



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT FORT PORTAL
LABOUR DISPUTE REFERENCE NO. 10 OF 2021
(Arising from Labour Complaint LB/006/FPTC/2021)

AHIMBISIBWE FAUSTA.....**CLAIMANT**

VERSUS

HOLY FAMILY VIRIKA HOSPITAL LTD**RESPONDENT**

Before:

The Hon. Mr. Justice Anthony Wabwire Musana:

Panelists: Hon. Jimmy Musimbi, Hon. Emmanuel Bigirimana and Hon. Michael Matovu.

Representation:

1. *Mr. Francis Katsigazi of M/s. Byamukama Kaboneke & Co. Advocates for the Claimant.*
2. *Mr. Gerald Mirembe of Mirembe, Muhoozi & Co. Advocates for the Respondent.*

AWARD

Introduction

- [1] Between 2004 and April 2021, the Claimant was employed as a nurse with the Respondent. The Respondent is a faith-based health services provider in Fort Portal. Allegations of refusal to care for a patient and causing the death of a pregnant woman were raised against the Claimant. She was invited to attend a disciplinary hearing where she asked for details of the complaint against her. On the 12th of March 2021, the Disciplinary Committee (**DC**) advised the claimant to resume work as there was no merit in the allegations. The Claimant did not return to work because she had been traumatised by the allegations. She maintained that she required details of the allegations against her. On the 27th of April 2021, she was invited to attend a disciplinary hearing on the 29th of April 2021. She was found guilty of being absent from work without leave, gross insubordination, abdication of duty, use of abusive language and terminated from work.
- [2] She complained to the Labour Officer at Fort Portal. The Labour Officer (LO) commenced a mediation exercise, and two sessions were held. Unable to settle, the matter was referred to this Court.

The Claim

- [3] In her memorandum of claim, the Claimant sought recovery of special damages of UGX 6,511,948/=, general and exemplary damages arising out of breach of the contract of employment, compensation for unlawful termination, terminal benefits, an order for remittance of NSSF benefits for two years, costs of the claim and interest thereon and a certificate of service.

Memorandum in reply

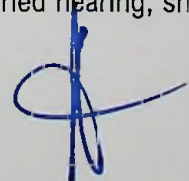
- [4] In its reply, it admitted to commencing disciplinary proceedings against the Claimant on allegations of mistreatment of patients and terminating the same after finding no merit. The Claimant was asked to resume work, but she did not. The Respondent commenced fresh disciplinary proceedings and found the Claimant guilty of absence from work without leave, gross insubordination, abdication of duty, use of abusive language, contempt of governance procedures and decided to terminate the Claimant.

The proceedings and evidence.

- [5] The draft issues in the joint scheduling memorandum were adopted for determination. They are:
- (i) *Whether the Claimant's employment contract was lawfully terminated?*
 - (ii) *Whether there are any other remedies available to the Parties?*

The Claimant's evidence

- [6] In her Claimant's witness statement, made on the 28th day of February 2022, she testified that she was first employed in 2004. On 2nd March 2021, she heard that there was a disciplinary hearing notice on the notice board indicating that she had been summoned to appear before a D.C to answer allegations of refusing to attend to a pregnant woman who had later died, chasing away a patient without a mask and being persistently rude to patients. She said she appeared before an incomplete DC. She said during the hearing the complainant did not appear and that the allegations had tortured her psychologically and mentally as a Nursing Officer. It was her testimony that there was no prior writing of these allegations, and she did not have a history of such allegations. She told us that she asked for details of the complaint and was advised to put the same in writing, which she did on the 12th of March 2021. The Respondent cleared her of the allegations on the same day and advised her to return to work. She was aggrieved with how her complaint was handled, and in her letter dated 19th March 2021, she reiterated her demand for details of the complaint. It was her testimony that she had been asked to stay away from work, and she was depressed by what her workmates were saying about her. She admitted to receiving the invitation to a disciplinary hearing on 27th April 2021 and attended the same on 29th April 2021. She told us that the Chairperson had a predetermined decision, and following a hurried hearing, she

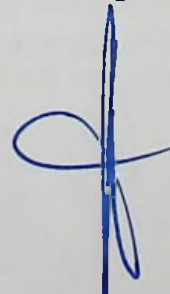


was terminated on the 30th of April 2021. She said her name had been tarnished, suffered mental anguish, psychological torture and emotional stress. She had a bank loan that needed to be cleared, her dismissal was malicious, and she asked for UGX 300,000,000/= in damages and other claims within the memorandum of claim.

- [7] Under cross-examination, she confirmed receiving JEX 3 on the 3rd of March 2021 and acknowledged receipt. She confirmed appearing before the DC on 9th March 2021 and asking for details of the allegations. She confirmed receipt of JEX 5, in which she was told that the allegations had no merit and was advised to return to work. She wrote a letter on 19th March 2021 saying she was still aggrieved. She confirmed being away from work from 9th March 2021 until the 27th of April 2021, about 51 days. She testified that she appeared before the DC on 29th April 2021, accompanied by Hillary Tushabomwe. She also confirmed that the allegation at the 2nd DC concerned an absence from work.
- [8] In re-examination, she said she did not attend work because her name had been placed in RED ink in the schedule, meaning someone else was in her place. She also clarified that the allegations psychologically tortured her. Finally, she said the 2nd DC did not tell her the committee resolutions.

Respondent's evidence.

- [9] George William Kakyoma testified that the Respondent invited the Claimant to answer allegations of mishandling patients. She appeared before a DC, which found no merit in the allegations and advised her to resume work. She did not resume work, and a 2nd DC was constituted. She appeared before the 2nd DC, which found her guilty of absconding, and she was terminated.
- [10] Under cross-examination, he said he had encountered two disciplinary cases against the Claimant with no history of indiscipline. He conceded that he would not be happy if allegations of causing death were made against him and confirmed that the claimant had asked for details in JEX4. He maintained that the Respondent did not give reasons because the 1st DC cleared the Claimant. He said the Claimant should have returned to work because she had been cleared. He told us the Respondent did not write to the Claimant for confidentiality reasons and that the complaints had been verbal. He said Sister Musoki Cecilia made the second complaint of abscondment, and the 2nd DC found the Claimant guilty of abscondment and advised the management of the sanction. He said management was represented in the DC by the administration and Medical Director. They only resolved, and the final decision lay with management. He also testified that the claimant was entitled to benefits under the Human Resource Manual. He also said that under the HRM, there were exceptional circumstances under which a person could return to work. The Respondent did not address the Claimant's concern about being distressed with how her case was handled.
- [11] In re-examination, RW1 told us that the purpose of JEX5 was to clarify that the Respondent had no issues with the Claimant on allegations of patient mishandling. He also confirmed



that in JEX 7, the Claimant had used offensive and contemptuous words about the committee.

- [12] At the close of the Respondent's case, we invited the parties to address the Court through written submissions, which we have summarised below.

Analysis and Decision of the Court

Issue 1. Whether the Claimant's employment contract was lawfully terminated?

- [13] The thrust of Mr. Katsigazi's argument was that the DC's conduct was unfair by denying the Claimant full disclosure of the allegations that caused her depression and mental psychological torture, one of the reasons she could not return to work. Counsel submitted that the termination did not mention the DC's minutes, nor was she paid her terminal benefits. It was also submitted for the Claimant; her name remaining in RED ink was constructive termination. Counsel argued that the claimant was not accorded a fair hearing. He cited Sections 62(1) and (2) EA for the proposition that no disciplinary penalty was imposed on the Claimant. Under Section 62(3) EA, the Respondent should have followed the Code of Discipline in Schedule 1EA, where termination should not be imposed before a final warning. An employer shall first consider alternative penalties, including loss of privileges or suspension without pay. We are asked to find the termination unlawful.

The Respondent's submissions

- [14] It was submitted for the Respondent that it invited the Claimant to a disciplinary hearing vide JEX14, indicating that the Claimant had not appeared at work since 12th March 2021, a situation that the Respondent considered abscondment. She was asked to come along with a person of her choice. She attended the hearing. The facts were put to her, and she said the reason for none attendance was that the allegations aggrieved her before the 1st DC. It was submitted that she did not furnish any evidence for not attending work. For this reason, it was suggested that she had been accorded a fair hearing.
- [15] It was also submitted on the work schedule that the claimant did not interact with any of the Respondent's officers when she found her name in RED ink. She did not include this in her witness statement or place this complaint before the DC. Counsel submitted that this was an afterthought. It was suggested that this was a smokescreen for an abscondment, which she confirmed before the 2nd DC. It was also submitted that she made a mockery of DC. Finally, it was submitted that the Claimant did not write to the Respondent articulating her difficulty, depression and mental psychological torture. It was submitted that the Respondent expedited the 1st DC by closing and recalling the Claimant within three days of the allegations being made. Citing Section 63(3) EA, it was submitted that a disciplinary penalty may be imposed by considering what is reasonable. It was suggested that the Claimant was not remorseful, and the Respondent was justified in dismissing her.



Determination

- [16] While the issues were being framed, this Court asked the Counsel whether the terms termination and unfair dismissal mean the same thing. Counsel for the Claimant maintained that he would make the case for his client's termination. We note that these terms are used interchangeably under the EA; in *Uganda Development Bank v Florence Mufumba*, 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.¹ For clarity, Section 65EA relates to the termination of a contract of employment on grounds of expiry of the term, termination by notice or retirement. Under Section 66 EA, an employee may be dismissed for misconduct or poor performance. Therefore, dismissal shall apply where the matter relates to performance or misconduct. In all other cases, the term termination applies except for constructive dismissal, to which we shall return later in this award.
- [17] According to JEX 8, the letter dated the 30th of April 2021, the Respondent 'terminated' the Claimant's contract of employment on the ground of abscondment from duty for a period exceeding seven days(One Week). The letter said that the claimant had refrained from reporting for duty from 12th March 2021 in contravention of Section A 8.14 and Section B 9.0(F) of the HRPM of the Respondent. She was immediately terminated and directed to hand over by 4th May 2021. The Respondent did not produce its HRMP before this Court. However, the Claimant attached an extract of the HRMP, which was admitted as JEX13 on page 25 of the Joint Trial Bundle. It provided for an offence called Absence without Leave(AWOL), where any staff member absent without being granted office leave is considered to have abandoned his/her work, which are grounds for immediate dismissal and all rights, privileges and benefits accruing to him or her shall be forfeited. According to Black Law Dictionary,² abscondment means the act of secretly leaving one's usual place of abode or business to avoid arrest, prosecution, or service of process. Abscondment has the connotation of unlawful conduct. In the realm of employment disputes, abscondment is considered grounds for dismissal. In the present case, the Claimant was dismissed for absconding or absence. This was common cause. We, therefore, find that this was an act of misconduct, as the facts demonstrate. The only question that this Court must answer is whether the dismissal and not termination was fair.
- [18] The standing dicta of the Supreme Court of Uganda is that an employer has a right to terminate or dismiss its employee if it follows procedure.³ In *Ogwal v Kampala Pharmaceutical Industries Limited*⁴ we observed that an employer is legally mandated to ensure the disciplinary process is procedurally and substantively fair. Simply put, there are two tests: procedural fairness and substantive fairness.

¹ [2020] UGCA 2051

² Garner, Bryan A. *Blacks Law Dictionary 11th Edn* Thomson Reuters 2019

³ *Hilda Musinguzi v Stanbic Bank U Ltd* SCCA 5 of 2016

⁴ [2023] UGIC 68


[19] For procedural fairness, the Court looks at Section 66EA. Under this provision, an employer must explain why the employer is considering dismissal before deciding to dismiss an employee on the grounds of misconduct or poor performance. The employee is entitled to have another person of his or her choice present during this explanation. The employer must give the employee an opportunity and reasonable time to prepare to present his or her defence. The golden standard was set in *Ebiju v Umeme Ltd*⁵ where it was held:

On the right to be heard, it is now trite that the Respondent 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 Respondent'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 Respondent.

[20] In the matter before us, by letter dated 27th April 2021 (JEX14), the Respondent invited the Claimant to appear before a DC to explain her action of absconding. She was advised to appear with a person of her choice. It was alleged she had been away from work from the 12th of March 2021. The minutes of the 2nd DC demonstrate that at the hearing, in Min 29/Discp/HFVH/Apr/21/Submission of the case, the Committee received the grievance that the Claimant was away from work with no explanation to her supervisor and on several occasions she had been called by her supervisor to work in vain. In her defence, the Claimant said she had received a letter to a disciplinary hearing which she did not understand. She said that at the 1st DC, she had been suspended for four weeks but that she had received a letter exonerating her. She said she had written asking for details of the earlier allegations and was not ready to report to work because she was still distressed and not content with how the 1st case was handled; she had applied for leave and did not expect further communication from the Committee. She is said to have been contemptuous of the committee. The DC noted that the absconding case differed from the 1st DC regarding the mishandling of patients. The 2nd DC had found her guilty of being absent from work without leave, gross insubordination, abdication of duty, use of abusive language and contempt of governance organs and authority. The committee resolved that she be terminated in accordance with the HRPM.

⁵ [2015] UGHCCD 15



- [21] In our view, the Claimant was duly invited to attend a disciplinary hearing on grounds of abscondment from duty. The charges were explained to her in the presence of a person of her choice. She was allowed to give her version of events. We think the Respondent was procedurally fair and adhered to the tenets of a fair hearing. It is our finding that there was a fair hearing.
- [22] As to substantive fairness, in *Ogwal* citing *Airtel Uganda Ltd v Peter Katongole*⁶, where a passage from the case of *Laws v London Chronicle Ltd*⁷ was extracted, Lord Evershed, in discussing the justification of summary dismissal, stated that

It follows that the question must be – if summary dismissal; is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. One act of disobedience or conduct can justify dismissal only if it is of the nature which goes to show that the servant has repudiated the contract or one of the essential conditions and for the reason therefore, I think what one finds in the passages which I have read that the disobedience must at least have a quality that is willful. In other words it connotes the flouting of the essential contractual terms.

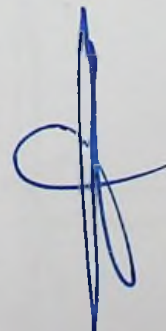
We observed that an employer must show that the employee had repudiated the contract or any essential conditions to warrant summary dismissal. We cited *Uganda Breweries Ltd v Robert Kigula*⁸ and noted that the Court of Appeal dicta, to which this Court is bound, stated that for summary dismissal, gross and fundamental misconduct must be verified. Mere allegations do not suffice.

- [23] The evidence on record shows that on the 12th day of March 2021, the Respondent asked the Claimant to resume her duties. By JEX 6, the Claimant's lawyers, M/s. Ahabwe James & Co Advocates, asked the Chairperson of the Respondent's Disciplinary Committee to provide a copy of the complaint letter. In this letter, the lawyers acknowledge that their client had received a letter from the Respondent's administrator indicating that the allegations against her had no merit, and she was cleared. It was, therefore, plain to all concerned that the Respondent had closed the 1st Disciplinary proceedings against the Claimant. The Claimant did not return to work. On the 27th of April 2021, 51 days after JEX5 was served on her, the Respondent invited her to the 2nd DC to answer charges of abscondment. We think that at this point, the Respondent had sufficient basis and grounds to ask the Claimant to explain her absence without leave. We do not accept the Claimant's account statement that she has been suspended. There was no letter of suspension. There was a letter of exoneration, clearing her of all allegations and asking her to resume her normal duties. That letter was dated the 12th of March 2021, three days after the 1st DC. Her Advocates had acknowledged her clearance. Therefore, in our view, at the 2nd DC, the Respondent had proven that the

⁶ [2023] UGIC 17

⁷ [1959] 1 WLR 698

⁸ [2020] UGCA 88



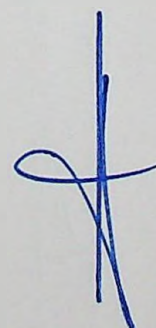
Claimant had been absent without leave for 51 days, so her dismissal from employment was justified.

[24] Mr. Mischele stressed that the Claimant was too distressed to return to work. That may be true of the Claimant, but in the present case, would it mean that her dismissal for being out of work was unfair? We think not. The Claimant had ample opportunity to explain her state of mind to the Respondent. First, in her letter dated 12th March 2021, she did not state her state of mind. Her lawyer's demand seven days later, JEX 6, does not mention any distress. It is only at the 2nd DC that she says she was aggrieved by how the 1st DC handled her case. At this point, when she had already been absent without leave, she informed the 2nd DC of her distress. There was no other evidence to support her distress thesis, and we do not find this proposition believable. In our view, the distress should have been brought to the Respondent's attention earlier to qualify as an exception, as Mr. Mischele submitted.

[25] We indicated we would return to the question of constructive dismissal. Mr. Mischele suggested that the Claimant was constructively dismissed. Constructive dismissal occurs as in *Nyakabwa J. Abwooli Vs Security 2000 Limited*⁹ where the employer's conduct must be illegal and injurious to the employee and make it impossible for the employee to continue working for it to be deemed unreasonable within the meaning of Section 65(1)(c)EA. In the present case, the Claimant was invited for a disciplinary hearing. The initial charges were found to be without merit. The Claimant was advised to resume work. She kept away from work and was invited to disciplinary proceedings for abandonment. We do not think that she was constructively dismissed. Conversely, we find that she was lawfully dismissed. In our view, following her absconding, the Respondent was well within its rights to impose a disciplinary penalty as it did.

[26] One final matter merits comment. Mr. Mischele invited us to consider the procedure for the imposition of disciplinary penalties under Section 62EA. We think the reference to this provision is misplaced. Section 62(1) reads as follows: Sections 62 to 64 shall apply where an employer imposes a disciplinary penalty other than dismissal. The opening of Section 62(1) does not apply to the present case because the Respondent did apply the penalty of dismissal.

[27] As a result, we find that the Respondent has justified the reason for dismissal and was, therefore, substantively fair.



Issue II. What remedies are available to the parties?

- [28] Having found, as we have on issue 1, the Claimant would not ordinarily be entitled to any of the remedies arising from unfair dismissal. We shall, however, deal with each of the remedies as submitted by Counsel for the Claimant.

Salary arrears.

- [29] Mr. Mischele sought salary arrears of three months for UGX 2,187,363/=. Counsel argued that this was not objected to. The position of the Industrial Court in *Aliker v Appliance World (U) Limited*¹⁰ regarding salary arrears, salary is only payable for work done. The Claimant was not at work in the present case from the 12th of March 2021 until her dismissal for abscondment on the 30th of April 2021. Therefore, in keeping with *Aliker*, we decline to award any salary arrears.

NSSF Contributions

- [30] Mr. Mischele argued that the Claimant was entitled to UGX 2,515,464/= being deducted but unremitted social security benefits. Counsel submitted that the Respondent adduced a Deed of Settlement (JEX15) between it and the Fund entered on 15th November 2023 after the institution of this case. The Claimant asked that we be pleased to grant this claim. In reply, the Respondent argued that JEX 15 was proof that the Respondent had arranged with the Fund to meet its statutory obligations.
- [31] This Court has held that under Section 12 of the National Social Security Fund Act Chapter 222, an employer is obliged to remit 5% of the salary of the employee and 10% as the employer's contribution to the employee's NSSF account for Social Security.¹¹ In *Otim Robert vs Tirupati* and other decisions of the Industrial Court, there has also been a unanimity of view that where the claimant does not adduce any proof, a claim for NSSF benefits would be speculative and be denied.¹² In the case of *Aijukye v Barclays Bank (U) Ltd*¹³ this Court held that NSSF deductible amounts could only be recovered if deducted and not remitted to the claimant and that only NSSF had the mandate to prosecute or file civil proceedings against the employer for recovery of the same. Given the above authorities, under JEX 12, the Claimant attached her NSSF statement, which showed a contribution of UGX 2,648,071 in June 2020. At her base salary of UGX 729,121/=:, the Respondent was required to contribute UGX 72,912/= and deduct UGX 36,456/= from her salary. The contribution would be UGX 109,368/= per month. JEX 12 does not show any contributions from June 2020 to April 2021. Additionally, the amount of the contributions varied from 30th June 2018 until her termination. We are satisfied that the Claimant would be entitled to a declaration that she has unremitted NSSF benefits for UGX 2,515,464/= and direct the Respondent to remit the same to the fund.

¹⁰ [2022] UGIC 67

¹¹ LDR 104 of 2017,

¹² *Lubega v Holycross Orthodox Hospital*[2019] UGIC 211

¹³ [2019] UGIC 1

One month's basic salary

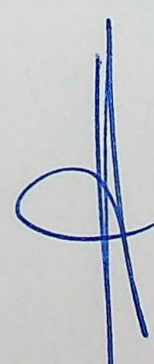
- [32] The Claimant asked for UGX 729,121/=, a one-month basic salary, because RW1 said she was entitled to terminal benefits. This would not be consistent with Clause F of JEX 13, which disentitles an employee dismissed for being absent without leave from all rights, privileges and benefits. In the circumstances, we decline to grant one month's salary.

General Damages

- [33] Counsel for the Claimant was contending for UGX 300,000,000/= in general damages. The law is that general damages are those damages such as the law will presume to be the direct natural consequence of the action complained of¹⁴. Having found that the Claimant was lawfully and fairly dismissed, we declined to grant her any general damages.

Costs

- [34] 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. In *Kalule v Deutsche Gesellschaft Fuer Internationale Zusammenarbeit(GIZ) GMBH*¹⁵ this Court 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 guilty of some form of misconduct. In the present case, the Claimant has not misconducted herself to warrant an award of costs against her.
- [35] Finally, we find that the Claimant was accorded a fair hearing and conclude that she was lawfully dismissed from employment. She is, therefore, not entitled to any terminal benefits except for the statutory social security contribution of UGX 2,515,464/=, which we direct the Respondent to remit to the National Social Security Fund within 30 days from the date hereof and to furnish the Registrar of this Court with proof of such remittance.
- [36] Overall, this reference stands dismissed except for the order directing the remittance of NSSF contributions.

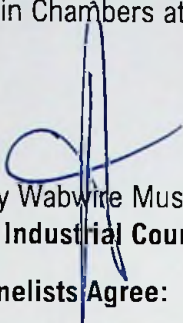


¹⁴ *Stroms v Hutchinson* [1950]A.C 515

¹⁵ [2023] UGIC 89

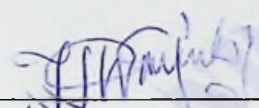
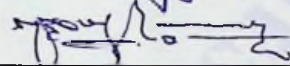

It is so ordered.

Signed in Chambers at the High Court of Uganda in Fort Portal this **26th day** of June **2024**.


Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

1. Hon. Jimmy Musimbi,
2. Hon. Emmanuel Bigirimana &
3. Hon. Michael Matovu.

26.06.2024

9:30 a.m.

Appearances:

1. **For the Claimant:** Mr. Francis Katsigazi
Claimant in Court.
2. **For the Respondent:** Mr. Gerald Mirembe accompanied by Sr. Agnes Ngonzi from
Uganda Martyrs University.
Sr. Consolata Bitekyerezo of the Respondent's Chaplaincy and Mr.
Bagonza Charles – Finance Manager are in Court

Court Clerk: Mr. Samuel Mukiza

Mr. Mirembe: Matter for award, and we are ready to receive it.

Court: Award delivered in open Court.


Anthony Wabwire Musana,
Judge, Industrial Court, 10:30a.m.