THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE No. 184 OF 2022

(Arising from MGLSD/LC/615/2021)

ENG.NSIIMIRE ANNET:: CLAIMANT

VERSUS

UMEME LIMITED :: 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. Arthur Ayorekire of M/s. ASB Advocates for the Claimant.
2. Mr. Ferdinand Musimenta of M/s. S & L Advocates for the Respondent.

AWARD

Introduction

[1] On 18th April 2005, the claimant was contracted and employed by the Respondent as a telecommunication engineer, where she earned a monthly salary of Ugx. 4,605,686/= and a gross annual pay of Ugx. 55,268,200/=. She served in this position

for seventeen (17) years in accordance with her job description marked as CEX1 on the claimant's trial bundle (pg.1- 4).

Around March 2021, the Respondent commenced a reorganization following the COVID-19 Pandemic. The restructuring resulted in the abolition of the position of Telecommunication Engineer, which the Claimant held. Instead of declaring her redundant, she was reassigned a new role as ICT Helpdesk and User Support Officer on 15/12/2021. According to her, the position was of a lower rank and grade compared to the position she formerly held as Telecommunication Engineer under her employment contract, and she did not have the requisite qualification to do it. She requested to be redesignated to a role matching her qualifications in vain.

She contends that the new role was a demotion, which was unlawful and unfair, unreasonable, malicious, and was intended to frustrate her and push her out of the job where she had diligently served for 17 years. As a result, on 17/01/2021, she resigned from her role as Telecommunication Engineer and rejected the redesignation to ICT Helpdesk and User Support Officer on grounds that the working conditions were unfavorable and this amounted to constructive dismissal, which is unlawful.

Issues for determination:

1. Whether the claimant was unlawfully terminated by the Respondent?
2. Whether the claimant is entitled to the remedies sought?

Claimant's Submissions

1. Whether the claimant was unlawfully terminated by the Respondent?

[2] Mr. Ayorekire, Counsel for the Claimant, submitted that it is an undisputed fact that the Claimant was employed by the Respondent on contract as a Telecommunication Engineer, with effect from 18/04/2005, a position in which she served for 17 years. It is also undisputed that she was earning a monthly salary of Ugx. 4,605,686/= and her gross annual pay was Ugx. 55,268,200/=.

He contended that her transfer from the position of Telecommunication Engineer to a position of ICT Help Desk and User Support Officer, which was lower in rank and grade and for which she did not have the requisite qualifications and expertise to handle was

wrong and it was contrary to Section 19.1 (h) of the Respondent's Transfer and Relocation Policy. This is because the transfer was done while the claimant was still on a Performance Improvement Plan and yet Section 19.1(h) of the Respondent's Transfer and Relocation Policy provides that "All employees who are serving a performance improvement plan (PIP) shall not be eligible for transfer or relocation until they have served the PIP to the end."

He asserted that a court of law cannot sanction what is illegal, and an illegality once brought to the attention of the court overrides all questions of pleadings, including an admission thereof. He relied on *Makula International Ltd -v- His Eminence Cardinal Nsubuga & Anor* (Civil Appeal No.4 of 1981) which was cited with approval in *Adam Kafumbe Mukasa & 2 Ors -v- Uganda Breweries Ltd* (Civil Appeal No.115 of 2018) [2022] COA at page10, in support of his assertion.

[3] He asserted that the Claimant is a highly trained and experienced Telecommunication Engineer, who practiced her profession for several years, therefore, transferring her to the position of ICT Helpdesk and ICT Support Officer was a demotion which was disguised as redundancy.

He argued further that, ordinarily, a person is demoted after a system of appraisal finds him/her lacking in capacity to handle the current responsibilities or after a disciplinary process has established that the employee has committed an infraction warranting a demotion. He relied on *Muyimbwa Paul -v- Ndejje University*, LDR No.222, to support this argument. It was his submission that the Claimant was illegally placed on a PIP, which she successfully contested and thereafter transferred and relocated to the position of ICT Help Desk and User Support Officer without a hearing, which was contrary to Article 28 of the Constitution of the Republic of Uganda. He insisted that, even though a demotion is not a termination of employment, an employer is still required to give the employee a reason for such demotion. He further submitted that the Claimant's request to be relocated to an appropriate position matching her qualifications, having been denied, she was left with no option but to resign because the workplace was no longer desirable.

[4] Counsel further submitted that an employee's job title is a fundamental component of the employment contract which cannot be varied unilaterally, unless the variation is to the benefit of the employee. Therefore, any unilateral variation of an employee's job title as stipulated in the contract of service amounts to a fundamental breach on the

part of the employer. He relied on *Ugafode Micro Finance Ltd MDI -v- Mark Kyoribona* Labour Dispute Appeal No.034 2019 and refuted the Respondent's assertion that the Claimant was not affected by the restructuring simply because it was only her title that changed, because her salary and attendant benefits remained unchanged. He vehemently argued that, as stated in *Ugafode Microfinance Ltd (MDI) -v- Mark Kyoribona* (supra), demotion of an employee is not only reflected in the salary and other benefits but also in the stature and responsibilities attached to the new role as compared to the previous role. In this case, the Claimant's demotion not only affected her title but also her grade, status, dignity, responsibilities, and leadership, among others. He insisted that the Claimant was transferred to another job altogether, and such a transfer amounted to a demotion, which was done without following due process. It was therefore illegal and injurious to the Claimant since it lessened her stature and responsibilities. According to him, the Respondent's unreasonable conduct towards the Claimant left her no option but to resign from work, which amounted to constructive dismissal as provided under section 64(1) (c) of the Employment Act, 2006.

Respondent's Submissions in reply

[5] Mr. Musimenta Ferdinand, Counsel for the Respondent, submitted that every employer has an unfettered right to organize their business in the most profitable way possible. According to him, the effects of the Covid 19 pandemic from March 2020 had negative ramifications on the systems of work, the organization of work, and workflow strategies, that caused a lot of changes in several businesses leading to several Companies including the Respondent, restructuring their business in a bid to respond to the new normal which became a business reality. He argued that this case arises out of such restructuring of the Respondent, which led to the Claimant's job of Telecom Engineer being declared irrelevant to the Respondent's business and being phased out. This affected 4 employees who were working under the department, including the Claimant. However, rather than terminate the 4 employees, the Respondent opted to re-designate them to other roles in the organisation. The Claimant was redesignated to ICT support officer, but her employment terms and conditions, including her salary, grade, and other benefits, remained the same.

Upon being informed of her re-designation, the Claimant refused to take up the new position, choosing instead to tender her resignation. She served three months' notice

and eventually left the service of the Respondent, and all her terminal dues and all entitlements were paid. Therefore, she is not entitled to the relief sought in this case. This is especially because she was not terminated by the Respondent, but she resigned from her job and has not adduced any evidence to prove unfair termination or dismissal.

[6] Counsel refuted the allegation that the Claimant was transferred from her position as a Telecommunication Engineer to the position of ICT Help Desk and User Support Officer contrary to section 19.1 (h) of the Respondent's transfer policy. This is because she successfully contested the PIP and therefore did not undertake it. He also contested the allegation that she was not given an opportunity to be heard before the alleged demotion, which she alleges amounted to constructive dismissal, because she did not prove constructive dismissal as was defined by this court in *Kandimaite Alfred Vs. Centenary Rural Development Bank Limited*, Labour Dispute Claim No.024 of 2014, as follows:

> *"Constructive dismissal occurs when an employee resigns because the employer has created a hostile work environment, making the resignation referred to as having been involuntary. The hostile environment created by the employer will have amounted to a serious breach of contract, giving rise to the resignation, which then ends the contract of employment in accordance with section 65(1)(c) of the Employment Act. (now Section 64(1)(c) of the revised Employment Act Cap 226)".*

He also cited *Nyakabwa J. Abwooli Vs Security 2000 Limited,* Labour Dispute Claim No. 0108/2014 and *Mbiika Dennis Vs Centenary Bank* LDC 023/2014, where this court's holding is to the effect that, in order for the conduct of the employer to be deemed unreasonable within the meaning of section 64(1)(c) of the Employment Act, such conduct must be illegal, injurious to the employee and it should make it impossible for the employee to continue working and the conduct of the employer must amount to a serious breach and not a minor or trivial incident.

[7] He further submitted that it was the Claimant's own testimony that, following her appraisal in which she was rated "time to step up", she was placed on a performance improvement plan, which she appealed against, and following this appeal, on 4/11/2021, the Managing Director exonerated her from the PIP. He stated that, RW1, on the other hand, confirmed that the Respondent's management took a decision to restructure and reorganize the business, which involved phasing out the

telecommunication unit owing to a change in the business model and technology used. However, it was decided that the five Telecom Engineers who were affected should be integrated into other roles and positions, while maintaining their salaries and benefits, and the said process was intended to address a skills gap in the business as stated in the ICT report marked "REX1" on the Respondent's trial bundle.

Counsel asserts that it was RW1's testimony that the decision to restructure was communicated to the affected staff, who were informed that the Telecom role was increasingly becoming irrelevant and all of them were required to undertake additional responsibilities and training meant to beef up responsibilities and create relevancy. The Respondent intended to integrate them into the new structure while keeping their contractual benefits intact, rather than terminating them. As a result, all the affected employees in the Claimant's Department were absorbed in the new structure and are still employees of the Respondent.

[8] He further submitted that the Claimant did not deny that she was aware that the Respondent's mode of operation changed after the COVID-19 pandemic and that the business had to work differently. She also did not deny that she was aware that the department of telecom engineering in which she worked held no value to the new business and that the roles of the affected staff would be moved to another department.

Counsel further submitted that the Claimant testified that she received the communication about the Respondent's intention to restructure from RW1 and the proposal to redesignate her, including the proposed Job Description at pages 44 - 49 of the Respondent's trial bundle, on 8/11/2021. She received the letter confirming her redesignation on 14/12/2021, and it was also her own evidence that the restructuring would take effect in January 2022. She was also aware that four of her colleagues were also affected. It was also her testimony that the grievance against the Performance Improvement Plan (PIP) was resolved in her favour before the restructuring took effect in January 2022, but she resigned on 17/01/2022 with all her benefits as exhibited under REX10. Therefore, given the evidence on the record, the appraisal and restructuring processes were mutually exclusive. Neither process affected the other. Counsel further contended that the Claimant did not undertake the PIP because she successfully contested it, yet the restructuring process began as far back as March 2021, post-COVID-19 pandemic. Counsel concluded that the Claimant

has not satisfied the standard of proof of the existence of circumstances that would otherwise force a reasonable employee to resign. He relied on *Achiro Beatrice Adong v Uganda Land Alliance* Labour Dispute Reference No. 179 of 2015 where this court while defining unreasonable conduct, referred to the court's decisions in Edema McJohn V Magnum Security which relied on the decisions of Edotun James V Okra Beverages Limited and George Wimpey Ltd V Cooper where it was stated that;

> *"By good industrial relations practice, no employee could reasonably be expected to accept that unreasonable conduct which must be severe, a breach of the employment contract so fundamental that it at once destroys the employer's implied duty of trust and confidence and destroys the employment relationship. It would be conduct that an employee would not be reasonably expected to tolerate under the regulatory architecture governing the workplace..."*

[8] He also relied on the Kenyan case of *Susan Njeri Warui V Postal Corporation of Kenya,* Cause No. 1374 of 2016 (2022 eKLR), which considered the unreasonable test and the contractual test, as follows:

> *"Unreasonable test",... the court held that the employer's behaviour must be so unreasonable that the employee could not be expected to stay, and "the contractual test", that the employer's conduct was grave enough to constitute a repudiatory breach of the employment contract."*

It was his submission that the evidence given by the Claimant in the instant case does not fit the unreasonable test and it does not show any sort of unreasonableness on the part of the Respondent, on the contrary, it shows compassion and reasonableness, because the roles the Claimant previously undertook became obsolete and as such, the Claimant could have easily been treated as redundant and exited from the company. Instead, she was redesignated to a new role with the same salary and entitlements, and she was not the only one who was affected. It was her own testimony during cross-examination that she knew Martin Kabanda, Vena Tugume, and Amis Senoga, who worked in her department, were also moved to other roles as part of the restructuring process. Therefore, the assertion that she was demoted and consequently compelled to resign is inconceivable and unreasonable on her part.

[9] Counsel insisted that the Claimant exchanged several email correspondences with RW1, the Respondent's Operations Manager, regarding the proposed redesignation, and she requested for time to review the Job Description and revert. She therefore

does not assert now that she was not given audience before the restructuring process was concluded and effected. In any case, her letter dated 22/12/2021, confirms that she understood all efforts the Respondent made to improve Umeme's operations at large, and she committed to contributing to it. She therefore acknowledged that there was need to improve the operations of the Respondent, she supported it, and she knew that her old role would be affected by the restructuring process. In the circumstances, the Respondent did not do anything illegal or injurious to the Claimant, and it did not create any unreasonable circumstances to disable her from staying in employment. He reiterated that she was always aware of the Respondent's intention to restructure as far back as April 2021, and soon thereafter, a new job description was shared with her, and her opinion was sought regarding the new designation. He also quoted the email correspondences exchanged between the Claimant and the Respondent as proof. She was therefore not constructively dismissed from employment.

Decision of Court

1. Whether the claimant was unlawfully terminated by the Respondent?

[10] It is not in dispute that around March 2021, the Respondent decided and did restructure its business following the negative effects of the Covid 19 pandemic on its systems of work, that necessitated a restructure of its business mode. However, the restructure led to the position of Telecom Engineer being declared irrelevant and obsolete. Four staff including the Claimant, under that department were affected. However, instead of declaring them redundant, the Respondent redesignated them to other roles in the organisation under the ICT department, and the Claimant was redesignated to the position of ICT Help Desk and User Support Officer.

In our understanding, the substantive fairness of the redundancy was not in contention. The question for resolution was whether the Claimant's redesignation to ICT Help Desk and User Support Officer, which is lower in rank than her previous role of Telecom Engineer, was a demotion which justified her resignation and whether it amounted to constructive dismissal. Before resolving this issue, we found it necessary to first discuss dismissal based on operational requirements.

[11] This court is cognizant of the employer's prerogative to determine the requirements of his or her business to improve efficiency and profitability, and that it cannot fetter this

prerogative. This prerogative includes the right to reorganize or restructure the organisation. (see in *Elizabeth Kiwalabye v Mutesa 1 Royal University* [2020] UGIC34. However, the Court still has a role in ensuring that prerogative is exercised fairly and any affected employee is treated fairly.

In *Kayiwa Muhamed Kigongo & 13 others,* LDR No. 121 of 2015, the court cautioned that in exercising his, hers or its managerial prerogative, the employer is expected to maintain mutual trust and confidence in the employment relationship with his or her employees and emphasized the importance of ensuring procedural and substantive fairness in the process. Black's Law Dictionary, 11th edition, law 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..." Termination by redundancy is provided for under section 80 of the Employment Act, Cap 226, as follows:

"80.*Collective Terminations*

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

a. *Provide the representatives of the labour union, if any, that represent 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;*

b. *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.

[12] This section provides for the termination by redundancy of 10 or more employees, for reasons of an economic, technological, structural, or similar nature (operational requirements), and the termination is contemplated within a time frame of 3 months. It makes it mandatory for the employer to notify the unions about the impending

redundancy, but is silent on what should happen where fewer than 10 employees are involved. It also requires the employer to notify the Commissioner Labour in writing about 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.

[13] Article 13 of ILO Convention 158 on Termination of Employment, from which section 80 is derived, provides that:

> "When the employer contemplates termination for reasons of an economic, technological, structural, or similar reason, the employer shall:
>
> a) Provide the workers' representatives concerned in good time with relevant information, including the reasons for the terminations contemplated, the number and categories of workers likely to be affected, and the period over which the terminations are intended to be carried out;
> b) Give in accordance with the national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or minimize the terminations and measures to mitigate the adverse effects of any termination on the workers concerned, such as finding alternative employment...."

Article 13(b) is more elaborate on the requirement for the employer to provide relevant information about the impending redundancy, an opportunity for consultation on measures to be taken to avert or minimize the terminations, and the measures to mitigate the effects of any termination on the affected workers. This Court in *Programme for Accessible Health Communication and Education (PACE) v Graham Nagasha*, LDA 35/2018, emphasized that in addition to consulting with relevant unions and where an employee was unrepresented such employee was employee was equally entitled to be consulted, to ensure fairness and to enable him/her/ them to mitigate the effects of the terminations, including seeking possible alternative employment within the organisation or elsewhere.

[14] Termination or dismissal by redundancy is generally referred to as a no-fault dismissal/termination because it is not caused by any fault on the part of the employee and is a result of due to economic, technological, structural, and similar needs of the organisation. It is an accepted form of fair dismissal/ termination, unless it can be proved that there was discrimination or unfairness involved. Astra Emir, in his book, Selywyns' Law of Employment, suggests that a dismissal for reason of redundancy occurs if it is wholly or mainly attributable to:

a) The fact that the employer has ceased, or intends to cease, to carry on that business for the purposes for which the employee was employed by him or her, or
b) The employer has ceased or intends to cease to carry on the business in the place where the employee was employed; or
c) The fact that the requirements of that business for the employees to carry out work of a particular kind, or for the employees to carry out work of a particular kind in the place where the employee was employed, have ceased to diminish or are expected to cease or diminish.

[15] According to Amir, such a dismissal only arises if there is a change in the terms and conditions of employment because the employer's need for a particular work is ceasing or diminishing. Therefore, the employer is only expected to show that there is a reason for the redundancy. The debate on whether the courts should use either the function test which is concerned with the work which the employee performed or the contract test which considers what the employee was obliged to do under the contract of employment and questions whether there was still work to be completed as a basis of determining whether the dismissal was for redundancy or not, was addressed in *Safeway stores v plc Burrel* 1[1967] 1 ALLER 644 which suggested a three stage process in deciding whether an employee had been dismissed for redundancy as follows:

a) Was the employee dismissed?
b) If so, had the requirements of the employer's business for the employee to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
c) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

This proposition was affirmed by the House of Lords in *Murray v Foyle Meats Ltd* [1999] ICR 827 HL, where it was held that the questions to ask are whether one or other of various states of economic, structural, technological, or other reasons exist and if so whether the dismissal or termination is 'attributable' wholly or mainly to the state of affairs. Therefore, the keyword is "attributable." According to Lord Irvine, there is no reason in law why the dismissal of an employee should not be "attributable" to a diminution in the employer's need for employee irrespective of the terms of the contract or the function performed. In the circumstances, even if an employee is dismissed and

the Job remains, but the needs of the business for the kind of employees reduce, this can still be considered a redundancy. (also see *ZTE Uganda Ltd v Sseyiga Hermenegild & Others LA No. 34 of 2017).* Redundancy is therefore considered a fair reason for termination unless it can be established that there was discrimination, there was no consultation and or there was any form of unfair treatment during the process.

[16] It is not in contention that the Respondent in the instant case undertook a restructuring of its mode of business following the adverse effects of the COVID-19 Pandemic on its management systems. It is also not in dispute that the restructure resulted in eliminating/abolishing the position of Telecommunication Engineer, which the Claimant held. The Claimant did not dispute this fact. The requirements of the Respondent for employees carrying out work in Telecom Engineering ceased or diminished; therefore, the position was rendered redundant. Whereas the affected employees could have been declared redundant and exited from the organisation, the Respondent opted to provide them alternative employment within the same organisation and under same department of ICT. The Claimant was redesignated to the position of "ICT Help Desk and User Support Officer, which she rejected for, among other reasons, being lower in grade than the position of Telecom Engineer she held before the restructure. She contended that the resignation was a demotion that amounted to constructive dismissal. The Respondent, on the other hand, asserted that by offering her this role as alternative employment, it had acted reasonably; therefore, she had no basis to claim that she was constructively dismissed.

[17] We had an opportunity to analyse the trajectory of the events leading to the Claimant's resignation and established the following:

It was the evidence of RW1 Moses Bukenya that the Claimant was asked to move to the IT help desk on 4/04/2021. The email correspondences marked REX11 at pages 44-50 of the Respondent's trial bundle and particularly the email dated 8/04/2021 indicated that the Respondent communicated the impending changes and shared the Job description of the proposed new role, "ICT Help Desk and User Support Officer with her. It is also clear from her response that she was given time to consider whether to take it or not. This communication was issued to her during the pendency of a grievance process regarding her appeal against being placed on an illegal PIP. The record indicates that she was placed on a PIP on the 15/03/2021, she appealed against it on 16/03/2021 and a committee to address the grievance was set up on

24/03/2021. On 12/04/2021, she wrote to the Managing Director marked CEX "E" and requested to be treated fairly and protested the assignment of a new role during the pendency of the PIP Appeal. She also contested the new role for being of a lower grade and requested that the PIP be canceled and she be given a fair hearing.

Although she alleged that her redesignation during the pendency of the PIP Appeal was contrary to section 19 of the Respondent's Transfer Policy, that bars the transfer of an employee on a PIP, there was no evidence on the record to prove that the PIP had been implemented. This is because she testified that she appealed against the PIP and she was exonerated from it on 27/10/2021(CEX "G"). In the absence of any evidence to the contrary, we found the argument that the Respondent contravened section 19 (supra) baseless.

[18] The Claimant testified that the Respondent was undergoing restructuring and by 08/04/2021, she was aware that her role of Telecommunication Engineer was going to change. The evidence in the email correspondences between her and RW1. Pages 44-50 of the Respondent's trial bundle clearly indicate that she was consulted via email, and the proposed redesignation, including its job description, was shared with her. It is also clear from the responses to the various emails that she requested time to consider the proposed redesignation and revert. In particular, the email dated 8 April 2021, from RW1 Moses Bukenya, head of IT Operations at the Respondent, reads in part as follows: "Following the discussion, we had about reassignment into another job, attached is the JD for the role under discussion. You are required to read it, and if you're happy with it, sign it and send it back." She responded, "Thank you for the offer. I request that you give me time to analyze the roles, and I will respond accordingly."

According to RW1, the redesignation was a reassignment and not a transfer. It was the Claimant's own testimony that she was aware her role as Telecom Engineer was going to change based on the ICT departmental report. She testified that; "...The lockdown was declared, the business worked differently...", when asked about whether the role of Telecommunication Engineer in the ICT department ceased to have value after COVID, she said "Yes". She also said the change in role was communicated to her as early as March 2021, and on whether there was a review of the organization, she said "yes". It was also her evidence that her salary remained the same, but the grade changed "... yes, as early as April 2021 I knew what the new role

was ...to take effect in January 2022 ... I resigned on 17th January 2022..." After the restructuring had taken place? "Yes"..."

[19] Although section 80, does not explicitly provide for the requirement to consult on measures to be taken to avert termination by redundancy or to mitigate adverse effects such as difficulty in finding suitable alternative employment or being offered suitable alternative employment, save for notifying the relevant union and the Commissioner Labour, this court in *Ndaula and Another v Post Bank Uganda Ltd,* emphasized the requirement for an employer to ensure substantive and procedural fairness during restructuring and in particular to ensure that affected employees are consulted before redundancy terminations occur.

[20] Comparative jurisprudence also suggests that an employee who has been rendered redundant is not automatically dismissed but is only dislocated until he or she cannot be relocated to "suitable alternative employment" within the organisation. In the South African case of *SA Breweries (PTY) Ltd v Louw* (2018) 39ILJ 189(LAC), which was cited in *Johaness v 4Gs Secure Solutions (Pty) Ltd* No. J 3933/18, the Labour Appeals Court of South Africa stated that "...Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed..." The Court further stated that when making an offer for alternative employment to a potentially redundant employee, the employer should objectively assess what it considers suitable alternative employment. In our understanding, this means that after restructuring/reorganization, the employer is expected to try as much as practically possible to provide suitable alternative employment to affected employees, within the organisation or elsewhere.

Following the restructure, the Respondent in the instant case declared the position of Telecom Engineer which the Claimant held, irrelevant; the position ceased to exist. She was then redesignated to the position of "ICT Help Desk and User Support Officer" in the same department of ICT. The position of Telecommunication Engineer, having been found irrelevant, ceased to exist. We therefore have no doubt in our minds that her redesignation to another role was alternative employment within the same organisation and not transfer as the Claimant would like this court to believe. Even if the Claimant asserted that the new position was lower in grade, the redesignation letter dated 14/12/2021 marked CEX "I" described it as **"ICT Support Officer" Band**

C Sub- band C1 reporting to the **ICT Help Desk & User support Administrator...**" which was equivalent to that of **Telecom Engineer Band C sub- band C1"**. This notwithstanding, the Claimant insisted that it was not a suitable alternative employment. What amounts to a suitable offer of alternative employment in cases of redundancy is discussed by the House of Lords in *Taylor v Kent County Council* (1969)2 QB 560, where Lord Chief Justice Parker states that;

> "...by the words "suitable employment" suitability means employment which is substantially equivalent to the employment which has ceased. "suitable" in relation to that employee means conditions of employment which are reasonably equivalent to those under the previous employment ... it does not seem to me that by suitable employment meant employment of an entirely different nature..."

[21] It is not in dispute that even if she were redesignated, her salary and benefits remained the same. However, she contended that she did not have the requisite qualifications to carry out the new role. Therefore, it could be argued, as stated by Lord Chief Justice Parker in Taylor (supra), that the redesignation was reasonably equivalent to the previous employment as Telecom Engineer as far as the emoluments were concerned, but of a different nature. This was confirmed by RW 1, who testified that whereas the person specifications in the role of Telecom Engineer required an Engineering Degree, the person specifications in the new role were different, requiring the Claimant to possess a bachelor's degree in IT, which the Claimant did not possess. The Respondent, however, argued that the Claimant had the opportunity for training to enable her to perform the new role. As to whether it was possible for her to train to fit the redesignated role successfully is a matter of conjecture. Be that as it may, the employee had the option to accept or reject the new role, and in this case, the Claimant exercised her right to reject the offer. Given that she did not possess the requisite qualifications to carry out the new role. It is our finding that it was reasonable for her to reject the redesignation, and by doing so, she had become redundant.

Did the redesignation amount to a demotion?

[22] It is not in dispute that the position of Telecom Engineer ceased to exist, having been found to be irrelevant to the Respondent's management mode after restructuring. It is also not in dispute that the claimant was aware that the position of Telecom Engineer ceased to exist after restructuring. We are further fortified by her letter dated 22/12/2021, in which she requested to be placed in a position which matches her

qualifications and experience so that she could maximize her knowledge and skills and suggested that she had expertise in projects planning, tracking, monitoring, reporting and management of stakeholders including third party contractors and suppliers. This letter clearly shows that she was aware that the position of Telecom Engineer was no longer available, otherwise she would not have requested the alternatives she listed for the Respondent to consider.

[23] We reiterate that it is a settled position of the law that an employer has managerial prerogative to organize or reorganize his or her organisation for its efficiency, and Courts cannot interfere with this prerogative unless there is evidence of unfairness. In the circumstances, the Court cannot create positions of employment or decide how an organisation should be managed. Its role is limited to ensuring that this prerogative is exercised in accordance with the law.

In the circumstances, where a position has been rendered redundant as a result of either economic, technological, structural, or similar reasons, the employer cannot be faulted for an incumbent redundant employee's refusal to accept a proposed alternative employment. Even if the proposed alternative employment may be of a lower grade than the previous redundant position, it cannot be construed as a demotion because the previous employment ceased to exist. The proposed alternative is a new engagement, and it may be under new terms. The Claimant in the instant case was not declared redundant and laid off, but was redesignated instead. She testified that the redesignation happened after the restructure occurred. As suggested in *SA Breweries*(supra), the Respondent would only be required to, as practically possible, offer suitable alternative employment within the organisation, and the employee /Claimant was at liberty to accept or reject the offer. The Claimant in this case did not consider the redesignation a right fit for her, on grounds that it was lower in grade and she lacked the required qualifications to do it, therefore, it was reasonable for her to reject it. However, by doing so, she had become redundant, because the purpose for which the respondent hired her as Telecom Engineer ceased to exist after the restructuring.

[24] In our considered view, the redesignation was an attempt by the Respondent to assist the affected staff to mitigate the loss of the position of Telecom Engineer. Even the Claimant considered it of a lower grade, by maintaining the pay grade and benefits at the level of Telecom Engineer, it can be construed as the Respondent's intention to

ensure that the alternative employment was equivalent to the position of Telecom Engineer. We are persuaded by the proposition of the South African Labour Court of Appeal, in *Freshmark (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2003) 24 ILJ 373(LAC)* The south African Labour Court of Appeal where it stated thus:

> "... An employee who unreasonably refuses an offer of alternative employment is not without fault. He has himself to blame if he subsequently finds himself without employment and therefore, does not deserve to be treated on the basis as the employee who finds himself without employment due to fault on his part – whether in the same position but on different terms or on the same terms but in a different position and on the same terms but a different place, that is still alternative employment. It is an offer of an alternative contract of employment..."

Although we find her rejection of the new role reasonable, because she did not have the qualifications to carry it out and she had a right to accept or reject the offer because it is not what he or she had applied for in the first place, once she rejected the alternative employment she had become redundant because once a job has been rendered redundant the employers requirement for employee to do it has diminished or ceased. The purpose for which the employee was recruited to undertake the job has ceased. It would therefore be unfair to require the employer to mandatorily provide suitable alternative employment to the affected employee if there is none and to penalize him or her where the incumbent redundant employee rejected the offer of alternative employment. We believe that this is the reason the employee is given an option to accept or to reject an offer if he or she considers it unsuitable, and the employer cannot be faulted for the rejection, and only claim redundancy pay.

In conclusion, the previous position having ceased to exist after the restructuring, the redesignation of the Claimant, even if she considered it of a lower grade, cannot be construed as a demotion, but rather as alternative employment, which she had the option to accept or reject.

Did the resignation amount to constructive dismissal?

[25] A summary of the Claimant's resignation dated 17/01/2022, stated that she was a victim of unfair treatment, having been subjected to abuse and harassment, starting with her being placed on a PIP, which she challenged, and being demoted. She claims her supervisor used abusive language against her, and according to her, she had to

endure abuse because she had not cleared the PIP, and her bonuses and inflationary adjustments were not being reckoned. She was not given feedback about her queries regarding her redesignation, and her request to be considered for more suitable redesignations was ignored, which she construed as rejection. She also stated that the working environment was so hostile that it caused her emotional, financial, and social damage, stress, and anxiety, which left her no choice but to resign. In her pleadings, she contended that her resignation amounted to constructive dismissal, which was unlawful.

[26] Constructive dismissal is not explicitly defined under the Employment Act 2006; however, Section 64 (1)(c) thereof provides that termination shall be deemed to take place:

> "...
>
> (c) Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employee...".

This section, unlike other provisions in the Act, places the burden of proving that his or her resignation or termination was a result of the employer's conduct on the employee. The employee must demonstrate that the employer's conduct was so intolerable and wicked and went to the root of his or her contract to warrant the resignation being construed as a fundamental breach of the contract of employment. The employee must, in the same vein, show that the employer is no longer interested in being bound by the terms and conditions of the employment contract. Lord Denning MR, defined constructive dismissal in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 222 or [1978] QB761 thus:

> " if the employer is guilty of the conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then, the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

[27] Lord Denning further proposed that when determining claims of constructive dismissal, the court must find that the conduct of the employer must constitute a repudiatory

breach of contract, and it must be established that the employee left in response to the employer's conduct (also see *Office v Roberts* (1981) IRLR 347). Therefore, a causal link must be shown, and the employer's conduct, when viewed objectively, must amount to repudiatory and fundamental breach of the contractual obligations.

[28] We have already established that the Claimant's grievance regarding her placement on the PIP had nothing to do with the restructuring process, which seemed to be happening concurrently. The restructuring resulted in the abolition of the position of Telecom Engineers, thus, the requirement for employees to do this role ceased to exist. There was no evidence placed before this court to prove the allegations stated in the claimant's resignation letter, that she suffered abuse. Even if it is the correct position that the grievance regarding her placement on a PIP was not resolved immediately, there was nothing on the record to create a nexus between the grievance process, the diminution of the role of Telecom Engineer, her redesignation, and eventual resignation. It is not sufficient for her to make an allegation without any proof. We found nothing on the record to indicate that the supervisor was abusive or that he used abusive language against her as she alleged, and there was no evidence to prove that the redundancy targeted her alone, to warrant the restructuring process to be construed as unfair. It was her own testimony that the entire department, which comprised 4 staff including herself, was affected by the restructuring and all of them were redesignated to other roles. As was stated by this court in Wanyoto... "...the restructuring was blind and in that way fair...." In any case, instead of declaring her redundant, the Respondent opted to redesignate her. Even if she considered the redesignation unsuitable, it was an alternative employment to the job of Telecom Engineer, which ceased to exist when it was declared irrelevant.

[29] We have already established that by the time she resigned on 17/01/2022, the position of Telecom Engineer had already been declared irrelevant and redundant. It is also not in dispute that by then she had already been redesignated, having received the new Job title and description on 8/4/2021 and the letter of redesignation on 14/12/2021. Having refused to assume the new role, on 22/12/2021, the new contract did not commence, and she became redundant. In the circumstances, there was no contract that could have been breached for her to claim constructive dismissal. We reiterate that, her employment as Telecom Engineer having been severed by restructuring, the Claimant had nothing to resign from. Similarly, the Respondent's

acceptance of the resignation from the position of Telecom Engineer, which had ceased to exist, was redundant.

In the circumstances, the Claimant having not assumed the new role and the previous one have ceased to exist by the time she tendered her resignation, and having not adduced any evidence to prove the ingredients of constructive dismissal, her resignation based on a nonexistent contract did not amount to constructive dismissal.

2. Whether the Claimant is entitled to the remedies sought?

The Claimant prayed for the following:

Salary for the month of April 2022.

[30] It was submitted for the Claimant that she left the Respondent's workplace on the 16/04/2022, having served the notice period. Therefore, she worked for half of April 2022 as indicated in her resignation letter. According to Counsel, she was earning a monthly salary of Ugx. 4,605,686/=, therefore, she was entitled to payment of Ugx. 2,888,456/=.

In reply, the Respondent argued that a Bank transfer of UGX.1,051,298/= was made to the Claimant on 17/05/ 2022 and the payment type is described as pay-payroll and the attached payment requisition describes the payment as salary April 2022 and leave in lieu. According to Counsel it followed the internal memo at page 40 of the Respondent's trial bundle that directed the said payment. Therefore, this claim is unfounded.

Decision of Court

[31] The Claimant in her pleadings stated that by the time of her resignation, she had been paid Ugx. Ugx. 4,605,686/= per month. Save for a letter dated 1/07/2019, titled Job grade and Reward Review, 2019, attached to her memorandum of claim, there was no further evidence to confirm this. However, the Voucher on page 30 of the Respondent's trial bundle stated her salary as Ugx. 3,913,900/-, therefore, half a month's salary would amount to Ugx. 1,956,950/= as opposed to Ugx. 1,051,531/-, which the Respondent remitted to her Bank. Given this voucher, the payment on page 37 of the Respondent's trial bundle, which was in respect of salary and leave, was an

underpayment. The Respondent is therefore ordered to pay the Claimant Ugx. 905,419/- as an outstanding balance on the salary.

Three months' payment in lieu of notice.

[32] The Claimant chose to serve her notice, and she received salary during this period, save for the month of April. In the circumstances, her claim for payment in lieu of notice is untenable. Even if we had found that it was constructively terminated, which was not the case, having served the notice period, her claim would not be tenable. This claim, therefore, fails.

Annual leave.

[33] According to the evidence on the record, the Claimant had accumulated 25 annual leave days untaken in 2022, and this was not disputed by the Respondent. The Claimant's claim is for payment of Ugx. 4,605,686/= in lieu of leave days not taken in 2022 as provided under section 53(1) (a) and (5) of the Employment Act, 2006 (now Cap.226).

She contends that the Respondent only authorized payment of Ugx. 1,485,052/= for only 7 days, which was not correct. In any case, there is no evidence that it was paid. What the Respondent seeks to rely on is only a letter authorizing such a payment but not a bank statement as proof of payment.

Citing, *Mugisha M Abrahim & Another v G4S Security Services (U) Ltd* is in which the High Court stated that merely stating that leave was not taken is not sufficient and it is upon denial of taking leave that an employee is entitled to payment in lieu of annual leave, counsel for the Respondent, contends that the Claimant admitted that she received a sum equivalent to 7 days of untaken leave and she only worked until April 2022. Therefore, having served for only three months and 16 days, she is not entitled to any other leave days.

Decision of Court

[34] Section 53(1) (a)

1) Subject to the provisions of this section-
(a) An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months' service

to be taken at such time during such calendar year as may be agreed between the parties. (Our emphasis).

It is trite that leave is computed at the rate is 7 days in respect of each period of a continuous 4-months service. The evidence on the record confirms that the Claimant only worked until 17/04/2022, therefore, she was entitled to 7 days' untaken leave for the period January to April 2022. According to the memo at page 40 and the Voucher at page 41 of the Respondent's trial bundle, the leave was computed at 1,245,332/-. However, there is no evidence that this money was remitted to any of her accounts. In the absence of any evidence to prove that it was actually paid, the Respondent is ordered to pay the Claimant **Ugx.1,245,332/-** as payment for untaken leave.

One-month payment for unfair termination

[35] We have already established that the Claimant's termination was as a result of restructuring for operational reasons, and this dismissal/termination is considered a non-fault and fair reason for termination. In the circumstances, she is not entitled to compensation for unfair termination.

Severance Allowance

[36] Having established that the Claimant was not constructively dismissed, and was only rendered redundant, she is not entitled to severance pay as provided under section 86 of the Employment Act, cap 226.

Bonuses on the 2020 annual gross pay.

[37] The Claimant prayed for an award of Ugx. 8,878,581/= as bonuses for 2020, because she had been placed on the Performance Improvement Plan (PIP) at the time. According to Counsel for the Claimant, the Respondent does not dispute that the Claimant is entitled to these benefits. He contested the computation of Ugx. 2,069,531/= as bonus payment for 2020 because she was entitled to Ugx. 8,878,581/=. Therefore, having already paid her Ugx. 2,069,531/= the Respondent owed the Claimant a balance of Ugx. 6,809,050/= as part of the 2020 bonus. He also contested the computation of the 2021 bonus and prayed that the Claimant is awarded Ugx. 9,671,940/= as bonuses for 2021.

In reply, Counsel for the Respondent submitted that it is a well-known principle that bonuses are performance-based and often discretionary. Therefore, no employee can demand a bonus if not earned through performance parameters. The bonus is also determined by the employer. The Claimant in this case did not provide any proof of entitlement to a bonus or the formula for the determination of bonus. Although she was paid a sum of Ugx.2,069,531 as bonus for the year 2020, her claim for additional bonus is not justified. He also refuted the claim for bonus for 2021, she did not adduce any evidence to prove it. He submitted that these claims are considered special damages, which must be proved. He relied on *Benedicto Musisi vs Attorney General & Rosemary Nalwadda vs Uganda Aids Commission* HCCS No.67 of 2011.

[36] It is indeed the correct the Respondent agreed which they computed and paid. It is her contention, however, that the computations were wrong because they were based on the wrong formula. This court in *Kasozi Iga v UBA Ltd* LDR No. 183 of 2020, is of the proposition that where a bonus is discretionary as it is in this case, the employer must exercise the discretion in an open and transparent manner. Therefore, the expectation is that he, she, or it would have an open and transparent formula for calculating the said bonus.

Unfortunately, both parties did not provide any evidence regarding the formula upon which we could make a determination of this issue. In the circumstances, we have no basis upon which to resolve the Claimants contention regarding the computation and nonpayment of bonus payments. This claim is therefore denied.

Payment of inflationary adjustments on the 2021 salary arrears

[37] The Claimant prayed for payment of Ugx. 5,666,835/= as a 10% inflation adjustment on the consolidated monthly salary of 2021. Counsel for the Claimant argued that the Respondent did not deny that the Claimant is entitled to this award, but it undercomputed it at a rate of 8.3% instead of 10%. In any case, the application of 8.3 % would amount to Ugx. 4,987,957/- and not Ugx. 1,286,363/ = that was computed by the Respondent.

Both parties did not adduce evidence on which they relied to determine the computation of inflationary rates. In the circumstances, we had no basis on which to decide the correct percentage inflationary rate on which it should be computed. Therefore, the claim fails.

General Damages

[38] Mr. Ayorekire, Counsel for the Claimant, submitted that the Claimant diligently served the Respondent as a Telecommunication Engineer for 17 years before her unlawful and unfair termination. He contended that the Respondent breached the contract of employment and did not follow the due process when demoting her to a mere ICT User Support officer despite her expertise and ignoring her request for appropriate redesignation. He further contended that her demotion without subjecting her to a disciplinary hearing and without following due process, coupled with the act of ignoring her request of an appropriate relocation caused the claimant humiliation, embarrassment, stress, and loss of her job to her detriment and her family, for which she is entitled to an award of general damages. He relied on *Muyimbwa Paul v. Ndejje University* (supra) for the legal proposition that damages arise from the wrongs committed against a successful litigant and are awarded at the discretion of the court. They represent compensation in terms of the loss or injury, or damage caused by the unsuccessful litigant to the successful litigant. Damages are not a way of profiteering from litigation but a way of putting the successful litigant in the position he would have been had the wrongs not been committed against him/her. Therefore, the claimant should be awarded Ugx. 200,000,000/= as general damages.

[39] Unlike comparative legislation, the Employment Act does not provide a statutory remedy for termination by redundancy. Comparative legislation provides that where an employee is terminated by redundancy, he or she would be entitled to redundancy pay. We are persuaded by comparative jurisprudence that termination by redundancy, being a no-fault termination, entitles an employee whose termination is by way of redundancy to compensation for loss of employment, as guided by the principle of *restituo in integrum.* This is supported by Article 126 (2)(c) of the Constitution, which provides that in adjudicating cases, adequate compensation shall be awarded to victims of wrongs, because the termination in the case is no fault of the employee. Although the Claimant rejected the Respondents offer of alternative employment, having served the Respondent for a long duration of 17 years with a clean record, because no evidence was adduced to the contrary, and having found that her rejection of the alternative employment was reasonable given her lack of qualifications to carry out the new job, she would be entitled to some compensation. In a recent case of *Uganda Post Limited v Consolette Mukadisi,* SCCANo.13 of 2022, the Supreme Court was of the Legal position that general damage can be awarded in addition to payment

of the contractually agreed amount in lieu of notice and other statutory remedies. This being a no-fault termination, the claimant cannot claim any damages but compensation for loss of employment for no fault of her own. In the circumstances, the Claimant is awarded **Ugx. 20,000,000/-.**

Balance on the remaining part of the Contract.

[40] The contract of employment as Telecom Engineer having ceased to exist after the restructuring, there was no future employment based on it therefore, this claim has no standing. It is therefore denied.

Interest rate

[41] An interest of 12% per annum shall accrue on the compensation above from the date of this award until payment in full.

No order as to costs is made.

Signed in Chambers at Kampala this **28TH** day of **March 2025**.

Hon. Justice Linda Lillian Tumuslime Mugisha,
Head Judge

The Panelists Agree:

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