THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 059 OF 2021
(Arising from KCCA/MAK/LC/048/2020)

SHALLON KANSIIME:::CLAIMANT

VERSUS

FINANCE TRUST BANK UGANDA LTD:::RESPONDENT

Before:

The Hon. Mr. Justice Anthony Wabwire Musana,

Panelists:

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

Representation:

1. *Mr. Leonard Opurong of M/S Jamani Advocates for the Claimant.*
2. *Mr. Horace Nuwasasiira of M/S Signum Advocates for the Respondent.*

AWARD

Introduction

[1] Ms. Kansiime joined the Respondent's service on 29th May 2006. She was appointed Accountant in 2008 until 3rd May 2019, when she was suspended for one month on allegations of neglect of duty from 24th October 2013 to 24th November 2014. She was invited to and attended a disciplinary hearing, and the first disciplinary committee *(from now 1st DC)* recommended her dismissal. On the 13th of August 2020, she was summarily dismissed. She appealed against her dismissal, and a retrial was ordered. The second disciplinary committee *(from now 2nd DC)* recommended that she make up 70% of the loss she had caused to the Respondent. She was also dissatisfied and lodged a fresh appeal. The Respondent dismissed her summarily on the 13th of February 2020. She complained to the Labour Officer at Makindye Division. Mediation was unsuccessful, and on the 2nd of March 2022, the Labour Officer referred the matter to this Court.

[2] By her memorandum of claim, she sought various statutory remedies and damages for unfair termination and unjustified summary dismissal, interest on pecuniary awards, and costs of the claim.

[3] The claim was opposed, and in its memorandum in reply, the Respondent contended that the Claimant was dismissed for breach of the Respondent's Operations Policy and the Human Resource Policy and Procedures Manual.

[4] On the 6th of July 2023, the joint scheduling memorandum was adopted with two issues framed for determination, namely:

(i) Whether the Claimant's termination was lawful?
(ii) What remedies are available to the parties?

The Proceedings and evidence of the parties

[5] The parties called one witness each, and we will not reproduce the evidence of the parties except to highlight parcels relevant to the dispute.

The Claimant's Evidence

[6] The Claimant told us she was suspended on the 3rd of May 2019 over allegations of neglecting certain clauses of the Human Resources Policies (*from now HRP*) during the period 24th October 2013 and 24th November 2014. She served forty-four days of suspension and was reinstated on the 17th of June 2019. On the 23rd of July 2019, she was invited for a disciplinary hearing based on an investigation report which had yet to be given to her. Following the disciplinary hearing on 1st August 2018*(from the 1st hearing*), the 1st DC recommended her dismissal. She was dismissed on the 8th of August 2019. She appealed against this decision, and the Respondent's Appeals Management Committee *(from now AMC*) directed her retrial. On 3rd October 2019, she was retried *(from the 2nd hearing),* and the 2nd DC recommended that she refund UGX 41,300,000/= being the loss she had caused. She also appealed against this decision, and the Respondent summarily dismissed her on the 13th of February 2020. It was her case that her dismissal was unfair and illegal.

[7] Under cross-examination, she confirmed having filed a written response (REX5) and being allowed to give responses to the allegations during the hearing. She said the client whose account she authorised payment had mandated any of three signatories, and on most occasions, two signatories would come to the bank. She did not know of any police case and had heard rumours of forgery of some signatures. She also said that the operations manual required the signatories to sign in the presence of the paying cashier. The Claimant read out clause 14.1(vi) of the HRM, which had been admitted as JEX 32, and admitted that looking at the signatures critically, they appeared forged, but that verification was not her duty. She noted that the signatory's biodata was not captured. She also said that she did

not interact with the customers. She could not confirm that she had said *"Am defeated"* when told to read page 17 of the minutes. She confirmed that she would have an accountant trainee below her. She also confirmed that any withdrawals above UGX 3,000,000/= (three million shillings) required her signature. She said that her retrial was because the first hearing was regarded as a discussion, and she was given a copy of the investigation report during the retrial. She said she appealed against the retrial because, with her salary, she could not pay the UGX 40,000,000/=. She noted that the Respondent accommodated her four times during the disciplinary process, and she did not ask that the tellers be brought before the hearing.

[8] In re-examination, she said she did not know the complaint against her when she attended the first disciplinary hearing. No witness was called, and she was not allowed to ask questions or call any witnesses. She also testified that it was the teller's duty to verify signatories when paying out money. She clarified that she appealed against the decision of the 1stDC because she was not given time to study and make a reply to the investigation report. The order for retrial needed to be revised because the 2nd DC consisted of officers junior to the 1st DC. She said she did not know if the Respondent had lost money in the transaction; she needed to know who determined that the signatures were forged. She told us that she appealed against the decision to pay back because it would have been difficult, and she would always be in debt. As a result, she opted out. She also said that one of the tellers implicated paid back the money while another resigned.

The Respondent's evidence.

[9] Ben Kisuule(RW1) confirmed that the Claimant was placed on investigative suspension on 3rd May 2019 on allegations of neglecting to follow laid down procedures between 24th October 2013 and 24th November 2014. He said the allegation was that UGX 124,700,000/= was withdrawn from the Kakyeka Abatana Women's Group Account. The Claimant was notified on 23rd July 2019 to attend the 1st hearing on the 1st of August 2019. She responded to these allegations on 25th July 2019. The charges were read to her at the hearing, and she could respond. She did not ask for any other documentation. The 1st DC concluded that the Claimant was guilty of gross misconduct, and she was summarily dismissed. On 14th August 2019, she filed an appeal and raised the grounds for the lack of an investigation report. She was invited to attend an appeal hearing on the 3rd of October 2019. She was allowed to make formal and oral representations before the AMC, and the committee ordered a retrial. RW1 also told us that during the retrial, the Claimant was given the investigation report and all particulars of the charges against her were laid. The Committee still found that the Claimant had committed a grave offence and resolved that considering her long service, she be ordered to pay back UGX 41,300,000/=. He said that the Claimant appealed against this decision, and on the 10th of January 2020, the AMC convened and heard the second appeal. On the 13th of February 2020, a decision to dismiss the Claimant summarily was reached. It was RW1's testimony that the Claimant had been allowed to be heard, the defects of the 1st disciplinary hearing had been rectified, and she had not been prejudiced in any way. As an employee of a financial institution, the Claimant was under an

obligation to be careful in the execution of her duties, which she failed to do, hence her summary dismissal. There was no premeditated plan to dismiss her, and she was given fair treatment over and above Section 66 of the Employment Act.

[10] Under cross-examination, he said that the Respondent's management made the allegation against the Claimant, and he was unsure whether the alleged incident occurred in 2013 or 2014. He said the complaint was raised in 2019. He told us that he attended the first hearing and confirmed the substance of the allegation, which was that the Claimant did not follow procedure, that it was her duty to verify signatures and that money had been lost. He was shown JEX2, and it was confirmed that the teller did not have the final authority to pay the customer. He admitted that the procedure for retrial was not provided for in the HRM. When he was shown JEX 1, he said that the AMC could decide on the substantive matter and order a retrial and that the decision on the retrial was based on the absence of the investigation report at the first trial. He insisted that there was a fair hearing at the first trial, and at the second hearing, members of the 1st DC did not attend. He said the failure to give a copy of the investigation report did not prejudice the Claimant, and he did not know if the Claimant had benefitted from these transactions. He told us that the Claimant was competent and well-trained and that the Respondent was justified in terminating her services.

[11] In re-examination, RW1 said the Claimant was treated fairly, given an opportunity to present arguments in mitigation, and that, by policy, she could only be heard by persons in the position of Manager and above.

Analysis and determination.

[12] At the close of the Respondent's case, Counsel were invited to address the Court on the issues through written submissions. The Claimant filed his written submissions, but according to the Industrial Court Case Management Information System (ICCMIS)[1] As of the 23rd of April 2024, the Respondent had yet to file any written submissions. By letter dated the 26th of April 2024, Counsel for the Respondent sought leave to file submissions out of time. Mr. Nuwasasira repeated the prayer on the 3rd of May 2024, when the matter was called for award. Under Section 14(1) of the Labour Disputes Arbitration and Settlement Act 2006, decisions of the Court are reached by consensus. Late filing affects coram, and the Court takes a very dim view of late submission filing. Nonetheless, the right to be heard is sacrosanct, and we have considered the Respondent's submissions in arriving at this award.

[1] Event log ID 10372 last accessed 23-04-2024 at 17:35:56

Issue 1. ***Whether the Claimant's termination was lawful?***

Submissions of the Claimant

[13] Mr. Opurong, appearing for the Claimant, submitted that there was no fair hearing in the first disciplinary hearing. Citing **Section 66(5) of the Employment Act 2006(*from now "EA"*),** he submitted that an employer who fails to impose a disciplinary penalty within 15 days from the time he or she becomes aware of the occurrence gives rise to the disciplinary action shall be deemed to have waived the right to dos so. He suggested that the alleged actions occurred between October 2013 and November 2014 and were ignored until the Respondent's client filed Civil Suit No. 18 of 2019 in March 2019. Because of contradictory penalties, the Claimant was suspended for more than the statutory period, and the Claimant was not given a fair hearing. Counsel suggested that the hearing contravened Schedule 1 EA, **Section 73(2) EA** and the HRM, which incorporates EA provisions. Counsel relied on paragraphs 82 to 92 of the HRM, suggesting that the complaint against the Claimant was initiated by the Respondent's Managing Director and not the Financial Crime Risk Desk and that the investigations were meant to be conducted within 30 days and not four years like in the present case. The Claimant was not permitted to examine and cross-examine witnesses or peruse the investigation report, and the AMC disregarded its procedure. Counsel proposed that the second hearing amounted to double jeopardy.

[14] Regarding the contradictory decisions, Counsel submitted that dismissing the Claimant was premeditated. Her previous stellar record was ignored, and a deliberate witch hunt occurred. We were asked to find in favour of the Claimant and grant her various pecuniary awards.

Respondent's submissions

[15] Mr. Nuwasasira cited **Sections 2** and **66EA** for the propositions on substantive and procedural fairness for a dismissal to stand. He submitted that the Claimant was invited to two disciplinary hearings and doubted the waiver of the right to impose a disciplinary action because the Respondent became aware of the infractions on 10th May 2019. It was suggested that conducting investigations into financial fraud is complex, so the Claimant was suspended. It was argued that the Claimant did not ask to call any witnesses.

Determination

[16] While the terms termination and unfair dismissal are used interchangeably[2] under EA, the present case was a dismissal for misconduct, as the facts demonstrate. The question that we must answer, therefore, is whether the dismissal was fair.

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[2] In Uganda Development Bank v Florence Mufumba C.A.C.A No. 241 of 2015, the Court of Appeal distinguished between dismissal and Termination where dismissal is for misconduct and poor performance and termination is for other reasons such as expiry of the contract, retirement age e.t.c

[17] An unfair or unlawful dismissal consists of procedural and substantive unfairness. The Supreme Court of Uganda said in **Hilda Musinguzi v Stanbic Bank Uganda Ltd**[3] an employer has an unfettered right to terminate its employee provided that the employer follows the procedure. Therefore, any employer considering severing the employment relationship must meet the procedural obligations set out in the law.[4]. We will deal first with procedural fairness.

Procedural fairness

[18] Adding to the Musinguzi dicta, this Court in **Nicholas Mugisha v Equity Bank Uganda Limited**[5] held that procedural fairness tests whether the process leading up to the dismissal was procedurally compliant, that the employer has complied with the procedural obligations set under the EA, the employment contract, the Human Resource Manual or other terms and conditions in ending the employment relationship. In other words, did the employer follow the rules of dismissal?

Unlawful suspension

[19] In the case before us, it was common cause that the Claimant was suspended for one month. She was reinstated, but Mr. Bainomugisha argues that the reinstatement was unlawful. Under **Section 63(2)EA**, a suspension shall not exceed four weeks or the duration of the inquiry, whichever is shorter. Mr. Nuwasasira should have addressed the point. The suspension letter dated 3rd May 2019 was admitted as CEX 1. The letter of reinstatement (CEX2) was dated 17th June 2019. **Section 63(1) EA** provides that

> *"whenever an employer is conducting an inquiry which he or she has reason to believe may reveal a cause for dismissal of an employee, the employer may suspend that employee with half pay."*

The Claimant was suspended on the 3rd of May 2019. She was required to return to work on the 6th of June 2019. Four weeks from the date of suspension would be the 31st of May 2019. The letter lifting the Claimant's suspension was dated the 17th of June 2019, outside the statutory timeframe. It was a 44-day suspension. In **Deogratius Lusiba v National Water and Sewerage Corporation**[6] a 54-day suspension was found to be unlawful. Given that **Section 63(2) EA** is couched in mandatory terms, we find that the Claimant's suspension was unlawful because it exceeded the statutory four weeks by 14 days.

Fair hearing

[20] The Claimant was invited to a disciplinary hearing following her reinstatement, and the 1st DC recommended her dismissal. Section 66EA requires that before deciding to dismiss an

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[3] SCCA No. 5 of 2016 Per Mwangushya J.S.C
[4] See LDR 207 of 2017 Kasenge Geoffrey Oscar v St Augustine Montessori School, where we cited LDR 001 of 2019 Eva Nazziwa Lubowa v NSSF
[5] LDR 281 of 2021 Nicholas Mugisha v Equity Bank Uganda Ltd
[6] LDR No. 120 of 2016

employee on the grounds of misconduct, the employer must explain to the employee why the employer is considering dismissal, and the employee is entitled to have another person of their choice present during this explanation. The employer must allow the employee to present their defence and give the employee a reasonable time to prepare a defence. In **Ebiju James v Umeme Ltd**,[7] 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.*
>
> ***1)*** *Notice of Allegations against the plaintiff was served on him, and a sufficient time allowed for the plaintiff to prepare a defence.*
>
> ***2)*** *The notice should set out clearly what the allegations against the plaintiff and his rights at the 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 cross-examine the defendant's witness or call witnesses of his own.*
>
> ***3)*** *The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the defendant."*

[21] The initial notice of invitation was admitted in evidence as REX 5. Its anatomy is as follows:

> *" MEMO*
>
> *To: Shallon Kansiime*
> *Branch Accountant*
> *Mbarara Branch*
>
> *From: Ben Kisuule,*
> *Human Resource Manager.*
>
> *CC: Branch Manager,*
> *Head of Human Resources,*
> *Regional Manager Mbarara Branch,*
>
> *Date: 23rd July 2019*
>
> *Re: Invitation to attend a Disciplinary hearing and respond to allegations*
> *Reference is made to the letter of suspension dated 3rd May 2019*

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

Investigations conducted in the operations of the Mbarara branch from 7th May 2019 to 9th May 2019 revealed several allegations against you.

The Human Resource Committee of Finance Trust Bank (FTB) has reviewed the findings and hereby invites you to respond to allegations made against you and to attend a disciplinary hearing to clarify the issues as below:

During the Period 02/06/2014, 10/07/2014 and 24/11/2014, you authorised three(3) cash withdrawals to the tune of UGX 59,650,000/= from the account of KAKYEKA ABATTATANA Women's group, customers of Finance Trust Bank-Account No. 40204000008, with forged signatures and against the account operating mandate.

By these acts, you contravened Section 16.2(f) of the Branch Operations policy, which that states

By these acts, you contravened Section 1.22 of the Branch Operations policy, which states, "All transactions shall be supported by appropriate documentation. The documentation shall clearly state what needs to be done and shall be duly signed and authorized. All customer signatures on documents shall be verified prior to a transaction being effected"

The meeting has been scheduled for Thursday, 1st August, 2019, at 11.00 am in the Board room, Head Office, at Katwe.

Prior to the meeting, you are advised to submit your formal written response to the allegations, to the Human Resource department not later than 26th July, 2019, at 3.00 pm.

Feel free to come with a colleague of your choice whom you feel will support you in your case."

[22] This invitation letter is adjudged against the golden standard set in **Ebiju,** and from its examination, it passes the **Ebiju** test in the following manner;

(i) First, the invitation letter spells out the allegations in sufficient detail.
(ii) Secondly, the invitation letter spells out the provisions of the manual that were said to have been contravened.
(iii) Thirdly, the letter invites the Claimant to file a written response, which she did in REX 5, but asks the Respondent to reveal the allegations further.
(iv) Fourthly, the invitation letter advises the Claimant of the hearing eight days in advance and finally,

(v) The Respondent advised the Claimant of her right to attend the hearing with a person of her choice.

[23] Mr. Opurong did not challenge the fairness of this invitation letter. Mr. Nuwasasira suggests that the Claimant acknowledged receipt of the notifications and had more than seven days to prepare a robust defence against the allegations. Following the absence of any challenge to the notifications, we shall not comment on them any further.

Failure to issue a copy of the investigation report.

[24] The thrust of the Claimant's case and the bulwark of Mr. Opurong's submissions is focused on what happened after the 1st hearing. In her appeal against the dismissal (CEX3), the chief complaint was that the 1st DC did not give her a copy of the report, the basis of which she was dismissed, and that the absence of the report hindered her ability to respond. Had she had a copy of the report, it was her view that she would have prepared a better defence. The Respondent adduced the forensic investigation report, which was exhibited as REX2. It was dated the 10th of May 2019, two weeks before the notice of invitation to attend a disciplinary hearing was issued. It was common cause that the Respondent did not give a copy of the REX2 to the Claimant.

[25] Mr. Nuwasasira conceded that the Respondent gave the Claimant the investigative report at the appeal, which appeal Counsel suggested was in the spirit of fairness.

[26] This Court has considered the import of not giving a copy of an investigation report to the employee before the disciplinary hearing. In **Kabagambe v Post bank U Ltd**[8] we cited **Douglas Lukwago v Uganda Registration Services Bureau**[9] where the Respondent's letter directing the claimant to show cause why his employment should not be terminated did not indicate that the IGG's report had been availed to him for his consideration before the hearing. The Industrial Court observed that it is well-settled that where the termination of an employee is based on an investigation, principles of natural justice dictate that the employee in issue must be given the report before the disciplinary hearing to enable them to respond to its findings. The Court held the omission as a breach of the principles of natural justice and declared the hearing unfair. [10]

[27] In the matter before us, the report was said to be a forensic report. According to the Law Insider, a forensic report is prepared during an investigation into an alleged offence by a person with specialised knowledge or training, setting out the results of a forensic examination in the form of facts, opinions, or a combination of both. It can be used in a court of law. In REX3, it was reported that on the 26th of March 2019, a plaint was filed at the Civil Registry of the High Court in Mbarara by which the Respondent was sued for breach of customer banker contract for fraud and loss of UGX 127,620,000/=. The

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[8] LDR 107 of 2020. See also LDR 193 of 2019 Nabaterega Kahdijah v KCB Bank (U) Ltd
[9] Labour Dispute No. 057 of 2016
[10] See also LDC No. 166 of 2014 Dorothy Namyalo v Stanbic Bank Ltd

Respondent's manager commissioned the Financial Crimes Desk to investigate the matter. The objectives were to establish the facts on irregular withdrawals from account No. 400021400008 and the different staff roles. The investigation found that the Respondent had authorised withdrawals of UGX 129,050,000 on forged signatures. In our view, forgery is a serious allegation, and considering the substantial amounts of money involved, it was only fair that the Respondent provided the Claimant with a copy of the report before the disciplinary hearing. Fairness demands that the Respondent disclose to the Claimant the exact details of the misconduct for which she was charged. We think it was procedurally defective for the Respondent to deny the Claimant a copy of a forensic report detailing findings against her before the meeting. The Respondent shares this view. It considered the Claimant's appeal against the 1st DC, and its appeals Committee recommended a 2nd hearing and that the investigation report be provided to the Claimant. To the extent that the forensic report was not offered at the 1st hearing, the Respondent was procedurally unfair.

[28] We are fortified in adopting this view by the decision of the Industrial Court in **Patrick Outa v Barclays Bank of Uganda Ltd**[11] where the Court observed that an allegation of impropriety with no substantive description of particulars to enable the Claimant to prepare adequately for his or her defence. In the matter before us, the forensic investigation report contained details of the allegations and was not supplied to the Claimant. In sum, we hold that this was a procedural misstep which resulted in procedural unfairness.

Waiver of imposition of disciplinary penalty

[29] The timeframe between the report's date and the disciplinary hearing's commencement is also significant because Mr. Opurong argues that the Respondent brought the allegations four years after the alleged infractions. Counsel contended that this was contrary to **Section 66(5) EA**, which requires the employer to impose a disciplinary penalty within 15 days of becoming aware of the misconduct. It is an argument we cannot accept. It fails because, according to Mr. Opurong's submission, Clause 9.35(a) of the Respondent's Human Resource Policy suggested that investigations should be carried out within 30 days of knowledge of the offence. We agree with Mr. Nuwasasira that by REX 3, which is dated 10th May 2019, the Respondent only became aware of the infractions in 2019. It did not know that date. Our reading of Clause 9.35(a) is that an investigation should start as soon as possible but not later than thirty days from when the supervisor knows the offence. The Respondent learnt of the offence through a case filed against it by its customer, Kakyeka Abatana Womens Group, which was filed on 26th March 2019. The Respondent did not tell us when it was served, but it suspended the Claimant on the 3rd of May 2019. It commenced investigations on the 7th of May 2019 and completed the same on the 9th of May 2019. The report was dated 10th May 2019. On the 17th of June 2019, the Respondent was reinstated and informed that investigations were ongoing.

[11] LDC 79 of 2014

[30] Mr. Opurong's reference to **Section 66(5) EA** was misplaced. Section 62(5) EA limits imposing a disciplinary penalty to 15 days from the date the employer becomes aware of it. We think the argument fails on the facts of the present case because Section 62(5) provides for the imposition of a disciplinary penalty after 15 days in exceptional circumstances. The facts of the instant case are that the Respondent only learnt of the transgression four years after its customer filed a civil suit at the High Court in Mbarara. In our view, these are exceptional circumstances, and we do not fault the Respondent.

Double jeopardy and the right of appeal

[31] The other procedural complaint was that the Claimant was exposed to double jeopardy by being subjected to two disciplinary hearings. Double Jeopardy is a notion of criminal law and procedure which is provided for under Article 28(9) of the 1995 Constitution, which does not permit a person who has been tried and acquitted of or convicted of a criminal offence to be tried again for that offence or for any other criminal offence that he could have tried for except upon the order of a superior court.[12] The question would be whether the double jeopardy principle applies in employment and labour disputes.

[32] In **Clovice Kalengutsa Tembo v Bugoye Hydro Ltd**,[13] this Court considered a case where Mr. Tembo committed an offence and was sanctioned with a final written warning for some infraction by his immediate supervisor. On review, the Respondent's top management imposed a much harsher punishment. The Industrial Court found that it was that it is within the powers of top management to review, reverse or agree with whatever decision made by management at a lower level as long as it is done within the confines of the law and such review, reversal or agreement cannot be construed to amount to double jeopardy if the same does not run concurrently with an existing decision to the detriment of the culprit. The decision to dismiss the claimant, having replaced the decision to give a warning, therefore, did not constitute double jeopardy. Indeed, in **S.P Ajuna V A.G & IGP**[14] the Honourable Mr. Justice Musa Ssekaana traces the defence of double jeopardy to the ecclesiastical premise that *"God judges not twice for the same offence"*. In that case, the Applicant had been charged before a police disciplinary committee and a criminal court. His Lordship found the proceedings to be different and distinct.

[33] In sum, the principle of double jeopardy has been applied in employment disputes. The Botswana Industrial Court confirmed the principle's applicability in employment disciplinary matters in **Bence Kgoadi V Grinaker Whyle (Botswana) (Pty) Ltd**.[15] The principle entails that an employer may not, on the same set of facts of an event, charge an employee twice for the same or a similar offence. To that end, it matters not whether the new charge is couched differently from the first so long as the facts that form the basis of the charge are

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[12] See **Uganda v Adriko Ismail & Adukule Ali** Criminal Case No. 122 of 2017, Per Mubiru J *"double jeopardy, properly understood, is the best described in the phrase 'No man should be tried twice for the same offence'"*

[13] Labour Dispute Reference 138 of 2016 [2017] UGIC 22

[14] H.C.M.A 238 of 2021

[15] Case No. IC 123/2001

the same. The rule seeks to prevent an employee from being put to task twice for offences arising from the same event. The Court found that a dismissal in such circumstances would always be unfair.

[34] In the case before us, following her dismissal, the Claimant appealed, arguing that she had been of great service to the Respondent for over 13 years and that the complaint for which she had been dismissed was before the High Court and had yet to be decided. She argued it was premature for her to be dismissed before the High Court at Mbarara rendered a decision. She also asserted that she had yet to be given the investigation report. The appellate committee recommended a retrial. She was invited to a hearing and provided a copy of the investigation report. The Claimant made written representations and appeared before another disciplinary committee on the 27th of November 2019. The 2nd DC still found that the Claimant was negligent when she did not manage the Kakyeka Abatana Women's Group Account well. The 2nd DC imposed a different penalty, this time asking the Claimant to refund a sum of UGX 41,300,000/=. In effect, the penalty of dismissal had been lifted and replaced with a penalty requiring a refund. By its letter REX10, the Respondent asked the Claimant to discuss a payment plan with the Human Resources department. Therefore, we conclude that following her appeal against the decision of the 1st DC, the Claimant was retried, and her retrial returned a different penalty, which did not amount to double jeopardy.

[35] This leaves us with a procedural question on the fairness of the appeal.

[36] On the 19th of December 2019, the Claimant appealed against the decision, arguing that before the 2nd DC, she had requested a teller, one Ms. Namyanzi Phiona's version of events, be put before the committee, and it was not. She also contended that the 1st DC's proceedings had been irregular and, therefore, it was improper to require her to appear before a second committee. She was in effecting pleading double jeopardy. She also argued that the complaints had pursued recovery of the lost funds against certain people, and it was unfair for the Respondent to penalise her. She contended that the Respondent could consider recovery from its insurers. She also felt that the decision to transfer her was unfair. Finally, she admitted that there was an error of judgment. This letter was admitted in evidence as REX 11.

[37] The Claimant attended an appeal hearing on the 10th of January 2020. On the 13th of February 2020, the Respondent dismissed the Claimant for employment on grounds of gross misconduct.

[38] It is our view that what transpired in the Claimant's case is that following her appeal, the 2nd DC imposed a less harsh penalty, ordering a refund. In keeping with the dictum in the **Tembo** case, the appeal process produced a different result and would not be considered double jeopardy. An appeal means to seek a review of a lower court's decision by a higher court.[16] It is the view of this Court and extending the dicta in **Tembo** that Appeals in the

[16] Black's Law Dictionary 11Edn by Bryan Garner at page 122

internal disciplinary process are a valuable feature of fair labour practices. Where an employer has the means, an internal appeals procedure permits remedial measures after the first disciplinary hearing. The Respondent exhibited its HRP as "JEX1" in the case before us. Under Chapter 9 of the HRP, Clause 9.41(i) provides for the process after the disciplinary process. The HRP provides for the employee's right of appeal to EXCO, and upon hearing an appeal, the dismissal can be upheld or revoked, leading to an employee's reinstatement.

[39] Under paragraph 1(11)(b) of the Disciplinary Code in Schedule 1 of the Employment Act 2006, it is provided that the employer shall ensure that an employee faced with disciplinary action is fully aware of the form the disciplinary proceedings shall take, including the possibility of **appeals** and the penalties for which he or he is liable if the allegations are well founded. Further, under paragraph 2(2)(b) of the Schedule, the employer must remind the employee of the right of appeal against any decisions. By providing for the right of appeal in the Schedule to the Employment Act, the framers of the Act intended that employees have an internal right of appeal against decisions of disciplinary committees. We, therefore, do not accept Mr. Opurong's argument that by retrial, the Claimant could plead double jeopardy. Conversely, the Claimant exercised a right of appeal, and the appellate committee found the proceedings irregular and ordered a retrial. To this Court, that was a promotion of fairness and transparency on the part of the Respondent. And we are persuaded in this approach by the persuasive decision of the Employment Appeal Tribunal of the United Kingdom in **Ms. T.O Adeshina V St George's University Hospitals NHS Foundation Trust & Others**[17] where Ms. Adeshina was dismissed for gross misconduct, she appealed against her dismissal for procedural defects, and the internal appellate committee upheld the decision. On bringing an action at the Employment Tribunal[18], it was found that the dismissal was procedurally flawed in many respects and thus unfair. It was concluded that the appeal process was fair and had the effect of curing the deficiencies at the dismissal stage. Judge Eady Q.C[19] confirmed the finding of the Employment Tribunal. We find this dictum a helpful guide and add that the Respondent's appeal committee decided to keep with fair labour practices in remitting the Claimant's matter for retrial. It was not, as Mr. Opurong would have us believe, subjecting the Claimant to double jeopardy.

Bias and premeditated witch-hunt

[40] In this complaint, Mr. Opurong argued that instead of the Claimant's supervisor carrying out the disciplinary process, the Respondent's Managing Director Annet Nakawunde Mulindwa conducted the proceedings. It was suggested that the members of the 1st DC were present in the 2nd DC. Indeed, the Respondent's witness conceded to this point under cross-examination and re-examination. By this concession, where members of the 1st D.C

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[17] UK/EAT/0293/14/RN *https://assets.publishing.service.gov.uk/media/58d50639ed915d06ac00000a/Miss_T.O_Adeshina_v_St._Georges_University_Hospitals,NHS_Foundation_Trust_and_Others_UKEAT_0293_14_RN.pdf last accessed 27.04.2024 at 10.01 pm*

[18] The South London Employment Tribunal was presided over by Judge Freer.

[19] The other members of the Tribunal were Mr. D.G Smith and Mrs. P.Tatlow

were present in the 2nd D.C, could it be said that the 2nd D.C could not be said to have been impartial, independent, or removed from its earlier decision?

[41] We think the answer to this question is yes because, first, the 2nd DC returned the same verdict but imposed a different penalty.

[42] Secondly and even more importantly, disciplinary committees are not constituted in a manner akin to a Court of Law. Under clause 9.40 of the Respondent's HRP (JEX1), the DC comprises the Head of Human Resources, the Head of Risk, the Legal Manager, and the Executive Director. The 1st DC consisted of Annette Nakawunde Mulindwa (Executive Director as Chairperson), Mr. Ben Kisuule (Human Resource Manager as Secretary), Mr. Martin Acegere (Head of Risk) and M. Mwanga(the Head of Legal). Mr. Kisuule signed the letter inviting the Claimant to the appeal hearing. We were not provided with minutes to determine the composition of the Appeals Committee and the 2nd D.C. But considering the decision of the Industrial Court in **Action Aid v David Mbarekye Tibekinga**[20] disciplinary committees (or any committees set up to resolve issues arising in Labour Relations) do not have to be on an equal footing with the courts of law in the procedure. We are not persuaded by the evidence and material before this Court that by including members of the 1st D.C in the 2nd D.C, the Claimant would not have assurances of an impartial and independent committee. The approach taken by the Respondent did not, on the evidence, erode the fairness of the disciplinary process.

Conclusion

[43] We declare that the disciplinary proceedings were procedurally defective because the Claimant was not given a copy of the investigative report before the 1st DC and was unlawfully suspended. For these reasons, the disciplinary proceedings were procedurally unfair.

Substantive fairness

[44] The test of substantive fairness is whether there is any justification for the reason for dismissal.[21] This means that the Court will test the fairness of the reason for termination.[22] The reasons for termination must be valid. By **Section 68EA,** the burden of proof shifts and places the onus on the employer to prove the reason or reasons for dismissal. The employer must show that they genuinely believed the reason to exist and that that reason caused the employer to dismiss the employee. In **Uganda Breweries Ltd v Robert Kigula,**[23] the Court of Appeal of Uganda observed that substantive fairness requires the employer to show that the employee had repudiated the contract or any of its essential conditions to warrant summary dismissal. Gross and fundamental misconduct must be verified for summary

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[20] LDA 028 of 2016 See also Matovu v Umeme Ltd L.D.C 004 of 2014 and Caroline Kariisa Gumisiriza v Hima Cement HCCS 84/2015
[21] See also Ogwal Jaspher *v* Kampala Pharmaceutical Ltd
[22] See Section 68 EA
[23] C.A.C.A No. No. 0183 OF 2016) [2020] *UGCA 88* (30 July 2020);

dismissal. The substantive test is a much more subjective test. It has been held that where the employer has a Human Resource Manual that lays out offences that constitute gross misconduct, and the employees are aware of that test, then the offence would be made out. **Section 68 EA**, an employer is required to prove the reason for termination. **Section 68(2) EA** provides that the reason or reasons for dismissal shall be matters that the employer genuinely believed existed at the time of dismissal.

[45] Mr. Opurong argues that the Respondent's decision to terminate the Claimant was unjustified. We think this argument does not have a firm legal premise. Mr. Nuwasasira makes a pointed argument. It is his view that the Claimant committed a verifiable misconduct. Counsel cited **Benon Kanyogoga v Bank of Uganda**[24] in support of this proposition. We agree with this restatement of the law.

[46] The evidence in the matter before us points to an infraction in Clause 1.2.2 of the Respondent's Banking Operations Policy Manual JEX 2. The provision requires all transactions to be supported by appropriate documentation, and all customer signatures must be verified before a transaction is affected. In the minutes of the 1st D.C, the Claimant admitted to approving payment vouchers that did not align with set guidelines. By this action, the Claimant's misconduct was inconsistent with the fiduciary duty of an accountant in a financial institution. The infraction for which the Claimant was charged was laid out in the operations manual, and the process of investigating the alleged misconduct did not exonerate the Claimant. According to the report, the Claimant failed to detect the forgeries of Jane Kasumali's signature.

[47] This Court has established a high duty of care for employees in financial institutions in various decisions. In the **Nabaterega Khadija v KCB Bank(U) Ltd**[25] we reiterated the dicta that:

> *"employees in the financial sector are held to a very high degree of accountability and ethical responsibility. In **Barclays Bank of Uganda v Godfrey Mubiru**[26] the Supreme Court of Uganda observed that managers in the banking business were required to be particularly careful and exercise a duty of care more diligently than managers in other businesses because they managed depositors' money. His Lordship opined that any careless act or omission could cause great losses to a bank and its customers. The dictum in the Mubiru case has been cited in various decisions of the Industrial Court, including **Ekemu Jimmy v Stanbic Bank Ltd.**[27] and later in **Akello Beatrice v Tropical Bank Ltd**[28]."*

[48] In the matter before us, it is demonstrable and proven that the Claimant breached her employer's banking operations policy and procedures manual. This infraction means that

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[24] LDC No. 80 of 2014
[25] LDR 193 of 2019
[26] Per Kanyeihamba J.S.C in S.C.C.A No. 1 of 1998
[27] LDC No. 308 of 2014
[28] LDR No. 25 of 2019

the Claimant is in breach of her duty of honesty and fidelity to the Respondent. In **Nabaterega** (supra), we took the approach to assess whether the Respondent was substantively fair and, therefore, justified in imposing the sanction of dismissal by standing back from the employer's decision and assessing whether the decision to dismiss was reasonable based on the information available to the employer when the decision was taken. On the evidence before us, the Respondent demonstrates that it genuinely believed the Claimant to have been culpable for misconduct and commenced disciplinary proceedings against her. We, therefore, find that the dismissal was justified.

Conclusion

[49] In the case of **Nicholas Mugisha**(*op cit),* we observed that;

> *"to ensure substantive fairness, the employer must maintain procedural fairness and vice versa. In other words, for a summary dismissal to be justified, there must be both procedural and substantive fairness. The absence of one or the other would render the dismissal unjustified and, therefore, unlawful."*

[50] In the matter before us, after objectively considering and reviewing the evidence, the applicable law, and the submissions advanced on behalf of the parties, we find that while the Respondent genuinely believed that it had valid reasons to dismiss the Claimant and was substantively fair, it was not procedurally fair in the conduct of the disciplinary process.[29] We are fortified in this conclusion by the persuasive decision of the Court of Appeal of Kenya while considering an appeal Industrial Court of Kenya in **Naima Khamis v Oxford University Press(EA) Limited**[30] confirmed the conclusion of Rika J that although a termination was justified, the process was faulty, for which the trial Judge awarded damages. In principle, there can be substantive justification for the termination, as is the case in the matter before us, but also procedural unfairness. We find that while the Claimant's dismissal was substantively justified, it was unlawful because of procedural missteps. Issue number one would be answered in the affirmative.

Issue II. What remedies are available to the parties?

[51] Having found the dismissal procedurally unfair and unlawful but substantively fair, the Claimant is entitled to remedies. However, because we have found that the dismissal was justified, the Claimant would not be entitled to the full range of remedies for unfair dismissal. This is because the principle of fairness in the employment relation is essential. For illustration, in **Edotun James v Okra Beverages Ltd**[31] we expounded on the principle of "fair

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[29] In **Evans Mogute Nyaundi v China Road and Bridge Corporation (K) Ltd Industrial** Cause No. 1082 of 2010, the Industrial Court of Kenya held that even in case of summary dismissal, the right to be heard is unassailable. There is no such thing as summary dismissal procedure. While employers are encouraged to establish internal disciplinary procedure and grievance handling procedures, these procedures must be in tandem with the law and where there is a conflict the law prevails.

[30] Civil Appeal No. 15 of 2014

[31] LDA 261 of 2021

go all round," which postulates that an employment relationship is based on equal and reciprocal responsibility. We cited the Australian case of **Re Loty and Holloway v Australian Workers' Union, and**[32] the Court observes that the idea is that in awarding remedies for unfair dismissal, the Court is to balance individual justice with the right of the employer to run its business. We suggested that the principle takes a broad view of industrial justice. In the matter before us, where an employee is found culpable for some misconduct, but the employer has not followed procedure, various EA provisions reduce or diminish the range of benefits or remedies. We think that Parliament crafted for this mischief. It was not the intention of the legislature that in all circumstances of procedurally unlawful but justified summary dismissal, an employee should receive mandatory and full terminal benefits or compensation for his wrongdoing. We do not think that a treatment of provisions of the EA on benefits results in a conclusion other than that a Court should consider all circumstances before granting an employee full benefits.

Statutory Compensation

[52] Mr. Opurong asked for statutory compensation under **Section 66(4)EA**, which requires the payment of four weeks' pay where there is a failure to observe the right to a fair hearing, irrespective of whether the summary dismissal is justified. In this case, having found procedural missteps in a substantively justifiable dismissal, we award the Claimant four weeks of net pay. She was earning **UGX 2,544,000/=**, which is hereby granted. We are fortified in this view by the decision of the Industrial Court in **Hivos East Africa v Mukalazi Denis Mubiru**[33] where the Court found that the Claimant was culpable for breach of trust and confidence. However, the Claimant was entitled to four weeks of net pay because of flaws in the hearing process.

[53] Mr. Opurong asked for another four weeks of net pay under **Section 78(1)EA**. This Court has ruled that awards under statutory compensation, especially in Section 78EA, are a composite of general damages. They would only be awarded by the labour officer. Therefore, we are not persuaded to depart from this position and decline to award the same.

Salary in lieu of notice.

[54] The Claimant sought payment of three months' salary in lieu of notice. She had served the Respondent for over 12 years at her termination. Mr. Opurong premised this claim on **Section 58(3)(d) EA**. There is a need to appreciate **Section 58EA** in its fullness. **Section 58 (1)(a) EA** provides that "*A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-(a)where the contract of employment is terminated summarily in accordance with section 69;...*"

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[32][1971] AR(NSW) 95 ASTLII:
[33] LDA No 13 of 2018

[55] Under **Section 69(3)EA,** an employer is entitled to summarily dismiss an employee where the employee has fundamentally broken his or her obligations arising under the contract of service. In the circumstances of the present case, we have found that the Claimant was in breach of her duty of care as a banker and that the Respondent was justified in imposing the dismissal penalty. Therefore, the Claimant would not be entitled to salary payment in lieu of notice, and we decline to grant any.

General Damages

[56] Mr. Opurong was contending for UGX 50,000,000/= in general damages. Counsel argued that the Claimant had worked for 12 years, had a reasonable expectation of employment, suffered trauma and stress and may not be able to obtain comparable employment. General damages are those damages such as the law will presume to be the direct natural consequence of the action complained of[34]. The Court of Appeal has 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.[35] In **Kabagambe(supra)**, we found that the Respondent had a justifiable reason for dismissing the Claimant, which diminished the quantum of general damages. In the present case, no evidence was led to show the causal relationship between the Claimant's dismissal and the trauma and stress. We were also not given any material with which to assess her employability. We have noted that where the dismissal is substantively justified, an award of damages is diminutive. While the Claimant had served for 12 years and was earning UGX 2,544,000/= per month, she was unlawfully suspended and the procedure for her dismissal was flawed. However, we have also found that the Claimant's dismissal was substantively justifiable. Therefore, we are inclined to order compensation of general damages in the sum of **UGX 7,632,000/=.**

Aggravated damages

[57] Mr. Opurong suggested that the Claimant was terminated callously. In **Betty Tinkamanyire vs Bank of Uganda**[36] the Learned Justices of the Supreme Court[37] found the appellant to have acted in a callous and degrading manner for which aggravated damages could be awarded. Callous means showing or having an insensitive and cruel disregard for others.[38] We do not find any aggravating factors in the matter before us and decline to grant any aggravated damages.

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[34] Stroms v Hutchinson [1950]A.C 515
[35] Stanbic Bank (U) Ltd v Constant Okou Civil Appeal No. 60 of 2020
[36] S.C.C.A No 12 of 2007
[37] G.W Kanyeihamba J.S.C
[38] https/ Oxford Languages and Google - English | Oxford Languages (oup.com) last accessed on 7.05.2024 at 11:02pm

Severance Pay

[58] Counsel for the Claimant sought severance pay of UGX 30,528,000/=. This was computed over about 13 years, earning UGX 2,544,000 per month. Counsel anchored his argument on the decision of the Industrial Court in **James Odong v Airtel (U) Ltd**[39] that the Claimant's calculation of severance shall be at the rate of her monthly pay for each year worked. The Claimant was employed from 26th May 2006 until 13th February 2020, when she was finally dismissed. We think the decision in **Odong** (*ibid*), while premised on **Sections 87EA** and **89EA**, is largely misapplied in the present case. In **Odong**, the Claimant was placed on a performance improvement plan, which was found unfair and unlawful. In the case before us, there has been a procedural misstep in a substantively justifiable dismissal in that there was verifiable misconduct on the part of the Claimant. Having so found, we think that **Section 88(1)EA** is applicable. It provides that no severance allowance shall be paid in circumstances where an employee is summarily dismissed with justification. We think the present case falls squarely within this provision, and we thus decline to grant the Claimant severance allowance.

Costs of the Claim

[59] 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.[40] We do not think the Respondent's defence was frivolous, and we have not been persuaded to award the Claimant's costs.

[60] In the final analysis, we make the following orders:

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

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

(a) **UGX 2,544,000/=** as four weeks net pay under **Section 66(4)EA** and

(b) **UGX 7,632,000/=** as general damages

(i) The sums above shall carry interest at 15% p.a. from the date of this award until payment in full.

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

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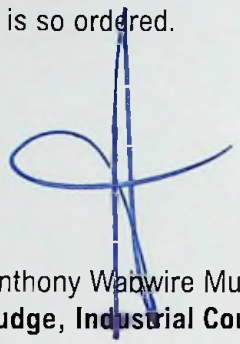
[39] LDR No. 210 of 2018

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

Signed in Chambers at Kampala this **7th** day of **May 2024.**

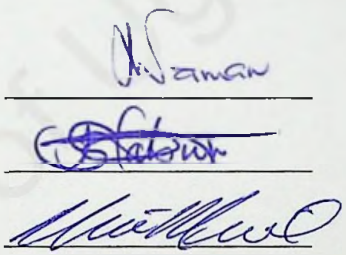
It is so ordered.



Anthony Wabwire Musana,
Judge, Industrial Court

THE PANELISTS AGREE:

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



7th May 2024
9.25 a.m.

Appearances

1.	**For the Claimant:**	Absent.
2.	**For the Respondent:**	Mr. Victor Ntabugambwa

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

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

Court: Award delivered in open Court at 10.40 a.m.

Anthony Wabwire Musana,
Judge, Industrial Court