



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 26 OF 2017
(Arising from Labour Dispute Complaint No. KCCA/GEN/LC/588/2019)

MUGABI DAVID.....**CLAIMANT**

VERSUS

CENTENARY BANK UGANDA LTD.....**RESPONDENT**

Before:

The Hon. Mr. Justice Anthony Wabwire Musana

Panelists: Hon. Adrine Namara, Hon. Suzan Nabirye & Hon. Michael Matovu.

Case Summary

Employment law- Summary dismissal- procedure for imposition of disciplinary sanction-where an employer commits a procedural misstep by failing to issue a proper invitation and notification of a disciplinary hearing. Effect of combining suspension letter with notice of invitation to attend disciplinary hearing-procedural and substantive fairness- where employer genuinely believes that reason to dismiss an employee exists.

Resignation by an employee- effect of resignation on disciplinary proceeding-exercise of disciplinary jurisdiction while the employee is serving out a notice period. An employer has jurisdiction to commence disciplinary proceedings during a notice period.

Remedies-diminution of damages where dismissal is procedurally defective but substantively justified.

Representation:

1. Mr. Grace Kiyimba of Murungi, Kairu & Co Advocates for the Claimant.
2. Mr. Ferdinand Musimenta of S & L Advocates for the Respondent.

AWARD

Introduction

- [1]** The Claimant served the Respondent as a commercial loans officer at the Respondent's Forest Mall Branch. On 23rd May 2016, he resigned and gave the Respondent two months notice. The Respondent rejected his resignation and subjected him to a disciplinary hearing on grounds of breach of bank procedures and policies. After a disciplinary hearing, on 28th July 2016, the Respondent summarily dismissed the Claimant on the grounds of fraud and

Award: Justice A. Wabwire Musana

presenting false and forged documents, out of which the Respondent lost UGX 232,000,000/=. Aggrieved, the Claimant complained to the Kampala Capital City Authority Labour Officer at Nakawa. After a failure to resolve the matter, it was referred to this Court.

- [2] By a memorandum of claim dated the 21st of February 2017, the Claimant sought a determination that his dismissal was unfair and wrongful. He prayed for compensation for UGX 350,000,000/= and other declarations that the Court may find just.
- [3] The Respondent opposed the claim, contending that the Claimant's dismissal was justified on account of fraud and fundamental breach of his terms of employment by actions of negligence and willfully/knowingly breaching and disregarding laid down bank policies when he fraudulently withdrew UGX 232,000,000/= from one Ms. Grace Tusabe Ostrom's (*from now Ms Ostrom*) account No. 2220000574 held with the Respondent. It was contended that he was accorded procedural fairness, an opportunity to explain the allegations against him before a competent disciplinary panel with adequate notification and the right to attend a hearing with a representative of his choice. This followed an investigation.

[4] The following issues were framed and agreed upon:

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

The proceedings and evidence of the parties

The Claimant's Evidence

- [5] In his witness statement adopted as his examination in chief, the Claimant testified that he submitted a written explanation on the allegations of the fraudulent withdrawal of monies from Ms. Ostrom's account. His defence to the allegations was that Ms. Ostrom had received money after presenting her identification. He only played a customer service role and requested an investigation of irregular transactions by a non-account holder. He was never allowed to cross-examine Ms. Ostrum or any other witnesses, and he never paid out the money. Ms. Ostrom had never appeared at the Criminal Investigations Department to make a statement. That he was dismissed without an investigation and has been severely prejudiced by the unjustified summary dismissal by the Respondent's publication of the criminal proceedings, he asked the court to find in his favour.
- [6] Under cross-examination, the Claimant confirmed he was an experienced banker and understood the Bank rules. He testified that while he had friends within the Respondent Bank, he did not trust them. It was his evidence that he had a duty to protect depositors' funds, and they were at risk if the rules were not followed. He said that there had been several audits during his tenure. He also confirmed that the bank did its best to pay the correct person when paying out funds. He testified that he did not know Ms. Ostrum. He confirmed that he was aware of the allegations that in March and April 2016, various people gave him money from Ms. Ostrum's account. He was aware of an investigation and wrote

a statement responding to the allegations. He was shown CEXH2, a statement written by him on the 12th of July 2016 and confirmed that he had written a statement saying he had met Ms. Ostrom. He conceded that this contradicted his evidence to the Court, stating that he did not know Ms. Ostrom and had never met her. He denied receipt of UGX 232,000,000 and UGX 30,000,000 from Ms. Namirembe and suggested that on 19th April 2016, he was on leave. He confirmed signing a resignation letter on 23rd May 2016 and receiving the bank's response on 8th June 2016. He confirmed that the 1st Investigation report was dated 6th June 2016 and that he appeared before a disciplinary panel on the 12th of July 2016. He conceded that he did not present proof that Ms. Ostrom had received the money. He stated that he did not know the full extent of the investigation or that the customer had been interviewed. He also testified that he was unaware that the customer was in Denmark during the investigations. He conceded to the knowledge of the reason for his dismissal and that if it were true that he had used pre-signed vouchers to withdraw money, he would be in breach of banking practice. He also conceded that payment to a customer in the customer's absence would breach banking practice.

- [7] In re-examination, he clarified that his role was to market, give out and recover loans. He spent five days in a Police Cell and was given bond. He denied knowing who received Ms. Ostrom's money.

The Respondent's evidence

- [8] The Respondent called two witnesses. Geoffrey Alot(RW1) testified as supervisor of investigations, having been assigned to investigate alleged fraudulent behaviour by the Claimant. He testified that he studied a complaint by Mr. Mugisha Jackson Irengaya, Ms. Ostrom's brother. He found that the Claimant had approached different tellers with pre-signed withdrawal vouchers to withdraw money from Ms. Ostrom's account. He testified that the funds were withdrawn from 22nd March 2016 to June 6th 2016 from various tellers and saw a CCTV system showing the Claimant receiving the money from multiple tellers. After an analysis of Ms. Ostrom's account, it was found that the Claimant had found it easy to withdraw the funds from the account following her absence. CCTV footage showed Ms. Ostrom was absent when the Claimant paid the money. He filed a copy of the investigation report with recommendations that management should take action against the Claimant.
- [9] Under cross-examination, Mr. Alot confirmed that he authored the investigation report "REX1" under instructions from his supervisor, Mr. James Matovu. He confirmed that a police case had been reported to Jinja Road Police Station when the report was made, and two organs were investigating the allegations. He was tasked to investigate the disciplinary infringement. He confirmed reviewing the CCTV footage and handing it over to the Police. He also confirmed interrogating Ms. Ostrom and her brother, Mr. Irengaya. Ms. Ostrom confirmed that she was not in the country at the time of the withdrawal and had been brought to Uganda by Interpol. Mr. Mugisha's telephone number was attached to the bank account to monitor the transactions as a caretaker. Ms. Ostrom confirmed that she had not authorised any withdrawals. He also confirmed that he made recommendations to management, and management's decisions were not his.



- [10] In re-examination, he told us that the preliminary report was issued on the 10th of June 2016.
- [11] Mr. Edgar Busiinge Kakooza(RW2) testified that Mr. Irengaya made a complaint of a transaction alert on his sister's account, and the Respondent commenced an investigation. On 23rd May 2016, the Claimant resigned. On 8th June 2016, the Respondent rejected the resignation and required the Claimant to answer allegations of fraud. On 12th July 2016, he was invited to a disciplinary hearing, which he attended and was allowed to explain his role in the transactions. He denied the charges, claiming he was trying to provide the customer with superior services. He admitted to meeting the customer three times when he had withdrawn the money on behalf of the customer. The Committee found that the Claimant had presented false or forged documents on the pretext of offering good faith service, which caused a loss of UGX 232,000,000 and recommended his summary dismissal for deliberate and verifiable gross misconduct. It was his evidence that the Claimant did not exercise his right of appeal and was accorded procedural fairness.
- [12] Under cross-examination, Mr. Businge confirmed that the right of appeal was provided in the Human Resources Manual and had been explained to the Claimant. It was not contained in the dismissal letter. He confirmed that the Claimant was notified of the disciplinary hearing and the right to representation. In the hearing, the Respondent based on the investigation report and the Claimant's acceptance of allegations of gross misconduct. He confirmed that the Respondent did not issue a first warning and that gross misconduct attracted dismissal. He cited Code R1((d) of the HRM, which provided a distinction between minor and major infringements. The Claimant admitted receipt of money for a Bank Customer who did not appear at the back. The Respondent had to refund the Customer. The Customer's complaint was raised in the emails in the investigation report, and her brother, Mr. Irengaya, had raised the initial complaints.
- [13] In re-examination, Mr. Businge confirmed that the HRM was available on the intranet, where constant information is available. It is called Cente-Portal. He also clarified that the right of appeal is explained as a closing remark at the disciplinary hearing.
- [14] At the close of the Respondent's case, we invited the parties to file written submissions.

Analysis and Decision of the Court.

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

Submissions of the Claimant

- [15] Mr. Kiyimba, appearing for the Claimant, submitted that the Claimant's dismissal was unfair and illegal. It contravened **Sections 66 and 69(3)** of the Employment Act, 2006 (**the EA**); because there was nothing to show that gross misconduct was verified by forensic examination, the termination letter did not prove that the Claimant was in fundamental breach of his terms of employment. It was irregular for a non-customer to make a complaint; RW1 did not interview the customer, and he did not sign the investigation report.

It was suggested that Mr. Irengya was a pseudo-claimant. It was also suggested that the investigation report and management recommendations breached Article 28(3)(c) and (d) of the Constitution. In the invitation notice, the Claimant was not allowed to appear with a lawyer of his choice; the committee members were biased and did not avail the Claimant an opportunity to cross-examine witnesses at the disciplinary hearing. The forged vouchers were not shown, and the investigation report contained falsehoods. The Claimant's facts were thoroughly mixed up, and all tellers should have appeared in court to provide evidence. He was not shown the CCTV footage or allowed legal representation, so it was suggested that the Claimant was dismissed based on the preliminary report's findings, which breached Article 42(c) of the constitution. He appeared for the hearing while out on bail on criminal charges. The disciplinary committee's decision was rash, irrational, and without justifiable cause. It was the Claimant's case that the dismissal of the Claimant was unlawful for failure to abide by the principles of natural justice.

Submissions of the Respondent

[16] Mr. Musimenta, appearing for the Respondent, submitted that the Claimant was accorded substantive and procedural fairness. It was submitted that there should be reasons for dismissal that the employer believed to exist. Counsel cited Sections 68(2) and (3) EA and the case of *Robert Mukembo v Ecolab East Africa (U) Ltd*¹ for the proposition that summary dismissal is justified where the employee has fundamentally broken his or her obligations under the contract of service, which the employer genuinely believed to exist. It was submitted that the evidence of record overwhelmingly demonstrates the Claimant's fraudulent actions, which caused the Respondent financial loss and reputational damage. The Claimant was dishonest and claimed to have handed over UGX 232,000,000/= to the customer because of customer service. It was submitted that the belated challenge to the authenticity of the investigation report was precluded under Section 57 of the Evidence Act Cap. 8. That agreed documents become part of the evidence on record. It was submitted that based on the glaring evidence of fraud, the Respondent was convinced of the Claimant's infractions and justified in summarily dismissing him.

[17] Regarding procedural fairness, it was submitted on the authority of *Ekemu v Stanbic Bank Uganda*² that a disciplinary hearing is not technical; under Section 66EA, the Respondent was notified of the formal disciplinary hearing after his resignation was declined. He appeared at the hearing and testified that he knew Ms. Tushabe, while at the Uganda Management Institute, would occasionally contact him to obtain bank balances, loan inquiries and prospective business. After hearing his evidence, the Committee decided to dismiss the Claimant summarily. It was also submitted that the Respondent gave the Claimant sufficient time, and he did not request to cross-examine any witnesses. He raised this issue after dismissal. Regarding lack of legal representation, it was submitted that the Respondent's policies provided an appearance before a disciplinary hearing with any person of one's choice and that the Claimant had worked for the Respondent for five years and was expected to know the HRM.

¹ [2009] UGHC 126

² [2020] UGIC 2



Submissions in rejoinder

- [18] In rejoinder, Mr. Kiyimba submitted that the investigation report was doctored and marred with inconsistencies and invalidities. The suspension letter was served on the Claimant after he had been charged in criminal court, and this did not constitute an invitation to a disciplinary hearing. He said that he did not have sufficient time and that there was no proof of gross misconduct. There was a lack of legal representation, and having been out of a job for seven years, the Claimant was entitled to UGX 350,000,000/= in compensation.

Determination on Issue 1

- [19] The Supreme Court of Uganda has established that the employer has an unfettered right to terminate or dismiss an employee, provided that procedure is followed³. Regarding dismissal, this Court holds the threshold for the lawfulness of dismissal as procedural and substantive fairness per our dicta in *Mugisha v Equity Bank Ltd*⁴. We will, therefore, determine the issue against that threshold.

Procedural fairness

- [20] Procedural fairness relates to the process and procedure leading to termination and is rooted in the rules of natural justice. It requires observance of the right to a fair hearing. In section 65EA, it is provided that before deciding to dismiss an 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. The golden standard on the right to a fair hearing was set in the case of *Ebiju v Umeme Ltd*,⁵ where 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 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 Per Mwangutsya JSC(as he then was) in *Hilda Musinguzi Vs Stanbic Bank (U) Ltd SCCA 05/2016*. His Lordship held: "... the right of the employer to terminate a contract cannot be fettered by the Court so long as the procedure for termination is followed to ensure that no employees contract is terminated at the whims of the employer and if it were to happen the employee would be entitled to compensation..."

⁴ [2019] UGIC 210

⁵ [2015] UGHCCD 15

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] For emphasis, the above case lays the essential elements of procedural fairness or a fair hearing, which can be listed as follows:

- (i) There must be a notice in writing,
- (ii) It should allow for sufficient time to prepare a defence,
- (iii) It should set out the allegations levelled against the employee and
- (iv) It should explain his rights at the hearing, the right to respond, be accompanied, cross-examine, produce witnesses, and present their case before an impartial committee.

[22] The events leading up to the Claimant's dismissal are relatively straightforward in the matter before us. On the 23rd day of May 2016, the Claimant tendered a resignation letter. It was admitted as REX2. It reads:

*"Mugabi David
Tel: 0701960993
C/O P.O.BOX 30098, Kampala
23rd MAY 2016*

*TO: GENERAL MANAGER HUMAN RESOURCE
THRU: REGIONAL MANAGER-CENTRAL B
THRU: BRANCH MANAGER-LUGOGO*

RE: RESIGNATION FROM BANK SERVICE

I regret to inform you that I would like to tender in my resignation as a Commercial Loans Officer effective today, the 23rd May 2016.

I hereby give a two(2) months' notice of my intention to leave Centenary Bank effective today, 23rd May 2016.

I made this decision not because I am unhappy with the opportunities you have presented but as a strategic career move. It has been a great pleasure working with Centenary Bank and representing it in my various capacities.

I wish the management of Centenary bank continued success.

Thank you.

Yours sincerely

*Mugabi David
PF 2457"*



- [23] The first question that this Court must determine is the effect of this resignation as the Claimant's Counsel argued that the resignation terminated the employment contract. In a broad range of decisions by this Court, resignation is recognised as one of the means of ending an employment relationship by an employee. In Etuket v Kampala Pharmaceutical Industries (1996)Ltd,⁶ this Court held that resignation is a method of terminating the employment relationship at the instance of an employee and can be provided in the human resources manual. In Beinomugisha Boniface v Rakai Health Science Programme⁷ the Court held that when an employee willingly and without coercion resigns and terminates his own employment, the employer is not obligated to accept or reject such a resignation. The employee processes his or her exit from employment and leaves. In that case, the Court found that having resigned, Mr. Beinomugisha had no business claiming he was unlawfully terminated. A similar effect of resignation is expressed in Serunjogi v International Justice Mission⁸ where the exception to voluntary termination of an employment relation at the instance of an employee is where the resignation results from the employer's unreasonable conduct and would be considered a constructive dismissal.
- [24] The principles that emerge from these decisions are that a willful and voluntary resignation, free of duress and undue influence or as set under Section 64(1)(c)EA, unreasonable conduct on the employer's part constitutes a termination of the employment relationship by the employee. In the present case, the Claimant served the Respondent with his resignation letter on the 23rd day of May 2016 and agreed to serve notice of two months. In keeping with the principles expressed in the jurisprudence above, that would have been the end of this matter, as the Claimant was not seeking any permission to resign. He simply resigned.
- [25] However, what transpired after the Claimant's resignation? By a letter dated the 8th day of June 2016, "REX3", fifteen days after receipt of the resignation letter, the Respondent's General Manager, Florence N. Mawejje, acknowledged receipt of the resignation letter. In that letter, the Respondent declined to accept the resignation pending the conclusion of the ongoing investigations at the Lugogo Branch, where the Claimant was alleged to have fraudulently withdrawn UGX 232,000,000/= from Ms. Ostrom's account. The letter also served as a suspension pending receipt of the written explanation of the issues raised and a formal hearing before the Bank's disciplinary committee. The Claimant was required to furnish his written explanation by the 17th of June 2016. Mr. Musimenta submitted that this letter served as an invitation letter. We will return to this shortly.
- [26] Then, on the 12th of July 2016, the Respondent convened a Human Resource Disciplinary Committee Meeting, which the Claimant attended. Minute 6/07/16 indicates that the Claimant's current and past disciplinary records and his written response to the allegations contained in REX3 were noted. It was also pointed out that the Claimant had not attended the disciplinary meeting on the 8th of July, 2016. After considering the Claimant's responses, the Respondent's Human Resources Disciplinary Committee(HRDC) recommended his

⁶ [2019] UGIC 5

⁷ [2010] UGIC 1

⁸ [2021] UGIC 75

summary dismissal for deliberate, verifiable gross misconduct. By letter dated 28th July 2016, the Claimant was summarily dismissed.

- [27] The question that confronts us is whether, having voluntarily resigned, it was open to the Respondent to reject the resignation and subject the Claimant to disciplinary proceedings. The EA is silent on this point, not offering a bar to an employee who terminates his or her contract before, during, or after the disciplinary proceedings. In *Cairo International Bank v Victoria Kawoya*⁹ the Industrial Court held that the effective date of resignation is the date on which the employee is set to leave employment. In *Mugeni v Siryoyi*,¹⁰ the Supreme Court was considering a resignation of a public officer under Articles 80 and 252 of the 1995 Constitution and other provisions of the Local Governments Act Cap.138 and found that such resignations could not be accepted if there were pending disciplinary proceedings. In the Kenyan case of *Kennedy Obala Oaga v Kenya Ports Authority*,¹¹ whose particularly apt dicta we find persuasive in the case before us, Rika. J held that if an employee has given notice and is serving a notice period, the employer retains jurisdiction to discipline the employee until the notice takes effect. In that case, the Claimant resigned immediately before the Disciplinary Committee could render a verdict. The Court found that the employer could not deliver a lawful verdict in the disciplinary process after the Claimant had terminated the employment contract immediately. The Court considered *Matati v KPMG(Pty) Ltd*,¹² the South African Labour Court held that when an employee tenders a resignation immediately, the employer is deprived of jurisdiction to continue the disciplinary process as the resignation takes effect immediately. Ndolo J. held a similar view in *Godfrey Alan Tollo v Registered Trustees Gertrude Children's Hospital*¹³.
- [28] From the above, the law on resignation is that if it is tendered with immediate effect, the employer does not have jurisdiction to subject the employee to disciplinary proceedings. However, if the employee is serving notice, the employer would retain disciplinary authority over the employee.
- [29] In the case before us, the Claimant's termination letter indicated that he was serving his two-month notice effective the 23rd of May 2016. In *Oaga*, the Claimant paid notice and instantly terminated the employment relationship. Conversely, the Claimant expected to leave employment after the expiry of his notice period, two months away, on the 23rd of July 2016. Therefore, and on the principles of the effect of resignation set out above, we would find that he was under the Respondent's jurisdiction and could be subjected to the disciplinary process, which we so find.
- [30] Having so found, we must return to the procedural lawfulness of his dismissal. Under Section 65EA, an employer considering dismissal must first notify the employee of the reasons he is considering dismissal. The tenets of procedural fairness were laid out in paragraphs [20] and [21] above and in *Ebiju*. Mr. Musimenta argued that the suspension

⁹ LDA 4 of 2019

¹⁰ [2007] UGSC 4

¹¹ [2018] eKLR

¹² [2016] ZALCJHB 403

¹³ [2022]eKLR

and resignation rejection letter constituted the invitation. It was admitted as CEX3. In Musoke J's(*as she then was*) words, the *Ebiju* case is clear. Her Lordship holds;

The notice should set out clearly the allegations against the plaintiff and his rights at the hearing. 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.

[31] So the question is, did CX3 meet this threshold? For this purpose, it is necessary to employ the text of CEX3. It read as follows:

" Our ref: CB/PF 2457

Your ref:

Date: 08/06/2016

Mr. Mugabi David
P.O.Box 31551,
Kampala
d.mugabi@yahoo.com

Mob: 0782960993/0701960993

Dear Sir,

RESIGNATION FROM COMMERCIAL LOANS OFFICER POSITION

Reference is made to your resignation notice dated 23/05/2016. This is to acknowledge receipt of your resignation notice.

Please note that Management has declined to accept your resignation pending conclusion of the ongoing investigation at Lugogo Branch, where you allegedly fraudulently withdrew UGX 232,000,000/=(two hundred and thirty-two million shillings only) from a customer's account 2220000574 belonging to Tushabe Grace Ostrom's without the customer's consent.

You will appreciate that the above act if proved, is in breach of the Bank's Policy and Procedures and contravenes the Bank's core values of Professionalism and Integrity which constitutes an offence subject to disciplinary action in accordance with staff policy in force.

In view of the above, management has decided and directed your suspension from duty with effect from 10/06/2016 pending receipt of your written and satisfactory explanation on the issues raised, after which you will be called for a formal hearing of the case with the Bank's Disciplinary Committee.

In the meantime you are required to handover all the Bank's operational materials that may still be in your possession to the satisfaction and approval of the Branch Manager, Lugogo after which you will not be expected to perform any Bank official duties until further notice.

During this period, your access to all the Bank's operating systems and e-mail system will be suspended.

During the period of suspension you will be entitled to half pay/salary in accordance with the Human Resource Policies and Procedures Manual in force.

Your written response through your immediate supervisor should reach the undersigned not later than 5:00 pm on 16/06/2016

Yours faithfully,

Florence N. Mawejje

General Manager Human Resources

c.c General Manager, Credit

" Chief Manager Commercial credit

" Ag. Chief Manager Branch Operations

" Regional Manager-Central B

" P/F. No.2457"

[32] This letter very clearly rejected the Claimant's resignation and informed him of the ongoing investigations into allegations that he unlawfully withdrew UGX 232,000,000/= from Ms. Ostrom's account. The letter also indicated that such an action was an offence attracting disciplinary proceedings. The letter suspended the Claimant and advised him that he would be called for a hearing. REX3 also advised the Claimant to prepare and submit a written explanation within nine days from the date of the letter.

[33] Regarding the *Ebiju* standard, this letter did not constitute an invitation to a hearing, as Mr. Musimenta would have this Court believe. While it advised the Claimant he would be called for a formal hearing after the Respondent received his written explanation, it did not indicate the date and time of the disciplinary hearing. This letter did not state the Claimant's right to cross-examine witnesses or bring any witnesses and did not state any of the Claimant's rights to attend with a person of his choice. We disagree that REX3 would pass the *Ebiju* test because it did not fully encapsulate all the rights of the Claimant. In our view, this was a procedural misstep on the part of the Respondent. While the right to respond in writing was set out, the rights to be accompanied, cross-examine, and call witnesses were not contained in the letter itself. We were not shown that the Claimant was given sufficient time to prepare for a disciplinary hearing and whether the allegations had retained their character



after the investigation. For these reasons, REX3 was not a proper notice or invitation to a disciplinary hearing as envisaged in Section 65EA and explained in *Ebiju*. We would be fortified by our decision in *Kabagambe v Post Bank Uganda Limited*¹⁴ where we found a notice deficient in not stipulating rights at the hearing and not containing an investigation report. In that case, we found that the hearing was unfair. We also cited *Douglas Lukwago v Uganda Registration Services Bureau*.¹⁵ where the Industrial Court faulted a disciplinary process for not permitting the employee to attend with a person of their choice.

[34] Mr. Musimenta suggested that there was sufficient time because the Respondent was reminded of the hearing on 27th June 2016. He was always aware of the facts of the case and the investigation and tried to resign. That may be true, but the standard that the Court has adopted per *Ebiju* is that the right to be heard shall be completed when the threshold is met. The Court of Appeal cemented this position in *Uganda Breweries Ltd v Robert Kigula*,¹⁶ where failing to comply with procedural fairness irrespective of substantive fairness makes the employer liable to pay four weeks' wages; as stated in *Kabagambe*, procedural requirements are strict, and we shall return to *Kigula* in our treatment of remedies and after resolving the matter of substantive fairness.

[35] Finally, one more persuasive Kenyan case illustrates the point more clearly. In *Boniface Mzungu v Base Titanium Limited*¹⁷ the employer combined the suspension, notice to show cause and invitation to a disciplinary hearing in one letter. Rika J. held that combining a show cause letter with an invitation to a disciplinary hearing was a misstep and inappropriate because the employee needs to have an opportunity to show cause before the decision to take him through the disciplinary hearing is made. From the wording of REX3, it was clear that the Claimant's suspension was intended to conclude the investigation to gather all the relevant and necessary facts before placing the Claimant before the Respondent's Disciplinary Committee. It follows, therefore, that absent the reminder that Counsel refers to, the Respondent did not issue any further written notification of an invitation to the Claimant to attend the disciplinary hearing on the 12th of July 2016. As a result, we hold that to the extent that there was no written invitation to the formal disciplinary hearing held on the 12th of July 2016 and REX3 was deficient as an invitation to a hearing, the Respondent was procedurally unfair.

Substantive fairness

[36] Substantive fairness relates to the reason for dismissal and proof of the reason for dismissal. Mr. Kiyimba, citing *Kanyangoga & Ors v Bank of Uganda [2016] UGIC 22*¹⁸ submitted that the employer must show verifiable misconduct and that there was nothing on the record to substantiate the allegations. He contended that the complainant was a pseudo-complainant, challenged the investigation report and asserted that no document

¹⁴ [2023] UGIC 20

¹⁵ Labour Dispute No. 057 of 2016

¹⁶ C.A.C.A 183 of 2016

¹⁷ [2020]eKLR

¹⁸ [2016] UGIC 22

had been placed before the committee or this Court. For the Respondent, Mr. Musimenta contended that there were justifiable reasons for dismissal, and the evidence supported the allegations of fraudulent actions. It was Counsel's view that the investigation report was an agreed document and the Claimant had launched a belated and untenable challenge to it. Under Section 67 EA, an employer is required to prove the reason for termination. Section 67(2) EA provides that the reason or reasons for dismissal shall be matters that the employer genuinely believed existed at the time of dismissal. The onus to justify a dismissal lies with the employer, and the threshold is that the employer genuinely believed the matters to exist. In *Kigula*,¹⁹ the Court of Appeal held 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 dismissal. Mere allegations do not suffice. The allegations must be proven to a reasonable standard, and such proof requires a hearing.²⁰

[37] In the matter before us, it was common cause that a hearing was held on the 12th of July 2016. The minutes of this meeting were an agreed document and marked REX4. These minutes showed that the Claimant attended the meeting. Under Minute 6/07/16, the Claimant case was recorded as CASE 1: Alleged fraudulent withdrawal of UGX 232,000,000/= from a customer's account at Lugogo. In the minutes, it was recorded that when he was asked about the allegation, the Claimant had stated that he was trying to offer superior customer service to the client because he had dealt with the client before. This was consistent with his written explanation (CEX2), in which he said he used to give the customer account balances. During his cross-examination, the Claimant stated he did not know Ms. Ostrom. When asked to read CEX2, he conceded that he had met her. He also acknowledged that he had not presented the disciplinary panel with proof that Ms. Ostrom had received money from him. He conceded that if the reason for his termination were true, it would be a breach of banking practice. In re-examination, he said he did not know Ms. Ostrom. The minutes, however, indicate that he said he met Ms. Ostrom several times. He said the very first transaction was when she withdrew UGX 2,000,000/=. He also said he knew her when he had enrolled at the Uganda Management Institute, and she would occasionally contact him for balance account inquiries. He also told the disciplinary committee that the third transaction was when she came to withdraw money and stayed in her car while he processed the withdrawal from a teller. He said he picked up the money on each occasion, and no one else at the branch knew Ms. Ostrom. He was also recorded as having assisted Ms. Ostrom with a transaction while he was on leave. That was in stark contrast to his testimony before this Court where, under cross-examination, he said he was on leave on the 19th of April 2016 when he is said to have approached one Mirembe Joanitor and received money on behalf of Ms. Ostrom.

[38] From the evidence above, there was a basis for the Respondent to believe that the Claimant breached its policies and procedures. It is trite that employees in financial institutions are held to a high degree of expectation because they deal with high-risk depositors' funds. In RW1's testimony during cross-examination, he said that the Claimant was the lead suspect in the investigation. He said he reviewed CCTV footage, which was handed over to the

¹⁹ C.A.C.A 183 of 2016

²⁰ See *Odongo & Another v Save the Children International* LDR 322 of 2015

Police. He also said he interviewed Ms. Ostrom, who confirmed that she had not authorised any withdrawals. Her brother, Mr. Irengya's telephone number, was registered for alerts and based on his findings, he made the investigation report recommending disciplinary action against the Claimant. RW2 testified that during the hearing, the decision to dismiss the Claimant was based on zero tolerance for gross misconduct under the Human Resource Manual. At the disciplinary hearing, the Claimant admitted receipt of money from a bank customer who did not appear in the bank, and the customer came to the bank complaining that she had not received the money. He testified that the bank had to compensate the customer. We think there is credible evidence that the Respondent had reason to believe that the Claimant committed gross misconduct and was fundamentally in breach of the bank's policies and procedures. The evidence, as we have indicated above, does not warrant any other outcome or conclusion except that the Respondent had reasonable cause for considering dismissing the Claimant for justifiable cause.

[39] In *Airtel Uganda Ltd v Peter Katongole*²¹, we extracted the following passage by Lord Evershed in *Laws v London Chronicle Ltd*²², where it was observed;

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. Therefore, 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.

This Court is persuaded that there were acts of disobedience and infractions by the Claimant that the Respondent genuinely believed to exist and that was in breach of its policies and procedures on cash withdrawals. The evidence contained in the investigation report overwhelmingly implicated the Claimant in practices contrary to the Respondent's established procedure. For these reasons, we hold that the Respondent was entitled to dismiss the Claimant summarily.

Conclusion

[40] Having found that there were procedural missteps but there is substantive fairness in that there was a justifiable reason for the Claimant's dismissal, the sum effect of a finding of procedural unfairness and substantive fairness, as we held in *Mugisha* is 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. In effect, however substantively justified, a dismissal is unfair and unlawful for procedural defects. Following the oft-cited dicta in *Musinguzi*, this Court will

²¹ [2023] UGIC 17

²² [1959] 2 All ER 285



interfere with the employer's unfettered right to termination of employment because we have found that the employer did not follow procedure. We conclude that the Claimant was unfairly and unlawfully dismissed and is entitled to a declaration to the effect. Issue one is answered in the affirmative.

Issue II. What remedies are available to the parties?

General damages

- [41] Mr. Musimenta invited the Court to find that the Claimant is not entitled to any remedies as he was lawfully dismissed. However, having found, as we have on issue 1 above, the Claimant would be entitled to remedies. Counsel for the Claimant, citing *Bank of Uganda v Tinkamanyire*²³ suggested that the Claimant would be entitled to UGX 350,000,000/= in general and aggravated damages for the wanton and reckless manner of his dismissal. Mr. Musimenta countered the authority of *Waiglobe(U) Ltd v Sai Beverages Ltd*.²⁴ for the proposition that damages are based on the principle of *restituto in integrum*, the Claimant should have adduced evidence supporting his claim for damages.
- [42] What are the principles governing an award of general damages in employment disputes? In *Sadat Serungoji v Guinness Transporters Ltd*²⁵ we cited recent precedent from the case of *Uganda Post Limited v Mukadisi*,²⁶ where the Supreme Court of Uganda held that an award of general damages is the exercise of the trial Court's discretion. In laying out the principal considerations for an award of general damages, the apex Court held that general damages are awarded to compensate the employee for non-economic harm and distress caused by the wrongful dismissal and include compensation for emotional distress, mental anguish, damage to reputation, and any other non-monetary harm suffered due to the dismissal.
- [43] In our view, the Respondent had a justifiable reason for dismissing the Claimant. We are satisfied that the Respondent genuinely believed there was reason to impose disciplinary sanctions on the Claimant, which led to his dismissal. This amounts to substantive fairness, which would have an effect of diminution on any award of general damages²⁷.
- [44] The facts of this matter are that the Claimant had resigned and was serving his notice period on the date of his dismissal. We have already found that the dismissal was substantively justified. Therefore, what would his restitution be? In other words, what position would he return to but for the unfair or unlawful dismissal? In our view, that position would be that the Claimant would be serving out his notice period. He expected to leave the service of the Respondent on the 23rd of July 2016, having served his notice period. His resignation was peremptory during an ongoing investigation into bank policy and procedure breaches. Unlike in *Tinkamanyire*, where the basis of the award of general and aggravated damages was a post-dismissal evaluation of the employee's stellar performance, in the present case,

²³ [2008] UGSC 21

²⁴ [2017] UGHCCD 172

²⁵ LDR 47 of 2022

²⁶ [2023] UGSC 58

²⁷ See *Kabagambe v Post Bank Uganda Limited* [2023] UGIC 20 and *Kamegero v Marie Stopes Uganda Limited* [2023] UGIC 52

the facts are not exculpatory because, as we have found, the Claimant was in breach of the Respondent's policy. The second distinction with *Tinkamanyire* is that there was no evidence that the Respondent's employees had acted callously and indifferently. There was a procedural misstep by combining a suspension letter with an invitation or notification of the hearing, but for emphasis, the dismissal was substantively fair.

- [45] As a result, we do not think the Claimant has laid a firm foundation warranting an award of general damages in the sum of UGX 350,000,000/=. In the circumstances that we find that the dismissal was substantively fair and justified, and the Claimant was serving out his notice period as restitution, we award the Claimant UGX 3,273,866/= as general damages.

Statutory sanction

- [46] Having found a procedural misstep in that the Respondent did not meet the threshold of a proper invitation to attend the disciplinary hearing, we hold that this procedural error invites a statutory sanction. The sanction for failure to grant a fair hearing under Section 65(4) EA is that irrespective of whether any dismissal, which is a summary dismissal, is justified or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks' net pay. In the circumstances, due to its procedural misstep, the Respondent is to be sanctioned. We award the Claimant UGX1,636,933/= as four weeks' wages.

Certificate of service

- [47] The Claimant sought an order for a certificate of service. Under Section 60EA, an employee is entitled to a certificate of service upon request. In the circumstances that by this claim now before us, the Claimant has sought a certificate of service albeit not by pleading but by his submissions, exercising the maxim of equity "*ubi jus ibi remedium*" where equity shall not suffer a wrong without a remedy and sitting as a Court of equity, we order the Respondent to issue the Claimant with a certificate of service within 30 days from the date of this award.

Conclusion and final orders

- [48] In the final analysis, we find that while the Respondent was substantively fair and genuinely believed that it had good and justifiable grounds to dismiss the Claimant, it was procedurally unfair because it did not issue an appropriate invitation or notification to the disciplinary hearing. Thus, the dismissal was procedurally defective but substantively justifiable.

[49] Having found as we have above, it is our conclusion in keeping with our dicta in *Mugisa v Equity Bank Ltd*²⁸ that the procedural misstep renders the dismissal unfair, and the Claimant is entitled to a declaration to the effect.

[50] In the result, we make the following declarations and 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) UGX1,636,933/= as four weeks net pay for not issuing proper notification and
 - (b) UGX 3,273,866/= in general damages.
- (iii) We direct the Respondent to issue the Claimant with a certificate of service within 30 days from the date hereof.

It is so ordered.

Dated, delivered and signed at Kampala on this 28th day of August 2024

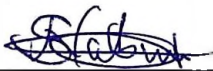

Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

1. Hon. Adrine Namara,



2. Hon. Susan Nabirye &



3. Hon. Michael Matovu.



²⁸ [2023] UGIC 62

28th August 2024

2:48 pm

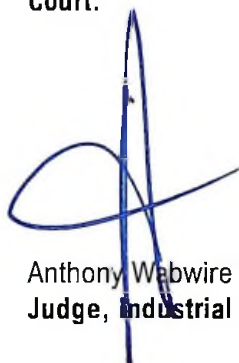
Appearances

1. For the Respondent: Mr. James Samuel Zeere, holding brief for Mr. Ferdinand Musimenta for the Respondent.
2. Claimant absent.

Court Clerk: Mr. Samuel Mukiza.

Mr. Zeere: Matter is for award and we are ready to receive it.

Court: Ruling delivered in open Court.



3:29 pm

**Anthony Wabwire Musana,
Judge, Industrial Court**