Mudiba**(supra), Kasule JCC (as he then was) observed that the petitioner never addressed the constitutional court on whether the alleged discriminative salary payments in the Uganda Government institutions were based on any of the attributes as set out in Article 21 of the Constitution of the Republic of Uganda. Therefore, a Claimant seeking to prove discrimination must demonstrate unequal treatment based on an attribute under Article 21 of the Constitution and **Section 6 (3)EA.** The attributes are race, sex, colour, religion, political opinion, national extraction, social origin, HIV status or disability. In her Lordship's seminal paper on "**Discrimination At The Workplace:**

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[37] Constitutional Petition No. 25 of 2012 Per Kasule JCC
[38] Constitutional Petition No. 15 of 2006
[39] Labour Dispute Reference No. 235 of 2019

Understanding, Addressing, And Overcoming Challenges"[40] the Honourable Lady Justice Linda Lillian Tumusiime Mugisha observes that the Court inquiry is concerned with the impact on the complainant and not the intention and authority of the person who is said to be engaging in discriminatory conduct. Her Lordship cited **Moore vs British Columbia (Education)**[41] where the Canadian Supreme Court held that in discrimination case, a complainant must demonstrate:

(a) that s/he has a protected characteristic;
(b) that s/he has experienced an adverse impact regarding employment; and
(c) that the protected characteristic was a factor in the adverse impact.

This approach was repeated by the Constitutional Court of South Africa in **Mbana v Shepstone and Wylie**[42] where the Court described an unfair discrimination inquiry to consist of three steps:

(i) The first step is to determine whether there is a differentiation.
(ii) To establish whether the differentiation amounts to discrimination and
(iii) Establish whether the discrimination is unfair.

[84] These dicta are persuasive in establishing an approach in determining discriminatory conduct on the part of an employer. What we gather from the above authorities is that the Court's inquiry for discrimination would establish the protected characteristic or attribute or differentiation and then determine if there has been unequal treatment based on the protected attribute in the employment relationship. In terms of **Section 6(3)EA,** discrimination is unlawful if the distinction, exclusion, or preference is made on any of the protected characteristics in the course of employment. A Claimant would have to prove that he or she was not treated equally because of a protected or attribute characteristic and that he or she experienced adverse effects. A Claimant would also have to show that his or her protected characteristic was a factor in the treatment that he or she received.

[85] In the case before us, the Claimant impleaded various particulars of discrimination. He also led evidence of discrimination including the multiple

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[40] Cited in a paper presented by Lady Justice Linda L. Tumusiime at the Commonwealth Magistrates and Judges Association in Cardiff, Wales September 2023.
[41] [2012] 3 SCR 360
[42] 2015(6) BCLR 693

complaints he had filed. He also demonstrated attempts to follow up with the Respondent's headquarters. The Claimant points to the unequal treatment given to Tania Culver Humphrey's complaint, which resulted in the forceful resignation of the Respondent's Global Chief Executive Officer, Neal Guyer. At the same time, in his case, the perpetrators were left scot-free. He suggested that his treatment in the restructuring process amounted to discrimination. He pointed us to August 2020, where following restructuring in the Respondent, Sagar Pharel moved from Resilience Director to Technical Director, Beatrice Okware moved from Acting Deputy Chief of Party to Implementation Director and Davis Sentongo and Godfrey Kolkoi were given alternative jobs when their old positions were abolished. For the Claimant, when his position was abolished, he was terminated and encouraged to apply for a new position after his termination.

[86] His case was that this action was retaliatory and against the Respondent's anti-discrimination and anti-retaliatory policies, which protect any team member from any retaliatory action where the team member has, in good faith, reported incidents of discrimination or misconduct. The Claimant reported the case of bullying and discrimination as early as November 2019, and the Respondent is reported to have investigated the matter between April 2020 and June 2020. An investigation report was sent to the Respondent's global headquarters in June 2020. It was never shared with the Claimant despite his repeated requests and escalation to the Respondent's Global Vice President and Interim Chief People Officer, who responded by email on 21st October 2020. This email is essential. It read:

> *" Dear George,*
>
> *Thank you for your patience.*
>
> *I want to affirm that as a result of the findings of this investigation, conducted by OSACO as a neutral third-party investigator, we are taking appropriate corrective action and we have clearly communicated the outcome of the investigation to you and the subjects of complaint.....*
> *.....The investigation outcome has already been communicated to you from both Jennifer Cabrera and Sophia Sanchez is final. As such, this matter remains closed."*

Following this email of the 21st of October 2020, was a declaration of redundancy one month later.

[87] We have already found that declaration to be unlawful. Still, the narrower question would be whether the declaration of redundancy one month after the complaints had been declared closed was motivated by any of the attributes in Article 21 of the Constitution and **Section 6 (3)EA**, particularly the Claimant's race. While the Respondent did not challenge or refute the allegation of bullying and discrimination, the Claimant did not adduce evidence to place his unequal treatment within the ambit of a protected attribute. He did not show that his redundancy was based on his race or sex, colour or creed, political opinion, national extraction, or social origin. He suggested unequal treatment with Ms. Humphrey but did not demonstrate how the Respondent's unequal treatment was motivated by the Claimant's race. In the persuasive South African case of **Louw v Golden Arrow Bus Services (Pty) Ltd**[43] Landman J. held that discrimination on a particular ground means that the ground is the reason for the disparate treatment complained of. This means that as the Claimant alleges racial discrimination, he had the *onus probandi* to prove that his complaints of unequal treatment were motivated by race or his race. The Claimant did not show that it is possible to aggregate the complaints of discrimination, bullying, and other violations of his employment rights with the declaration of redundancy on the grounds of race or other protected attributes.

[88] On the material before us, we cannot conclude that any of the Claimant's employment rights violations, including the impugned declaration of redundancy, were motivated by the Claimant's race or any other protected characteristic. In other words, we are not satisfied that the Claimant was racially or otherwise discriminated against. It is possible that the Respondent or its officers declared a redundancy of the Governance and Advocacy Team Leader position out of some reason other than redundancy, which we have declared both procedurally and substantively unfair. Still, it has not been shown to our satisfaction that the redundancy and other employee rights violations were due to his race or other protected attributes or characteristics. For this reason, we cannot find for the Claimant discrimination or that the Claimant had been discriminated against.

[43] (2000) 21 ILJ 188(LC)

[89] On workplace bullying, it was the Claimant's evidence that the Respondent's Global Office agreed that it was taking corrective action. This was contained in an email from Jessica Carl dated 21st October 2020, which was admitted as CEXH 22. By this email, Ms. Carl acknowledged that the Claimant might have disagreements with the outcome of the investigation but that the Respondent was taking corrective action and that in emphasising confidentiality, the subjects of the complaints and their managers were aware of the corrective actions. In our view, what was sought to be corrected could only be the basis of the Claimant's complaints. The Respondent did not challenge the Claimant's evidence. On the balance of probabilities, we are satisfied that the Claimant was not treated fairly, but we cannot conclude that this amounted to discrimination. The Claimant did not show the Court that he was mistreated because of the protected characteristics under Article 21 of the Constitution and **Section 6EA**. The Claimant did not show that his mistreatment was premised on his distinction, be it sex, colour or race. Ms. Humphrey, whose case the Claimant leaned heavily on, was alleged to have experienced sexual abuse in the 1970s and 1980s at the hands of her father, Ellsworth Culver. The Respondent investigated the allegations but did not find any evidence of intentional wrongdoing or of any effort to cover up Ms. Humphrey's abuse or Mercy Corp's earlier investigation. The report made several recommendations for improvement.

[90] It was the Claimant's case that the Respondent had denied him the right to appeal or apply for a review of a similar complaint and had not kept the investigation report a secret as had been the approach in his case. He suggested that this was an act of racial discrimination. The question is whether he was denied an appeal or a copy of the report because of race. We think not because the evidence does not point first to connivance between Mercy Corps Uganda and its parent Organisation to discriminate against the Respondent on the grounds of race. Secondly, the Claimant did not prove, on the balance of probabilities, that he was denied the report because of his race or other distinctions. We agree that the Claimant may have been subjected to unequal treatment, but we are not satisfied that it was due to his distinction on race.

Denial of a fair hearing.

[91] Regarding the denial of a fair hearing, the Claimant made two assertions, the first related to handling his grievances and the second relating to his appeal against the termination. The failure by the Co-Chair of the Respondent's Global Board of Directors was said to be a violation of the right to a fair

hearing. Step 3 of Clause 4.18 of the Respondent's handbook provided for the right of appeal to the Regional Program Director or Director of Human Resources at the Global Headquarters in Portland. The Claimant's evidence was that he denied a copy of the investigation report, which was a denial of a right to a fair hearing. His position was declared redundant three weeks after the last of his communication on the unfairness of the process relating to his complaints.

[92] The second aspect of the denial of a fair hearing is that the Claimant lodged an appeal by email on the 25th of November 2020. His grounds included the short notice to leave the Respondent, the matter relating to his complaint on bullying and discrimination, the declaration of redundancy, unlawful constructive dismissal and the letting down of whistleblowers. He asked that the Respondent pay him a repatriation allowance. He also suggested that the Respondent buy out his contract. His appeal to the Country Director was trivialized and later handed to the Respondent's external Counsel, who ignored the appeal. His official and other email addresses were blocked on the 25 of November 2020.

Determination

[93] The law relating to fair hearing is well-settled. The standard is set in the case of Ebiju **James v Umeme Ltd**[44] which is roundly regarded as a gold standard in employment matters. In that case, Musoke J(as she then was) held:

> *" On the right to be heard, it is now trite that the defendant would have complied if the following was done.*
>
> *(i) Notice of Allegations against the plaintiff was served on him, and sufficient time allowed for the plaintiff to prepare a defence.*
>
> *(ii) The notice should set out clearly what the allegations against the plaintiff and his rights at the hearing where such rights would include the right to respond to the allegations against him orally and or in writing, the right to be accompanied to the hearing and the right to*

[44] H.C.C.S No. 0133 of 2012

cross-examine the defendant's witness or call witnesses of his own.

(iii) The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the defendant."

[94] A fair hearing under Section 66EA relates to internal hearings and disciplinary processes for actions of misconduct or poor performance as a first instance. It does not relate to the internal appeals procedure[45]. Thus, this aspect of the Claimant's complaint would not be tenable.

[95] However, the circumstances of the Claimant's case are about an unlawful termination for redundancy. In **Stephen Edite v Berkeley Energy Uganda Ltd**[46] where the Industrial Court recently considered a termination on grounds of incompatibility, Lady Justice Linda Lillian Tumusime Mugisha held to the effect, that once a termination is for a reason, it carries with it the requirement for a fair hearing and justification.

[96] We have already found that the Respondent's declaration of redundancy was unlawful. In the present case, the Claimant was summarily terminated for redundancy. He was not consulted or prepared, and the appeal processes suffered a stillbirth. It was his evidence that the Respondent's management blocked him, as did external Counsel retained to consider his case. The Respondent did not allow him to be heard on his objections to the termination by declaration of redundancy. The Respondent did not refute this assertion. In these circumstances, we agree with the Claimant. He was denied a fair hearing in the process leading to termination and would be entitled to a declaration to that effect.

Violation of whistleblowers protection rights.

[97] Regarding the violation of whistleblowers' rights, it was the Claimant's case that he made 15 different protected disclosures related to bullying and discrimination by Beatrice Okware, for which he faced retaliation. He particularised the violation to be the non-responsiveness of the Respondent's officials and inaction, for which he suggested that he was entitled to a fine payable to him of UGX 36,000,000.

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[45] See E. Byakika v National Social Security Fund C.A.C.A No.0193 of 2017
[46] LDR No. 55 of 2020(Unreported)

Determination

[98] Under Section 2 of the Whistleblowers Protection Act, 2010 *(from now WPA)*a

> *"disclosure" means any declaration of information made by a whistleblower with regard to the conduct of one or more persons where the whistleblower has reason to believe that the information given shows or tends to show one or more of the following—*
>
> *(a) that a criminal offence or other unlawful act has been committed, is being committed or is likely to be committed;*
>
> *(b) that a miscarriage of justice has occurred, is occurring or is likely to occur;*
>
> *(c) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;*
>
> *(d) that any matter referred to in paragraphs (a) to (c) has been, is being or is likely to be deliberately concealed.*

The Claimant's disclosures related to his complaints against bullying, discrimination, and kindred violations of his rights as an employee. He argued that these are protected disclosures.

[99] The question for this Court to determine is whether these complaints amount to protected disclosures within the meaning of the WPA. The long title of the WPA reads;

> *An Act to provide for the procedures by which individuals in both the private and public sector may in the public interest disclose information that relates to irregular, illegal or corrupt practices; to provide for the protection against victimisation of persons who make disclosures; and to provide for related matters.*

[100] Under Section 1 WPA, a protected disclosure means a disclosure made by an employee to an employer. Section 2 WPA refers to disclosures, categorizing them in terms of impropriety or criminal activity. It appears to us from the long title that the WPA was enacted to encourage whistleblowing in an

environment of possible corrupt and illegal practices in organisations. Whistleblowing, therefore, consists of two broad elements, the first of which is disclosure, followed by the whistleblower's protection. The WPA and other whistle-blow legislation appear to have been fashioned along the lines of quotations attributed to Edmund Burke and John Stuart Mills on good men not standing by to let evil go unnoticed.[47]

[101] The first step before a Claimant can seek protection under Section 9(1) WPA is to establish if his disclosures qualify within the meaning of Section 2 WPA, which we cited in full in paragraph 91 above. The section lists criminal offences or other unlawful acts, occurrence of a miscarriage of justice, failure to comply with any legal obligation or deliberate concealment of any of these matters. It appears to us that the protected disclosures are in matters of public interest. Indeed, Nshimye J. appreciated the vital role of whistleblowers in the fight against corruption. [48] In the United Kingdom, The Public Interest Disclosure Act of 1998 (as amended) provides for protected disclosures in the public interest. It reads much like Section 2WPA with the addition of endangerment of health and safety and damage to the environment. A similar statutory approach obtains in Ireland under the Protected Disclosures Act, 2014. In South Africa, Section 1 of the Protected Disclosures Act follows the wording in the United Kingdom and Ireland Acts and adds unfair discrimination. These statutory approaches suggest that the protected disclosures do not relate to what might be categorised as employee grievances. We think this to be the case in the WPA. Under Section 1 WPA, "protected disclosure" means a disclosure made to an authorised officer, an employer, or a nominated disclosure officer.

[102] In the matter before us, the Claimant lodged his complaint on the 23rd day of November 2019. His letter of complaint was admitted as CEXH No. 13. The complaint was against the Governance Manager, Ms. Beatrice Okware. He testified to having made 15 protected disclosures. He expressed fear of retaliation in his letter, emphasising that he had been restrained from disclosing. His stated mistreatment included allegations of bullying, the particulars of which included discounting of his work performance, micro-management of staff, withholding of information, insults, and intimidation, being kept out of the loop, sabotage, isolation, humiliation, destabilization and removal from responsibility, undue pressure, shifting of goalposts.

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[47] Per Synman Ag.J in **David Smyth v Angorand Securites Ltd Case No: JS 751/18.** The Labour Court of South Africa was considering protected disclosures by an employee in respect of unlawful activities of a company listed on the Johannesburg Stock Exchange.

[48] Per Nshimye J. in **Twesigye Richard v Rubaare Town Council and Another** H.C.M.A No. 323 of 2023

Regarding discrimination, he listed several particulars that had been spelt out earlier in this award.

[103] We think that the Claimant's complaints were grievances in the workplace and not within the ambit of WPA in order for the Claimant to seek protection from victimisation under Section 9(2)(a)(i)(vii)WPA.

[104] We have found that his redundancy was unlawful. On the balance of probabilities, we are not satisfied that he was made redundant for making a protected disclosure under clause 4.2.2.2 of the Handbook which provided for formal action for dealing with unacceptable behaviour. The Claimant's complaint was investigated, and corrective action was said to be taken. We do not think that his complaints were matters of public interest to require protection under the WPA.

Tortious/wrongful interference with a contract of service and negligent referral and violation of the right to privacy.

[105] Under the heads of claim for tortious and wrongful interference/negligent referral, the Claimant's chief complaint was that the Respondent had interfered with his prospective employment with CARE Un Women and NDP. His evidence contained an email dated 21st January 2022 from Emily Babirye, Human Resource Officer at CARE, informing him that he had been offered an Advocacy Specialist position with CARE. It set out his terms of employment with a monthly remuneration of UGX 5,925,745/= plus allowances. By email dated 29th January 2020, Ms. Babirye indicated that CARE had rescinded the job offer after a background check. By email dated 5th February 2020, the Claimant wrote to the Respondent indicating that he had received transparent feedback from CARE that the reason for rescinding the job offer was misconduct on his part.

Determination

[106] The law on negligent referral or tortious interference in employment disputes appears not to have been readily legislated and litigated upon in our jurisdiction. Recourse must be had to persuasive jurisprudence. In **Kevin Hinks v Sense Network Ltd** [49] Mrs. Justice Lambert of the High Court, Queens Bench Division, considered a claim in tort and contract for a misleading reference where a reference letter submitted on behalf of the claimant

[49] [2018] EWHC 533(QB)

contained findings that the claimant had misunderstood and not followed procedures correctly. It also included a conclusion that following his rehabilitation, the claimant had knowingly and deliberately circumvented the agreed process. The Respondent argued that providing complete and accurate information concerning the person's fitness and propriety was required. Mrs. Justice Lambert observed that the Respondent owed the Claimant a duty of care to exercise reasonable skill and care in providing a true, accurate and fair reference. Her Lordship added that the standard of care should be calibrated by reference to the seriousness of the effects of a potential breach. Citing **Spring v Guardian Assurance PLC**[50] the Court restated the duty to be that reasonable skill and care should be exercised by the employer in ensuring the accuracy of facts which either (1) are communicated to the recipient of the reference from which he may form an adverse opinion of the employee or (2) are the basis of an adverse opinion expressed by the employer himself about the employee.

[107] Within the East African Community, the Employment and Labour Relations Court of Kenya has in **Bernard EN Gachuri v Jamii Bora Limited**[51] provided some very persuasive guidance on employee references. In that case, the Claimant resigned from employment with the Respondent after getting a new job. The Respondent refused to accept the resignation and wrote to the prospective employer advising that the Claimant was suspended and being investigated for credit valuation irregularities. Wasilwa L.J found that despite the admission that the Claimant had resigned, the desire to punish an employee who has resigned (and therefore ceased to be an employee) and the act of writing to the prospective employer was irresponsible and malicious.

[108] From these cases, it is decided that the standard of proof for tortious interference or negligent referrals, as the Claimant puts it, is a duty of care to exercise a reasonable standard of care to ensure that the reference is accurate, true, and fair. An employer's duty is very much fashioned on the neighbor principle[52].

[109] In the matter before us, beyond the Claimant's email to the Respondent's Director of Human Resources on the 5th of February 2020, in which he suggested that the Respondent had accused him of professional misconduct

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[50] 1995 2 A.C 296

[51] [2020] eKLR

[52] In **Donoghue v Stevenson(1932) A.C 562**, the House of Lords enunciated *"the neighbour principle"*, which holds that a person owes a duty of care to those closely and directly affected by their actions.

to CARE, there was no documentary or other proof that CARE rescinded the offer of employment to the Claimant on account of a malicious reference by the Respondent. We did not benefit from reviewing any allegedly malicious and negligent referral. The Claimant attached the email from CARE. Ms. Babirye, in her email dated 29th January 2020, indicated that the Claimant had failed the background check and that CARE's background check was not limited to the references provided. Still, it was entitled to go beyond in a bid to maintain its core values and principles.

[110] In our view, absent of the alleged malicious reference, the Claimant does not establish any direct evidence of tortious interference or negligent referral as he would have this Court believe. In effect, the Court would still ask what and where this reference is against which the Court should measure for accuracy, fairness, and truth. It was not provided and, therefore, cannot be ascertained. This would apply to the Claimant's allegations against the Respondent concerning his applications to UNDP, UNWOMEN, National Planning Authority and other entities. The Claimant persuaded himself that the Respondent was responsible for negligent referrals but did not put the evidence of negligence before us. We were left evidentially loose and are therefore unable to find for the Claimant on this front.

[111] In respect of the violation of the right to privacy under the Data Protection and Privacy Act, 2010 (from now DPPA), his chief complaint was that under Section 35(1) DPPA, the Respondent had replied to CARE's background check without his prior, informed, specific and unambiguous consent.

[112] Under Section 35(1)DPPA, unlawfully obtaining, disclosing, or procuring the disclosure to another person of personal data held or processed by a data collector, data controller, or data processor is a criminal offence. Under subsection (2), a person who contravenes the section commits an offence and is liable on conviction to a fine not exceeding two hundred fifty currency points or imprisonment or both.

[113] Section 35(1) provides for a criminal offence regarding a violation of the DPPA. Under Article 120(3)(b) of the 1995 Constitution, the Office of the Director of Public Prosecutions is to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial. What follows from these two provisions is that the claim for violating the Claimant's right to privacy, couched as it is, is wrongly before this Court.

Violation of the Employment Act, 2006.

[114] Under this head of the claim, the Claimant contended that the Respondent had violated the EA by denying him a repatriation allowance and concealing his terminal benefits breakdown. He suggested that this offended **Sections 39,43(6), 50, 61,75(h)** and **80 EA. Section 39 EA** provides for payment of repatriation allowance where an employee is recruited at a place which is more than one hundred kilometres from his or her home and his or her contract expires, is terminated because of illness or accident, on termination by agreement or on termination by order of the Labour Officer or the Industrial Court. The Employment Contract CEX1 executed between the Claimant and Respondent indicates the Claimant's address as Kampala, Uganda. Under Clause 1.4, it was indicated that the Claimant would be deployed in Kotido. He made the case to return to Kampala at a distance of 553 kilometres. We agree with the Claimant that he was recruited more than 100 kilometres from home.

[115] The Claimant led evidence demonstrating that he was entitled to repatriation allowance under Clause 8.8 of the National Team Handbook. This Clause provides for repatriation upon expiration of the period of service, termination of the employment contract because of the employee's incapacity and in the event of death of the employee. None of these circumstances obtained in the Claimants case.

[116] And we have found his termination by redundancy to be unlawful. We also established that he was recruited from more than 100 Kilometers from his home. We, therefore, find that he is entitled to repatriation. We shall return to the quantum in our resolution of remedies.

[117] Concerning the failure to issue a pay statement in accordance **with Section 50EA**, we note that the Respondent adduced payment instructions, which were admitted as REX6. At the end of the payment instruction, there was a detailed breakdown of the total amount of UGX 22,383,171/=, which the Claimant admitted he received under cross-examination. This amount was detailed to untaken leave of 15 days, NSSF on untaken leave, payment for one day, PAYE, pension, severance accrued, NSSF on severance and payment in lieu of notice. We are, therefore, unable to accept the Claimant's proposition that the Respondent was in breach of Section 50EA. A payment statement was duly produced.

[118] Regarding a breach of Section 61EA to provide a certificate of service, the Respondent produced no such certificate of service in Court. A certificate of service, when requested, is required to be provided. It was the Claimant's evidence that he asked for a certificate of service by email dated 12th December 2020 admitted CEXH 28A. The Respondent blocked his email. From the evidence on record, we are satisfied that the Claimant is entitled to a certificate of service. Accordingly, we order the Respondent to issue the same within 21 days of the date of this award.

[119] Regarding a violation of **Section 75 (h)EA**, the Claimant appears to suggest that his dismissal was unfair because he initiated a complaint against his employer. In our view, our finding that the declaration of redundancy was unlawful does not warrant a further interrogation of the Claimant's termination or dismissal. We declared the termination unlawful earlier in this award.

[120] Regarding a violation of **Section 80EA**, which provides for the settlement of termination cases, having found the termination unlawful, we do not consider it necessary to visit this complaint.

Violation of the Respondent's own policies.

[121] Under this head, the Claimant suggested that the Respondent's Officials had violated the Respondent's policies, which warranted disciplinary action against them. In our view, this assertion does not have a legal basis or foundation. It is established that it is not the role of the Industrial Court to supervise the internal disciplinary or grievance process between the employer and its employee but to ensure that the disciplinary process is undertaken by the proper procedure and under the Employment Act. [53] We respectfully decline to descend into the arena of the Respondent's internal disciplinary and decisional processes. It is entirely upon the Respondent to consider whether it should find that its officers violated its own policies or whether it should take any action.

Conclusion

[122] For the above reasons, we must conclude that the Respondent's declaration of the Claimant's redundancy was unlawful, and that the Claimant was unlawfully terminated. We disagree that the Claimant was treated unequally regarding the investigation into his complaints of workplace bullying,

[53] **Grace Tibihikira Makoko v Standard Chartered Bank Ltd LDR 315 of 2015**. See also **Akeny Robert v Uganda Communications Commission LDC 023 of 2015**

discrimination, and other violations of his rights as an employee. We also do not conclude that the Respondent is responsible for negligent referrals, tortious interference with the formation of an employment contract, violated the Claimant's whistleblower rights, violated the Claimant's privacy rights, and violated its own policies.

Issue IV. Whether the Claimant is entitled to any of the remedies sought?

[123] Mr. Kafero suggested that the Claimant was not entitled to any remedies as his termination was lawful. Having found the termination unlawful, the Claimant is entitled to remedies. As for remedies for heads of claims for which we have found no foundation, the remedies sought shall be denied.

Statutory Compensation.

[124] Specific statutory remedies under the Employment Act of 2006 accrue at a declaration of unlawful termination. Under **Section 66(4)**, where an employee is denied a fair hearing, he or she shall be entitled to four weeks' net pay in compensation. The Claimant was earning UGX4,043,742/= per month at the time of his termination. Having found that he was denied a fair hearing, we award this sum.

[125] The Claimant sought additional compensation of twenty-four months' salary under **Section 78 (3) EA.** This Court has ruled that awards under Section 78EA are a composite of general damages. They would only be awardable by the Labour Officer. No reason to depart from this position has been advanced. We decline to award the same.

[126] Under **Section 87(a)EA**, an unfairly dismissed employee is entitled to a severance allowance. Having found that the claimant was unfairly terminated, he is entitled to severance pay. We adopt the position of **Donna Kamuli v DFCU Bank Ltd, which states**[54] that a Claimant's calculation of severance shall be at the rate of his monthly pay for each year worked. The Claimant was employed from 15th October 2018 to 25th October 2020, two years, and ten days. According to CEXH4, he was earning UGX 4,043,742/= per month. We declare that the Claimant would be entitled to severance pay. We also note that according to REX6, the Claimant was paid UGX 8,550,411/=, and he acknowledged receipt. Therefore, the Claimant has been paid his severance pay for this award. We disallow the claim for a fine under **Sections 92(1)** and **92(2)EA** because the accrual of severance pay results from this

[54] See **DFCU Bank Ltd vs Donna Kamuli** C.A.C.A No 121 of 2016.

Court's declaration of unlawful termination. The imposition of such a fine would only follow a failure to pay the severance pay so awarded. We decline to grant this award.

[127] Similarly, the Claimant was paid a sum of UGX 3,833,305/= in lieu of notice. This is consistent with **Section 58(1)(b) EA** in that an employee who has worked for more than twelve weeks but less than five years is entitled to one month's notice. Accordingly, we only consider that the claimant is entitled to a top-up of **UGX 250,437**/= to meet his gross monthly salary unless it has been withheld by the Respondent for some other lawful reason.

[128] On repatriation, the Claimant contended he was recruited in Kampala to work in Kotido. This is clear for CEXH1. He was contending for UGX 10,000 per kilometre, making a total of UGX 5,530,000/= In **Kabagambe Rogers v Postbank Uganda Ltd**[55] where the Claimant's home district was found to be Mubende District, this Court awarded UGX 3,000,000 in repatriation. The sum of **UGX 5,530,000/=** is fair, and the Claimant is so awarded.

General Damages

[129] The Claimant was seeking UGX 45,000,000 in general damages for unlawful dismissal. He was summoned to the Police for failure to provide for his family because of financial distress, having lost his source of income. He has suffered stress, depends on his wife and the goodwill of his friends, is taunted in his community, has failed to pay back his loan, and is having difficulty getting alternative employment.

[130] 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 of[56]. The Court of Appeal [57] held that general damages are based on the common law principle of *restituto in integrum*. Appropriate general damages should be assessed on the prospects of the employee getting alternative employment or employability, how the services were terminated, and the inconvenience and uncertainty of future employment prospects. In the case of **Donna Kamuli v DFCU** [58] the Industrial Court considered the earnings of the Claimant, age, position of responsibility, and contract duration to

[55] LDR 107 of 2020
[56] **Stroms v Hutchinson [1950]A.C 515**
[57] **Stanbic Bank (U) Ltd v Constant Okou Court of Appeal Civil Appeal No. 60 of 2020**
[58] LDC No. 002 of 2015

determine the damages awardable. In **John Okumu v Equity Bank Ltd**[59], the Claimant had worked for one year and two months, and we awarded him 42,000,000/=. In **Nicholas Mugisha v Equity Bank Ltd**[60] the Claimant had worked for about two years, and we awarded UGX 52,000,000/=. The Claimant is entitled to general damages. He had been employed from 15th October 2018 to 25th October 2020, two years, and ten days. According to CEXH4, he was earning UGX 4,043,742/= per month. He has demonstrated difficulty getting employment, expressing fear of obtaining future employment. His term at the time of termination was set to expire in ten months. Considering all circumstances and the Claimant's employability, we determine that based on his monthly salary, the sum of **UGX 48,525,036/=** as general damages will suffice, and we so award him.

Aggravated damages.

[131] Regarding aggravated damages, the Claimant sought the sum of UGX 15,000,000/=. It was his evidence that the short notice redundancy contained innuendos and an impression that he was terminated for misconduct, that the Respondent refused to settle the matter at the Labour Office and that his termination was aggravated because it was in retaliation to his complaints. The principle considerations for an award of aggravated damages enunciated in **Bank of Uganda v Betty Tinkamanyire** [61] where Kanyeihamba J.S.C(as he then was) found illegalities and wrongs of the Appellant in terminating the Respondent were compounded further by its lack of compassion, callousness, and indifference to the good and devoted services the appellant had rendered to the bank. In his Lordship's opinion, the acts of the appellant were not only unlawful but degrading and callous. In his view, a good case had been shown for the respondent to be eligible for the award of aggravated damages.

[132] We agree with and are bound by the dicta in Tinkamanyire. In the present case, the Claimant was a good performer. His initial contract was extended from one year to a further two years. What was strange is that shortly after making announcements relating to the completion of the Respondent's restructuring, the Respondent declared a redundancy affecting only the Claimant. He was given very short notice, he was not prepared and consulted for the redundancy, his appeals were not handled well, and communication was blocked. All this points to unfair treatment. Redundancy is not a fault

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[59] LDR 72 of 2020
[60] LDR No. 281 of 2021
[61] S.C.C.A No. 12 of 2007 [2008] UGSC 21 (16 December 2008)

termination. In this case, we think these were aggravating factors for which an award of **UGX 36,000,000/=** in aggravated damages is deserving, and we so award.

Exemplary Damages.

[133] The Claimant sought exemplary damages of UGX 30,000,000/= for the highhandedness, malicious, vindictive, and oppressive manner of termination. The dicta of decided cases is that exemplary or punitive damages are an exception to the rule that damages are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects. The Court of Appeal in **DFCU Bank v Donna Kamuli**[62] held the view that punitive damages are awardable in employment disputes with restraint as punishment ought to be confined to criminal law and not the law of tort or contract. In keeping with the dicta of the Court of Appeal, while we found the declaration of redundancy to be unlawful, we are unpersuaded that the Claimant has made a case for an award of exemplary damages. There has been no proof of malice or vindictiveness, egregious, highhanded, or oppressive conduct to warrant such an award.

[134] Having found that the claims for wrongful dismissal, workplace bullying, discrimination, and violations of whistleblowers' protection rights, tortious, wrongful/unlawful interference and negligent job reference, violation of the right to privacy and violation of the Respondent's own policies, were not proven, the respective claims for damages under these specific heads are denied.

Interest on monetary awards.

[135] In **Ahmed Bholim v Car and General Ltd**[63] the Supreme Court of Uganda, citing Section26CPA, left the award of interest at the discretion of the Court, unless it is agreed upon by the parties. We consider interest at the rate of 18% per annum from the date of this award until payment in full to be appropriate in this case.

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[62] C.A.C.A No. 121 of 2016

[63] S.C.C.A No.12 of 2002) [2004] UGSC 8 (15 January 2004)

Costs of the Claim

[136] Under Section 8(2a)(d) of the Labour Disputes(Arbitration and Settlement) Amendment Act 2021, this Court may make orders as to costs as it deems fit. We have held that in employment disputes, the grant of costs to the successful party is an exception on account of the nature of the employment relationship except where it is established that the unsuccessful party has filed a frivolous action or is culpable of some form of misconduct.[64] We have not made a finding of a frivolous defence or that the Respondent misconducted themselves. Further, the Claimant appeared pro se. He made copious pleadings, witness statements and submissions. Copious materials do not always provide clarity but the case papers before us while overly detailed, were well-researched. However, the limiting factor, as pointed out in **Hon. Ababiku Jesc v Eriyo Jesca Osona**, [65] is that litigants whom counsel does not represent are not entitled to advocates' fees (otherwise referred to as legal fees) but only their disbursements. The Claimant did not appear as an Advocate to collect professional fees under The Advocates (Remuneration and Taxation of Costs) Rules S.I 267-4(as amended). The Claimant shall, therefore, only be entitled to his disbursements upon ascertainment by the Registrar of this Court.

[137] Finally, we make the following orders:

(i) We declare that the Claimant was unfairly terminated from the Respondent's service.

(ii) The Respondent is ordered to pay the Claimant the following sums:

(a) **UGX 4,043,742/=** as four weeks net pay for failure to have a fair hearing.

(b) **UGX 250,437/=** as a top-up of his payment in lieu of notice unless the Respondent is withholding payment for some other lawful reason.

(c) **UGX 5,530,000/=** as repatriation allowance

(d) **UGX 48,525,742/=** as general damages,

(e) **UGX 36,000,000/=** as aggravated damages.

(f) The sums above shall carry interest at 18% p.a. from the date of this award until payment in full.

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[64] Joseph Kalule Vs Giz LDR 109/2020(Unreported)

[65] Per Mubiru J. H.C.M.A No's 0004,0031 and 0037 of 2015

(iii) We direct the Respondent to deliver to the Claimant a certificate of service within 21 days of this award and

(iv) The Claimant is entitled to his disbursements, which the Registrar of this Court shall ascertain.

It is so ordered.

Signed in Chambers at Kampala this 11th day of March 2024.

Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

1. Hon. Jimmy Musimbi, _____
2. Hon. Robina Kagoye & _____
3. Hon. Can Amos Lapenga. _____

11th March 2024
9.37 a.m.

Appearances:

1. The Claimant appearing *pro se*.
2. None for the Respondent.

Court Clerk: Mr. Evans Joel Nsubuga

The Claimant: Matter for award, and we are ready to receive it.

Court: The award is delivered in open Court.

Anthony Wabwire Musana,
Judge, Industrial Court