THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE No.097 OF 2019
(Arising from KCCA/MAK/LC/180/2017)

1. **GRACE NAMAYANJA**
2. **TIBITA RICHARD TASIWUKA**
3. **BWANIKA YUNUSU**
4. **NZITA EDWARD JAMES:: CLAIMANTS**

VERSUS

CAVENDISH UNIVERSITY UGANDA::: RESPONDENT

Before:
The Hon. Head Judge, Linda Lillian Tumusiime Mugisha.

Panelists:
1. Hon. Charles Wacha Angulo,
2. Hon. Beatrice Aciro Okeny &
3. Hon. Rose Gidongo.

Representations
1. Mr. Saasi Marvin Augustin, Legal Agent for the Claimant.
2. Mr. Isaac Walukaaga of M/s. MMAKS Advocates for the Respondent.

AWARD

Background

[1] The Claimants were recruited into the Respondent's as per para 2 of their respective Witness Statements and the Parties' Joint Scheduling Memorandum filed in Court on 12th March 2021. In November 2016, the Claimants signed two-year renewable contracts. However, the Respondent suddenly terminated "with effect from today, 16th June, 2017", purportedly because the Respondent was restructuring to comply with the requirements of the NCHE. See exhibits G2, T4, BI, & JN2; and exhibits G3, T5, B3, & JN3, on the Claimants' Trial Bundle for copies of the contracts and termination letters.

[2] The Claimants filed their Memorandum of Claim on 31st May 2019, and then filed Witness Statements on 10th & 18th February 2020. Ten (10) months later, on 8th December 2020, when the Claim came up for mention, the Respondent had not filed any Witness Statement, prompting Court to give it up until 1st February 2021, and later 12th March 2021. One day before the cross-examination on 4th October 2021, the Respondent filed a Statement sworn by Lydia Nakibande (RW1), and later another one by David Mutabanura (RW2). On 5th Oct, 2021, when Court sat, the Respondent cited the COVID-19 lockdown as its excuse for disobeying Court's instructions. We invite Court to take Judicial Notice that Uganda's first COVID-19 lockdown began at the end of March 2021, not earlier.

Facts of the case

[3] In November 2016, the Claimants signed new, two-year employment contracts with the Respondent. Barely seven (7) months later, on 16/06/ 2017, the new contracts were suddenly terminated, purportedly on grounds that the Respondent was conducting restructuring to meet "requirements" of the National Council for Higher Education (NCHE) as stated in a Report marked RXS6 on the Respondent's supplementary trial bundle.

According to the Claimants, prior to their termination and contrary to the law, the Respondent did not notify them of nor consult them about any restructuring exercise

specifically targeting their positions. It did not give them any opportunity to apply and compete for the spare jobs. Instead, after concluding a restructuring exercise that was caused by the NCHE report of December 2015, the Respondent sent them an email in August 2015 assuring them that their employment was "secure" and that it had retained them "as the core group" of staff, which it demonstrated by giving them new contracts in November 2016.

Therefore, their termination on grounds of a 'restructuring' exercise was only intended to sanitize the manner in which the Respondent terminated them. This is because it later filled the alleged 'restructured' positions with other staff and, in some cases, merely renamed the positions to bolster its claim of having 'abolished' them. It is therefore their claim that their termination and the manner in which the Respondent did it was inequitable, unfair, and unlawful.

Issues

According to the joint scheduling memorandum, the following are the issues that were framed for resolution:

1) Whether the restructuring process in question was conducted in accordance with the law?
2) Whether the Claimants' employment contracts with the Respondent were respectively unlawfully terminated?
3) What remedies are available to the parties?

Resolution of Issues

1. Whether the restructuring in question was conducted in accordance with the law?

[4] It was submitted for the Claimants that, the Respondent's evidence on record shows that the restructuring exercise pursuant to which it allegedly terminated the Claimants' employment had already ended by the time the Claimants were given new contracts in November 2016. Counsel made reference an email that was sent by the Respondent's Vice Chancellor to the Claimants on 12/08/2016, (marked exhibit RXS8 on Respondent's Supplementary Trial Bundle) informing them that it had concluded a

restructuring exercise which was a caused by a 2015 National Council for Higher Education (NCHE) and as a result it terminated 60 of their colleagues. The email then assured the Claimants that their employment was *"secure"* since it had selected and retained them as part of *"the core group"* of staff that would build the Respondent *"into one of the best Universities in Uganda"*. According to Mr. Ssasi, this was further confirmed by Exhibit RXS12 on page 83 of Respondent's Bundle, which is the Respondent's letter to NCHE dated 14/12/2016, requesting for extension to deliver a status Report and final sets of documents on matters raised in the NCHE Report of December 2015, by 31/12/2016. By this time, the Claimants had signed new contracts in November 2016. He contended that had the Respondent intended to dismiss them on grounds of the restructuring, it would not have assured them in August 2016 that their jobs were secure and issued them with new contracts in November 2016. It was his submission that the assurance of August 2016 not only created a legitimate expectation among the Claimants that they would not be terminated on account of the impugned restructuring exercise but also estopped the Respondent from terminating them in the future on alleged account of that particular restructuring exercise and Exhibit RXS12 demonstrates the Respondent's intention to be bound by its assurance to the Claimants. He also cited ***Bank of Uganda v. Joseph Kibuuka & 4 Ors, Civil Appeal No. 281 of 2016 at pages 26 to 33.***

He invited Court to find that the impugned restructuring exercise which the Respondent based itself to terminate the Claimants had already ended by the time they signed the new employment contracts it terminated, and/or, in the alternative, that the Respondent was estopped from terminating the Claimants on a restructuring exercise purportedly triggered by the NCHE Report of 2015.

No proof of decision by Respondent's management to restructure operations (again)

[5] Mr. Ssasi further contended that contrary to Sec. 101(1) of the Evidence Act, that requires "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts" to "prove that those facts exist" and section 101(2) of the same Act that places the burden of proof upon the person who "is bound to prove the existence of any fact" and Sec. 103 of the Evidence Act that places the burden of proof as to any particular fact "on that person who wishes the court to believe in its existence", the Respondent has not provided any evidence

in the form of minutes and/or resolutions to prove that at any point after the claimants had signed their new contracts, its management formally met and resolved to restructure its operations. Accordingly, the Respondent was not carrying out any legitimate restructuring exercise when it terminated the Claimants.

In addition, it was his submission that the Respondent unlawfully failed to give Statutory Notice of the contemplated restructuring as provided under Section 80(1)(a) of the Employment Act, 2006 that requires an employer who "contemplates terminations of not less than ten employees" to inform the labor union, if any, which represents the employees "at least four weeks before the first of the terminations". Section 80(1)(b) that requires an employer to notify the Commissioner of Labour "in writing of the reasons for the terminations" he also cited Article 13(1) of the Termination of Employment Convention, 1982 (No. 158), which Uganda ratified and is therefore applicable in our jurisdiction as held by Mulyagonja, JA in *Bank of Uganda v. Kibuuka* (supra) at page 35. It was further his submission that Regulation 44(a) of the Employment Regulations, 2011 provides the form in which the requirements under Section 80(1) must be satisfied, including the requirement to attach the list of the affected employees.

[6] Mr. Ssasi also relied on *Cissy Nankabirwa v. B.O.G. St Kizito Technical,* L.D.C. No. 60/2016, where this Court held that an employer has a right to restructure only if the employees are aware of the process, and on *Vice-Chancellor of Massey University v. Wrigley & Anor*, [2011] NZEmpC 37 WRC 2/10, where the requirement to give personal notice and information in advance to staff about contemplated restructuring "and "... an opportunity to comment" before decision to terminate them was emphasized. According to him the word "contemplate" is defined in the Oxford Advanced Learner's Dictionary (9th ed) as, "to think about whether you should do something," or "to think carefully about and accept the possibility of something happening". He also cited *South African Commercial Catering and Allied Workers Union & Ors v. JDG Trading (Proprietary) Ltd*, JA 140/17 (pg 11) in which South Africa's Labour Appeals court upheld as mandatory Section 189 of their Labour Relations Act whose provisions are similar to those in our Sec. 80(1) (supra) and Regulation 44(a) (supra) and argued that the keyword "contemplate" when understood in its literary English meaning, command an employer to notify employees and the

Commissioner about anticipated restructuring but that was not done in the instant Claim.

[7] He further contended that during cross-examination, neither RW1 nor RW2 mentioned any occasion when the Claimants were given formal notice of a contemplated restructuring exercise after signing the November 2016 contracts, save for what occurred in March and May 2016, before the new contracts were issued. In any case, RW1 and RW2 admitted that there was no evidence to show that the Respondent notified the Commissioner about the contemplated restructuring. He further contended that, the Claimants were not consulted in accordance with Section 80(1)(a) of the Employment Act, read together with Reg. 44(a) of the Regulations and Form A of the Sixteenth Schedule of the Regulations that obligates an employer "who contemplates the termination of ten or more employees to certify in its Notice to the Commissioner "that the employees affected have been consulted. According to him, the Claimants' termination letters (exhibits G3, T5, B3, and JN3) were evidence that the Claimants were never consulted. He quoted part of the letters as follows: *"...the University has reduced its programs. Consequently, the need to restructure its staff has arisen, and this affects your employment. This is therefore to notify you that your employment will be terminated with effect from today, 14th July 2017 for the above reasons as explained to you at the meeting held with you today"* and argued that this was evidence that the claimants were notified about the restructuring on the same day they were terminated, therefore, breached Section 80(1) of the Employment Act.

It was further his submission that, in the context of terminating an employee for no fault of their own, as in the instant case, consultation of the affected employee is as mandatory as a hearing is to an employee facing dismissal for verifiable misconduct. According to him, to hold otherwise would be unjust, inequitable, and tantamount to promoting discrimination, contrary to *Art. 21(1) of the 1995 Constitution of Uganda; and Section 5(1) of the Employment Act and section 72(1)(b) of the Employment Act* (supra).

[8] Mr. Ssasi further contended that the Respondent acted arbitrarily because it did not follow any objective mutually agreed criteria when implementing the purported restructure as espoused in several authorities such as, Browne-Wilkinson J in *Williams v Compare Maxam Ltd* [1982] ICR 156 at pp 6 to 13, where it was stated

that; "The purpose of... objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees" and restructuring terminations carried out without criteria contravened "standards of fair treatment accepted by fair employers." He also relied on *Chemical Workers Industrial Union & Ors v Latex Products (Pty) Ltd*, J A 31 of 2002, where South Africa's Labour Appeal Court held that, where there are no agreed criteria between the employer and its employees for determining who to terminate or retain during a restructuring process, the employer must use only fair and objective criteria. In Simpsons Farms Ltd v Aber hart (2006) 7 NZELC 98,450 (EC) at pages 15 to 19, Court emphasized that "the selection criteria used by an employer to determine redundancy should be disclosed to employees affected by it". He also cited Clause 15 of the Termination of Employment Recommendation, 1963 (Receommendation119), which is to the same effect.

[9] He suggested that the most widely recognized objective criteria is the "Last in, First Out" (LIFO) method of selection, which involves selecting employees for termination on the basis of their length of service such that those with the shortest service should be selected first. He relied on *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, in which the appellate Court endorsed the LIFO criteria, holding that "the length of service criterion is one of a number of criteria for measuring employee suitability for redundancy ... length of service criterion is consistent with the overarching concept of fairness".

He insisted that according to the Claimants, they were restructured through a vague process with no clear and mutually agreed upon criteria for selecting staff to terminate or retain and this was confirmed by RW1 and RW2 who failed to prove that a single meeting was held by the Respondent's management to decide on the selection criteria for restructuring, or that any criteria was agreed upon with the Claimants. In the circumstances court should find that terminating the Claimants without following any objective criteria was arbitrary, discriminatory, and unfair.

[10] In addition, he submitted that the Respondent did not consider alternatives to terminating the Claimants, and yet an employer conducting a restructuring exercise must consider alternatives before terminating its staff, otherwise the terminations will be considered unfair. He relied on *SACCAWU & Ors v Woolworths (Pty) Ltd* [2018] ZA CC 44 at 13 and *Williams v. Compare* (supra), where South Africa's apex Labour

Court found that terminating workers during a restructuring without first examining alternatives was unfair. He insisted that, although RW2 testified that the structural changes in the faculties in which the Claimants were previously employed "were incompatible with their respective skillsets, the Respondent did ask them for their most recent curriculum vitae before concluding that they were incompatible.

[11] He also contested the Respondent's reliance on the NCHE report, as the basis of the termination, because the report did not specifically target the Claimant's but rather highlighted management failures, which had no logical connection with the Claimants termination, because it only queried the suitability of staff whose names are listed between pages 36 & 40 of the report and the Claimants were not among them and at pg. 55, it commended the Respondent for employing *"competent and well-qualified administrative staff"* who logically included the Claimants. While section 3.6(h) of the Report decries a communication gap between staff and management. Therefore, reliance on the report as the basis of termination is misleading. According to him, this is compounded by the fact that their positions still exist in the Respondent's 'new' organizational structure, because they were replaced by other staff. For instance, RW2 confirmed that the Faculty of Socio-Economic Sciences, in which the 1st Claimant was employed as a Faculty Administrator whose role is to assist with day-to-day administration to support students regarding registration, class attendance, and examinations, still exists as Faculty Assistant Registrar who plays the same roles. The positions of Financial Accountant and Accounts Officer, which were held by the 2nd and 3rd Claimants respectively, were changed to "accounts officer" which is an "entry-level accounting position", and is currently held by a one Enyau Julius who is employed as a cashier [who] bills/invoices students and recognizes payments" which roles similar to the ones the 3rd Claimant was performing in accordance with Clause 2 of exhibit B1.

[12] He contested the organogram which the Respondent tabled before court, because it was incomplete and unverifiable, as it did not show the new positions as against the organogram before restructuring, and therefore rendered it impossible to tell with certainty whether the Claimants' positions were scrapped or not. He considered **Exhibits RXS1 and RXS3 on the Respondent's Trial Bundle,** which the Respondent purports to be its "Revised Program Offering" and "Executive & Organizational structure," vague; incomprehensible, incomplete and inauthentic,

therefore, the Respondent failed to prove that the Claimants' positions were scrapped during the alleged restructuring.

2. Whether the Claimants' Employment Contracts Were Unlawfully Terminated?

[13] Citing *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013/ eKLR, where the Kenyan Court of Appeal held that "a discharge voucher per se cannot absolve an employer from statutory obligations and it cannot preclude the Industrial Court from enquiring into the fairness of a termination, because it must be established that the discharge voucher was freely and willingly executed, Mr. Ssasi argued that the assertion that the Respondent paid the claimants terminal dues did not absolve it from the allegations of unfairly and unlawfully terminating them because It did not act in accordance with justice and equity thus rendering the termination unfair and unlawful within the meaning of Section 73(I)(b) of the Employment Act (supra).

In reply Mr. Walukagga Counsel for the Respondents in his submissions restated the positions the Claimants held before their termination as follows: The 1st Claimant was employed as a Faculty Administrator on 15/04/2014, the 2nd Claimant was employed as an Academic Registrar - Internal Audit on 17/09/2012, the 3rd Claimant as an Accounts Officer - Student receipting on 08/0../2008 and the 4th Claimant as a Data Management Assistant on 18/062014 and all of them were terminated on 16/06/2017 as a result of a restructuring exercise by the Respondent and all were duly paid their dues. It was his submission that the restructuring process in question was conducted in accordance with the law, therefore it was incumbent on the Claimants to prove that their employment contracts with the Respondent were terminated out of the law, in accordance with the provisions of Section 103 of the Evidence Act (Cap 6) that enjoins he who alleges to prove the allegation. This is because it is trite law that an employment contract shall be deemed to have been lawfully terminated if terminated in accordance with the terms of the contract and the law that governs such a contract, as articulated in *Barclays Bank of Uganda Limited v Godfrey Mubiru* S.C.C.A No. 1 of 1998, where the Supreme Court stated thus:

"Where a service contract is governed by written agreement between the employer and employee as in this case, termination of employment or services to be rendered will depend both on the terms of the agreement and on the law applicable".

[14] He insisted that the Claimants' employment contracts were terminated as a result of restructuring, and restructuring pursuant to Section 81 of the Employment Act, 2006, is one of the permitted modes of ending an employment contract. Therefore, it is an agreed fact that does not need to be proven by evidence that the Claimants' employment was terminated as a result of a process that is permitted by the law, and Court should find so.

But this notwithstanding it was his submission that, David Mutabanura RW1 testified that the Respondent duly informed the Claimants of the restructuring that had been triggered by a Report from the National Council of Higher Education marked RXS6 on the Respondent's trial bundle, and the report specifically established that there were a number of weaknesses in service delivery by the Respondent which as testified by RW2 led to the Respondent "..*sometime in 2016, the Respondent undertook various initiatives with a target of aligning its core function with the requirements of the National Council of Higher Education. The net effect of these changes in the Respondent's operations was that the Respondent was downsizing its programs from 104 to 43, and this would ultimately affect some staff members...*".

According to him some of the staff that were affected by the changes that were made by the Respondent included the Claimants who were verbally notified about the changes that were going to be undertaken by the Respondent and that their respective employment contracts would be affected on 16/7/2017. That the Commissioner of Labour was duly notified of this restructuring and that, as indicated in the Restructuring Program and Milestones RXS7 (p.59 of the Respondent's Trial Bundle), the Respondent's Lawyers, M/s. MMAKS Advocates duly notified the Commissioner Labour of this process. According to Mr. Walukagga, RW2 testified that "The Commissioner of Labour was informed that the Respondent was restructuring and that as indicated in RX7, the Respondent's Lawyers wrote a letter to the Commissioner in this regard."

[15] He further stated that the Claimants under paragraph 3(d) of the Statement of Claim pleaded that the Respondent informed them that the reason for their termination was restructuring, and yet in their respective Witness Statements, they indicated that this restructuring was unfair to them. In any case, a restructure shall always be taken in bad light by the affected employee. Therefore, the question for determination by Court

is always whether such a restructure is legitimate and that the affected staff have been paid their dues.

[16] He submitted that the 1st Claimant (Grace Namayanja) who was employed as the Faculty Administrator, testified that, by the time of the restructure she only possessed a Certificate as her qualification and that she had no diploma or degree and yet according to RW2, the new structure did not have a position of Faculty Administrator, because it was replaced with a new position of Faculty Assistant Registrar and Academic Registrar who according to him undertakes the role of Faculty Administrator. Therefore, there was no proof at all that the restructuring process was conducted unlawfully against the 1st Claimant. He insisted that the 1st Claimant and all other staff were periodically engaged before their services were terminated, and they were notified through a staff email that their employment was going to be affected by restructuring. In any case, the 1st Claimant was paid all her dues. There is no proof that she had any accrued dues that were not settled.

2nd Claimant - Richard Tibita Tasiwuka:

[17] Regarding the termination of Mr. Richard Tibita Tasiwuka, the 2nd Claimant who was employed as the Academic Registrar - Internal Audit, Counsel relied on RW2's testimony that that the termination followed due process, and according to the Restructuring Program & Milestones RXS7, that the position of Academic Registrar Internal Audit ceased to exist after the restructuring and was replaced by the Financial Controller and the 2nd Claimant confirmed during cross-examination that the Respondent emailed all staff notifying them that it was restructuring its staff as a result of the requirements by the National Council for High Education and he confirmed that the Respondent paid all his dues at the time of termination of his employment. Therefore, there was no irregularity in the manner the 2nd Claimant's employment was terminated, because the Respondent followed the dictates of Section 80 (1) of the Employment Act, and it was not a disguised restructuring exercise. The 2nd Claimant was like other staff, was notified of the restructuring measures that the Respondent was undertaking, and his job description ceased to exist.

[18] Regarding the 3rd claimant, Yunusu Bwanika, and 4th Claimant, Edward James Nzita, Counsel submitted that the 3rd claimant was employed by the Respondent as the Accounts Officer - Student Receipting and the 4th Claimant as the Data Management

Assistant. Like the others, they were terminated by the Respondent on the basis of restructuring that followed the Report from National Council of Higher Education (RXS6) that highlighted weaknesses in service delivery by the Respondent. According to Counsel, it was the evidence of RW2 that the 4th Claimant's position of Data Management Assistant was scrapped and replaced with the position of Office Automation Support Officer. Both were duly notified about the restructuring through an email that was sent to all staff and both admitted during cross-examination that they received the notice of the restructure and RW2 testified that the Respondent duly notified the Commissioner Labour that the Claimants, including the 3rd and 4th Claimants, were to be terminated on the basis of a restructure.

Therefore, the allegation that the Claimants' jobs were not made extinct and there was no restructuring by the Respondent is flawed. Counsel submitted that the Respondent has demonstrated that the Claimants' jobs were made extinct. He relied on *Simon Omoding v Rakai Health Science Program Department* LDC No. 39 of 2016, where this Court pronounced itself on the question of extinction of jobs as follows;

"We do not accept the contention of counsel for the claimant that merely because the position of security supervisor was not rendered extinct by restructuring, the claimant was not terminated through the same process. In the absence of contradicting evidence, we believe that testimony of DW1, the Director of the respondent, that the claimant was in the category of staff that did not have funding at the time he was terminated."

[19] He concluded that the net effect of this decision is that once there is a termination as a result of a restructure, it matters not that the job of the affected employee is not scrapped.

He argued that the critical test for a termination of employment on grounds of restructure was laid down by this court in *Charles Abigaba Lwanga v Bank of Uganda* LDC No. 142 of 2014, where this court observed that:

"The employer has an inherent right to restructure posts in his/her organization as long as the employees are aware of the process, and that "the fact that one is occupying a certain position does not exclude the employer from advertising the same position if the said employer seeks more qualification or if the same post is being restructured...."

[20] The bottom line is that no restructuring of the position of an employee is acceptable unless the employee to be affected is informed at least 4 (four) weeks before, and all other factors mentioned in section 81 of the Employment Act are complied with. Ordinarily a restructuring process is intended to affect a large number of employees.

He also cited *Cissy Nankanbirwa Magezi v St. Kizito Technical Institute Kitovu* LDC No. 60 of 2016, where this Court reiterated its position that an employer has a right to restructure its jobs or downsize, provided the employees are notified.

He insisted that none of the Claimants could feign ignorance that they were not aware of the restructuring done by the Respondent. They were fully aware, and that is why it is an agreed fact that their employment had been terminated as a result of restructuring. We pray that issues 1 and 2 are answered in the affirmative and negative, respectively.

Decision of Court

1. **Whether the restructuring process in question was conducted in accordance with the law and whether the Claimants' employment contracts with the Respondent were unlawfully terminated?**

[21] It is clear from the evidence on the record that around June 2016, the Respondent undertook a restructure following the issuance of a report by the National Council for Higher Education (NCHE), which identified weaknesses in its Academic system that did not meet regulatory requirements. It is the Respondent's case that, as a result of this report, the Academic system changed from 3 semesters to 2 semesters and the Courses reduced from 103 to 43. This resulted in some staff, including the Claimants, being terminated on grounds of the restructure. Whereas all the Claimants admitted that they were aware of the restructure, they challenged their termination based on it.

This court is cognizant of an employer's prerogative to determine the requirements of his or her business to improve its efficiency and profitability, and that it cannot interfere with this prerogative. This prerogative includes the right to reorganize or restructure the organisation (see *Elizabeth Kiwalabye v Mutesa 1 Royal University* [2020] UGIC34.

[22] It is trite that termination or dismissal by redundancy or resulting from restructuring is a lawful method of termination, unless an employee can prove that there was unfairness on the part of the employer. Black's Law Dictionary, 11th edition, at page 1531, defines "redundancy" in relation to employment as "A situation in which an employee

is laid off from work because the employer no longer needs the employee..." The Employment Act, cap 226, provides for termination by redundancy under Section 80 as follows:

"Collective Terminations

Where an employer contemplates termination of not less than 10 employees over a period of not more than 3 months (emphasis ours) for reasons of an economic, technological, structural or similar nature, he or she shall;

Provide the representatives of the labour union, if any, that represents the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect, except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a)shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;

a. *Notify the commissioner in writing of the reasons for the terminations, the number and categories of workers likely to be affected, and the period over which the terminations are intended to be carried out*

(2) An employer who acts in breach of this section commits an offence.

[23] Regulation 44 of the Employment Regulations 2011 lays emphasis on the requirement to notify the Commissioner Labour about reasons for the termination, and the categories of affected employees. It also lays emphasis on the requirement to pay all terminal benefits. It provides as follows:

"An employer who contemplates termination of ten or more employees over a period of not more than three months as a result of restructuring, technological and economical change, shall –

Notify the Commissioners in the form prescribed in parts A and B of the sixteenth schedule and give reasons for termination, the number of workers, age, sex, occupation, wages, duration of employment, and exact date of termination;

a) Provide a report detailing the terminal benefits and plan of payments of those benefits to the affected employees.

The form under the 16th schedule of the regulation also includes the requirement to consult the affected employees or their unions (if any).

Therefore, these provisions of the law make it mandatory for an employer "who contemplates the termination of ten or more employees on grounds of redundancy to follow the correct procedure by notifying the affected employee and or their representatives if any, about the impending restructuring as early as possible and at

least 4 weeks before the terminations and to consult with them before terminating them as a result of the restructure.

[24] Section 80 also emphasizes the period within which the contemplated terminations must take place and that is not more than 3 months and reasons for the restructure should be economic, technological, structural or similar reasons and the Commissioner labour must be notified in writing, about the reasons for the terminations, the list, number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. Regulation 44 of the Employment Regulations 2011 provides that the terminal benefits of affected employees must be paid. The law is based on Article 13 of ILO Convention 158 on Termination of Employment which lays emphasis on the requirement to provide relevant information, and an opportunity for consultations with the workers representatives concerned or the affected employees themselves, on measures to be taken to avert or minimize the terminations and measures to mitigate adverse effects of any termination. (Also see *Programme for Accessible Health Communication and Education (PACE) v Graham Nagasha*, LDA 35/2018).

Although section 80 and Regulation 44 of the Employment Regulations, do not provide for a detailed procedure which employers should follow in the process of restructuring such as a criterion for selecting the employees to be made redundant and provision of alternative employment to affected employees instead of termination, it provides a basis upon which the employer, the workers and their representatives (if any) can agree on the best strategy to achieve fairness during a restructuring process. This Court in *Kayiwa Muhamed Kigongo & 13 others,* LDR No. 121 of 2015, cautioned that in exercising his, her, or its managerial prerogative, the employer is expected to maintain mutual trust and confidence in the employment relationship and emphasized the importance of ensuring procedural and substantive fairness in the process. In *Ndaula Abubaker and Anor, LDR No. 161 of 2022,* this Court cited *Veronica Mkiwa Mwalwala v Faiza Bhanji t/a villa Kalista Enterprises [202]KRLRC 1821*, where Rika J found that, "...there must be a notice of intention to declare a redundancy, followed by consultation involving either the union or the unrepresented employees and then a notice of termination after consultation and the notice to declare a redundancy was different from the notice of termination..."

[25] We are persuaded by comparative Jurisprudence that proposes the purpose of consultation is to as much as practically possible enable the parties agree on a criterion that can be objectively checked against the performance and length of service of affected employees in the organisation, to reduce the impact of the restructuring. (see Williams and others v Compare Maxim Ltd [1982] ICR 156). In *German School Society and Another v Ohany and Another, [2023]KECA 894, which was cited in Ndaula and Another* (supra), the Kenyan Court of Appeal emphasized that:

"In essence, consultation is an essential part of redundancy process and ensures that there is substantive fairness. The employer should ensure it carries out the process as fair as possible and that all mitigating factors are taken into consideration."

The Claimants in the instant case contend that the restructuring of the Respondent was not a legitimate restructure, because no evidence of any resolutions in that regard were adduced in court. However, the evidence on the record clearly shows that the NCHE issued a report on 15/12/2015(RXS6), in which it made recommendations on management issues that required the Respondent University to reorganize its operations and in order to comply with the requirements of the report, the Respondent made changes which included reducing its courses from 103 to 43, and laying off some lecturers and administrative staff. During cross-examination, all the Claimants admitted that they were aware of the restructuring. We had an opportunity to analyse the NCHE Report, and particularly updates on its implementation, we found that the assertion by the Claimant that the restructuring was not legitimate baseless. This is because, indeed, there was a report and the Respondent took action to implement the recommendation of the Report, which was evidenced in the report issued by NCHE for progress of the said recognition.

The question, however, is whether the Respondent made the changes in accordance with the law?

[26] After carefully analysing the evidence on the record, we found nothing to indicate that the Respondent followed the correct procedure in rendering the Claimant redundant. This is because in May 2016, the Respondent did notify the general staff about an impending restructure. In November 2016, all the Claimants' contracts were renewed. The contents of an email from the Vice Chancellor, Prof. Koi Tirima, addressed to all staff, dated 12/08/2016, at page 63 of the Respondent's supplementary trial bundle, on which the Respondent relies on as a basis of communication and notification about

the impending restructure and its effects on the Claimants' positions was specifically addressing lectures and not the entire staff. This email made reference to the general restructuring but particularly focused on the restructuring of Lecturers and not the entire staff. The email also stated that the restructuring process, which commenced at the beginning of the year 2016, and at that time so far sixty (60) lecturers had been laid off. Nothing was stated about the fate of the administrative staff at that particular point. Following this email on 12/08/2016, all four (4) Claimants contracts were renewed in November 2016.

We further established that during the pendency of the restructure, periodic updates were made to NCHE as evidenced on page 59 of the Respondent's trial bundle, and none of these updates referred to the Claimants in particular. It seems to us that the initial update was made in August 2016, followed by another one dated 7/11/2016, at page 81 of the Respondent's trial bundle. The record further indicates that on 14/12/2016, the Respondent requested a month's extension to deliver the final status report and final sets of documents on matters raised in the NCHE Report in December 2015. The chronology of the updates left no doubts in our minds that the restructuring process was concluded by 14/01/2017.

[27] Whereas all the Claimants in the instant case admitted that they were aware of the restructuring, the Respondent did not demonstrate with credible evidence that, after they were notified about the impending restructuring, they were informed that they would be affected by it, and there was a possibility that they would be terminated. We had an opportunity to analyze one of the standard termination letters, which reads in part as follows:

"16/06/2017

Dear Mr. Tibita,

NOTICE OF RESTRUCTURING & TERMINATION OF YOUR EMPLOYMENT WITH CAVENDISH UNIVERSITY UGANDA.

Cavendish University Uganda (the University) is currently undertaking various initiatives with the objective of aligning its operations to comply with the requirements of the National Council of Higher Education (NCHE).

As part of this compliance and transition process, the university has, amongst other actions, reduced its programs from 104 to 43. Consequently, the need to restructure its staff has arisen, and this affects your employment with the University.

This is therefore to notify you that your employment as AR, Internal Audit Affairs will be terminated with effect from today, Friday 16th June 2017, for the above reasons, as also explained to you in a meeting held with you today(emphasis ours). The University will comply with the requirements of the Employment Laws of Uganda, pay you in lieu of notice, and provide you with a certificate of service on fully clearing with the University...."

[28] A reading of the first paragraph of this letter gives the impression that the initiatives of aligning the Respondent's operations to comply with the NCHE only commenced in June 2017, whereas not. The second paragraph also indicates that the reasons for termination were only explained to the 1st Claimant in a meeting held on the day the termination occurred. It is glaringly clear from this letter that the Claimants were summarily terminated, without being consulted as opposed to what is provided for under section 80 of the Employment Act(supra) and regulation 44 of the Employment Regulations 2011. As already discussed, termination on account of redundancy involves consultation with the affected employees. This Court in *Ndaula and Another vs Post Bank Ltd,(supra)* Wabwire J, pointed out that,

"... where an employer finds that he must sever an employment relation due to redundancy, there ought to be a consultative process. A consultative process promotes fair labour practices. The fairness of the decision to terminate a given employee calls for transparency in declaring a given position redundant. Fairness makes for justice in a case, and not for the employee whose position has been declared redundant to feel victimized. It is all about fairness... it ought to be shown that the process was fair, transparent, objective, and involved the employee..."

The sample termination letter above, is clear demonstration that the Claimants were only notified about being directly affected by the Respondent's restructuring process had been completed in January 2017, on the same day they were terminated, which was contrary to section 80(1) (a) which requires the employer to notify an affected employee, at least 4 weeks prior to the termination. Whereas the Respondent insists that the Claimants were notified about the restructure, and impending termination in accordance with the law, the letter of termination indicates otherwise. Nothing was placed on the record to indicate that the Claimants were told that their positions ceased to exist after the restructuring, or that they would be directly affected by the restructuring process nor were consulted about the effects of the restructuring their positions and, that they would be terminated from their employment as a result of the restructure.

[29] Section 80 of the Employment Act and Regulation 44 of the Employment Regulations of 2011, are emphatic on an affected employee(s) being notified, being given relevant information regarding the impending restructure and particularly regarding the status of their positions after the restructuring and most importantly being consulted about it, at least 4 weeks before the terminations. We are not satisfied that this was done in the instant case. Contrary to the submissions of Mr. Walukaaga, that the Claimants were consulted and or involved in the process that led to their termination on grounds of redundancy, as discussed already no evidence was placed before us to prove that this was the case. We particularly found it peculiar that their respective contracts were all renewed on 21/11/2016, during the pendency of the restructuring process which ended in January 2017, but their terminations took place on 16/06/2017, almost 5 months later, which was outside the 3 months threshold prescribed under section 80(1)(a) (supra). We strongly believe that the Respondent only used the restructure as a cover-up to terminate them and are not convinced that the terminations were as a result of redundancy exercise. For emphasis, Section 80(1)(a) of the Employment Act provides that:

"Where an employer contemplates termination of not less than 10 employees over a period of not more than 3 months (emphasis ours) for reasons of an economic, technological, structural or similar nature, he or she shall;

Provide the representatives of the labour union, if any, that represents the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect, except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a)shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;..."

[30] We reiterate that, whereas termination or dismissal by redundancy is an acceptable and lawful form of termination of an employment contract and it is a no-fault termination, it is attributable to operational reasons, of an economic, technological structural or other similar nature and it must occur over a period of not more than 3 months. (also see *Murray v Foyle Meats Ltd* [1999] ICR 827 HL, where the House of Lords held that the dismissal of an employee should be "attributable" to a diminution in the employer's need for employee's work irrespective of the terms of the contract or the function performed. The Respondent in the instant case has not demonstrated with

credible evidence that by January 2017, it no longer required the claimants works, especially given that all their contracts were renewed in November 2016, during the pendency of the restructuring process which was completed in January 2017, and they were all terminated on 16/06/2017, 5 months later.

In conclusion, we have established that the Respondent did carry out a restructuring exercise, which was concluded by 14/1/2017. We are not satisfied that the termination of the Claimants' contracts 5 months after the completion of the restructuring exercise was attributable to restructuring as provided for under section 80(1)(a). In the circumstances, we find that their termination was unfair and unlawful.

2. What Remedies are Available to the Parties?

[31] Having found that their termination was unlawful, the Claimants would be entitled to some remedies, which they prayed for as follows:

1. **An Order directing the Respondent to pay to each of the Claimants the following:**

a) **Severance allowance** calculated at one (1) month's salary per year worked, basing on the last salary earned in accordance with section 86 (a) of the Employment Act; Bank of Uganda v. Joseph Kibuuka (supra) and *Donna Kamuli v. DFCU Bank,* Labour Dispute Claim No. 02 of 2015 and their respective contracts entered into on 26/11/2016.

It is indeed the position of the law under section 86 of the Employment Act, 2006, that an employee who has been in the employ of an employer for a period of 6 months and above would be entitled to payment of severance pay if he or she is found to have been unlawfully terminated. Section 87 provides that the calculation of severance should be agreed between the parties, however the holding of this court in *Donna Kamuli v. DFCU Bank,* Labour Dispute Claim No 02 of 2015, which is still good law is to the effect that where there is no agreed formula for calculating severance pay, an employee would be entitled to 1 month's salary for every year served. In the circumstances, the claimants would be entitled to the following:

i. Grace Namayanja who earned Ugx. 1,000,000/= per month and served for 3 years would be entitled to 1 month's pay for each year served, amounting to **Ugx. 3,000,000/- .**

ii. Tibita Richard Tasiwuka who was earning Ugx. 3,675,000/- and had served for 4 years, would be entitled to **Ugx. 14,700,000/-** as severance pay.

iii. Bwanika Yunusu, who earned Ugx. 2, 625,000/- per month and served for 8 years, would be entitled to **Ugx. 21,000,000/-** as severance allowance.

iv. Nzita Edward James who was earning Ugx. 2,220,000/- per month and had served for 2 years would be entitled to **Ugx. 4,400,000/-** as severance pay. The respondent is therefore ordered to pay the claimants the respective sums as severance pay.

b) Salary from the date of termination until contract expiry in lieu of reinstatement.

It was submitted for the claimants that Section 71(5)(a) of the Employment Act envisages reinstatement of unfairly terminated employees, however given the Respondent's conduct complained of in this case, there is unwillingness to reinstate them and although they do not seek to be reinstated, they have demonstrated that they have been unsuccessful in seeking alternative employment. He contended that had they not been unfairly terminated, however, they would have enjoyed contractual benefits and salary until November 2018. Therefore, Court should exercise its discretion to award them salary for the unexpired term of their contract in lieu of reinstatement so that they may be put in the same position as they would have been had they not been unfairly terminated.

The principle in the law of contract that where a party to a contract commits a fundamental breach, the innocent party may elect whether to accept it as a termination of the contract or not, is not applicable in contracts of employment, so that where an employer dismissed an employee eve in fundamental breach, the dismissal brought the contract to an end without the need for acceptance by the employee. In the circumstances, a claim for the remaining part of the contract or for future earnings cannot stand, and court cannot order the specific performance of an employment contract. This principle was confirmed by the Supreme Court in *Barclays Bank of Uganda vs. Godfrey Mubiru* SCCA No.1 of 1998, *Stanbic Bank Ltd vs Kiyimba Mutaale* SCCA No. 02 of 2010, *Hilda Musinguzi Vs Stanbic Bank Uganda Ltd* SCCA No. 28/2012, and *Bank of Uganda vs. Joseph Kibuuka and 4 others* (Civil Appeal No. 281 of 2016), that the rights of an employer to terminate an employee he or she no longer wants cannot be fettered by the Courts. However,

the Supreme Court in *Hilda Musinguzi vs Stanbic Bank already cited above, where Mwangusya JSC,* emphasized the requirement for the employer to follow the correct procedure for termination. In the circumstances, an employee can only claim damages for unlawful termination and not for future earnings. The claim for the remaining part of the claimants' contracts, therefore, fails, it is declined.

c) Special damages.

Citing *Sylvan Kakugu Tumwesigyire v. Trans Sahara International General Trading L.L.C.,* HCCS No. 95 of 2005 where it was held that special damages must be claimed specifically and strictly proved, but strict proof does not always mean proof supported by documentary evidence, Mr. Ssasi, legal Agent of the Claimants prayed that the Claimants are awarded special damages as pleaded under paragraphs 3(b)(v) and 5 of the Claimants' Memorandum of Claim, which include severance pay, outstanding loan balances, outstanding bonuses outstanding balance of the salary.

It is trite law that special damages must be specifically pleaded and strictly proven. Save for the claim for severance pay, which was listed among their claims for special damages, the claimants did not adduce any evidence to prove their claims for the outstanding loans and bonuses. In the circumstances, we had no basis upon which to make any award in this respect. This claim is therefore declined.

d) General damages.

Citing *UDB v. Florence Mufumba,* Civil Appeal No. 241 of 2015 at pages 49 & 50, where the Court of Appeal confirmed that general damages must follow a finding of unlawful termination and are the natural and probable consequence of that termination. Mr. Ssasi submitted that the Court also confirmed that the Claimant needs only to assert that such damage has been suffered, which the Claimants did, therefore, they should be awarded damages. He proposed the following awards based on the various salaries the Claimants earned as follows

1. Ann Namayanja should be awarded Ugx. 10,000,000/-
2. Tibita Richard Tasiwuka, Ugx.50,000,000/=
3. Bwanika Yunusu Ugx. 25,000,000/=

The principles regarding the award of general damages have been settled by the Supreme Court in *Uganda Post Limited v Mukadisi [2023]58,* where the court stated that general damages can be awarded in addition to remedies given to an employee who was unlawfully terminated, such as payment in lieu of notice. The court further stated that general damages are not tied to specific financial losses but are assessed by the court and are not restricted to salary or pecuniary benefits stipulated in the employment contract. they are awarded to compensate the employee for the non-economic harm and distress caused by the wrongful dismissal, including compensation for mental anguish, damage for reputation, emotional distress, and any other non-monetary harm suffered as a result of the dismissal. In *Stanbic Bank vs Okuo Constance* CA No.60 of 2020, Madrama JA, as then was stated that in computing the quantum of damages court should take into consideration, among other things, the length of service and the employability of the claimant. The Claimants in this case did not adduce evidence to prove that they actually failed to get alternative employment, although they stated they did apply severally, no evidence was placed on record to show where they applied, any rejections to show that they received as of this application for the said alternative employment.

This notwithstanding, we have already established that the Claimants were unfairly and unlawfully terminated, therefore, they are entitled to an award of general damages. Having already awarded each of them severance pay, they would be entitled to the following in general damages:

i. Grace Namayanja who earned Ugx. 1,000,000/=month and served for 3 years would be entitled to ***Ugx. 3,500,000/-*** as general damages
ii. Tibita Richard Tasiwuka who was earning Ugx. 3,675,000/- and had served for 4 years, would be entitled to **Ugx. 11, 500,000/-** as general damages.
iii. Bwanika Yunusu, who earned Ugx. 2,625,000/- per month and served for 8 years, would be entitled to **Ugx. 8,000,000/-** as general damages.
iv. Nzita Edward James, who was earning Ugx. 2,220,000/- per month and had served for 2 years would be entitled to **Ugx. 4,000,000/-** as general damages. The Respondent is ordered to pay the claimants the respective sums as general damages.

e) Aggravated damages.

Citing *UDB v. Florence Mufumba* at pg 51 (supra), where Court approved the award of aggravated damages for humiliating an employee in the course of termination and *Bank of Uganda v. Betty Tinkantanyire*, SCCA No. 12 of 2007 where Kanyeihamba JSC held that, *"the illegalities and wrongs of the appellant were compounded further by its lack of compassion, callousness and indifference to the good and devoted services the appellant had rendered...."* Mr. Ssasi argued that the Respondent terminated the Claimants in a way that was unjustifiable, which is a breach of trust by the Respondent, therefore, they should be awarded aggravated damages as follows: Ugx.15,000,000/= to the 1st Claimant, Ugx. 60,000,000/= to the 2nd Claimant; Ugx. 60,000,000/= to the 3rd Claimant; and Ugx. 25,000,000/= to the 4th Claimant as aggravated damages.

Although it is the correct position that aggravating circumstances include wrongs and illegalities, in the termination compounded by callousness and lack of compassion on the part of the employer, the onus is on the claimant to prove this. The Claimant's in this case fell short of adducing evidence of callousness that would warrant an award of aggravated damages. We therefore decline to make this award.

f) Punitive damages

It was the submission of Mr. Ssasi that at common law, Courts require that to award punitive damages, there must be an independent actionable wrong separate from the unfair termination that was being complained about; and the conduct complained of must have been highhanded, insensitive, and reprehensible. He relied on *Gail Galea v. Walmart Canada Corp.*, 2017 ONSC 245 at pages 91 - 95, where Court held that an employer's breach of its implied duty of good faith towards its former employee constitutes an independent actionable wrong, and its conduct so insensitive and high-handed as to justify punitive damages. He also relied on *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.JR. 701, where the Supreme Court of Canada held that employers have a duty of good faith when dismissing employees. The Court held that, "while the obligation of good faith is incapable of precise definition, at a minimum in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive". In his view, the Claimants were entitled to punitive damages as follows: Ugx.

5,000,000/= to the 1st Claimant; Ugx. 20,000,000/= to the 2nd Claimant; Ugx. 20,000,000/= to the 3rd Claimant; and Ugx. 10,000,000/= to the 4th Claimant.

Although we have made a finding that the Respondent was procedurally and unfairly lawful in its decision to terminate the Claimants, no evidence was placed before us to warrant an award of punitive damages. We are therefore decline to make this award.

g) Mitigation

Mr. Ssasi submitted that it is trite law that an unfairly dismissed employee has a duty to mitigate the economic loss arising from their termination by, for example, attempting to secure alternative employment. He argued that the Claimants discharged this duty as shown under paragraphs 12,15,15, & 11 of their respective Statements.

It is indeed the correct position that each of the claimants stated in their respective witness statements that they made several applications for alternative employment in vain. However, they all fell short of adducing evidence of the specific applications and rejections on account of their termination from the respondent's employ. In the circumstances, we have no basis to agree with them in this regard.

h) Costs of the Claim

This court is of the position that costs in employment disputes are only awarded in exceptional circumstances, except where the losing party is guilty of misconduct. Having found nothing to implicate the Respondent for any misconduct, the award for costs is denied.

i) Interest.

An interest of 6% per annum shall accrue on the award for severance pay and general damages from the date of filing the matter in this court until payment in full.

Final Orders

In conclusion, it is our finding that the claimants were unfairly and unlawfully terminated, and we make the following orders;

1. It is hereby declared that the Respondent unlawfully and unfairly terminated the Claimants from employment.
2. We order the respondent to pay the 1st Claimant Severance pay of **Ugx. 3,500,000/-**, the 2nd Claimant **Ugx.14,700,000/-,** the 3rd Claimant, **Ugx. 21,000,000/-,** the 4th claimant **Ugx. 4,400,000/-**
3. We order the Respondent to pay the 1st Claimant **Ugx. 3,500,000/-** in general damages, 2nd Claimant **Ugx.11,500,000/-** in general damages, the 3rd Claimant **Ugx. 8,000,000/-** and the 4th Claimant **Ugx. 5,000,000/-** in general damages
4. An interest of 6% per annum shall accrue on the award for damages from the date of filing in the Industrial Court until payment in full.
5. No order as costs is made.

Signed in Chambers at Kampala this **29TH** day of **April 2025**.

Hon. Justice Linda Lillian Tumusiime Mugisha,
Head Judge

The Panelists Agree:

1. Hon. Charles Wacha Angulo,
2. Hon. Beatrice Aciro Okeny &
3. Hon. Rose Gidongo.