THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE No. 348 OF 2019

(Arising From KCCA/RUB/LC/407/2019)

KAWEMBA GEORGE ::: CLAIMANT

V

D-LIGHT DESIGN LIMITED ::: RESPONDENT

Before:

The Hon. Head Judge, Linda Lillian Tumusiime Mugisha

Panelists:

1. Mr. Ebyau Fidel
2. Ms. Harriet Mugambwa Nganzi
3. Mr. Fx Mubuuke

Representation:

1. Ms. Okumu Stella of M/s. OSH Advocates Kampala for the Claimant.
2. Ms. Babirye Miriam Kaggwa of M/s. Onyango & Company Advocates Kampala for the Respondent.

AWARD

Background

[1] The Claimant's claim against the Respondent is for compensation for unfair termination, severance pay, compensatory payment, general damages for unfair termination, exemplary damages, interest, and costs.

The Claimant was employed by the Respondent as the Head of Training on 1/05/2019. On 25/07/2019, following a performance appraisal his salary was reviewed to Ugx. 8,667,000/- month, and his position changed to National sales trainer. The contract period was maintained from 1/05/2019 to 31/03/2021.

The Claimant was responsible for ensuring that Sales Energy Promoters (SEPs) in the country were fully educated on the Respondent's services and pricing. On 12/09/2019, he was given Key Performance indicators (KPI's) which he was to realize in two and a half months as follows: 80 daily to 320 MTD by mid-July, 160 daily to 640 MTD by end of July, 230 daily to 1,280 MTD by end of August, 650 daily to 2,600 MTD by end of September, which he duly accepted.

Facts of the Case

[2] On 26/08/2019, according to him the Respondent unlawfully terminated the Claimant's contract for failure to achieve the set targets during the agreed period. He contends that the termination was unlawful because he was not given an opportunity to be heard, the process of termination was unrealistic and unjustifiable.

The Respondent on the other hand contends that the termination was lawful and justifiable because the Claimant failed to achieve an acceptable level of work performance. That Respondent properly implemented a performance improvement process and on termination, it paid all the terminal benefits due to the Claimant, therefore he was not inconvenienced in any way to entitle him to an award of damages and other claims sought.

Issues

[3] According to the joint scheduling memorandum, the following were the issues framed by the parties:

1. **Whether the claimant's termination was unjustified and unlawful?**
2. **Whether the claimant is entitled to the remedies sought?**

Submissions

[4] Counsel for the Claimant refuted the testimony of Mr. Wanasolo RW1 regarding the performance meeting that allegedly took place on 12/07/2019 because he had not adduced the minutes of the meeting. She further contended that, the targets that were set by the Respondent were unrealistic and ambiguous therefore they could not be realized by the Claimant in the shortest period of time. In addition, it was her submission that the KPIs under REX2 were never availed to the Claimant and this constrained his work productivity. Counsel further contended that the emails on which the Respondent relies on under REX6 were emails of 2018 before the Claimant assumed the roles of Head of training.

She contested RW1's testimony on grounds that it was riddled with falsehoods because the Claimant was not subjected to any performance improvement process as claimed. She insisted that RW1 did not adduce any evidence to substantiate the allegation that the Respondent conducted a performance improvement process for the Claimant. It was her submission that the Respondent did not accord the Claimant a fair hearing, as elucidated in *Ebiju James vs. UMEME Ltd*, HCCS No.133 of 2012, and *Carolyne Turyatemba and others vs. Attorney General*, Constitutional Petition No. 15 of 2006, because he was not subjected to a disciplinary hearing and the allegations of poor performance were not proved therefore his dismissal was unlawful.

[5] In reply, Counsel for the Respondent submitted that the Claimant's employment was terminated in accordance with the Employment Act and in line with clause 11.1 of his employment contract which allows for termination of the contract by either party upon notice of one month or payment equivalent to one month's salary in lieu of short notice.

[6] According to Counsel, the Claimant's termination was undertaken after several performance improvement plans and set targets were given to the Claimant which he failed to achieve and in accordance with Sections, 65 now 64 which permit termination of employment by giving notice, Section 58 of the Employment Act which prescribes notice periods and Section 69 which permits termination where the employee has indicated by his or her conduct that he or she has fundamentally breached his or her obligations under the contract. She also cited *Moses Obonyo vs. MTN (U) Ltd*, Labour Dispute No. 195 of 2009 and *Hilda Musingizi vs Stanbic Bank (U) Ltd* SCCA No. 2 of

2010, which emphasized that even if the right of an employer to terminate the employment of an employee could not be fettered by courts, employers could not merely terminate because there was a provision of payment in lieu of notice.

She argued that the termination letter marked CEX5, the Respondent had a discussion with the Claimant regarding his performance on 12/07/2019, the Head of Sales and Regional Managing Director and Human Resources manager, in which the Claimant was reminded of his responsibility as the National Trainer to ensure that the SEPs in the country are fully dedicated and educated about the Respondent's products. The Claimant was expected to increase the rate of 85 daily SEPs to 320 MTD by mid-July, 640 MTD by the end of July and 1,280 MTD by the end of August, however, by the time of this meeting he had only achieved 686 active SEP's as opposed to the target of 1280 by end of August 2019, therefore he was performing below the expected performance. She contended that the Claimant did not deny that the Respondent had given him targets and he had failed to achieve the set targets, moreover, he was given all the support he needed to meet the said targets. According to her, the Claimant was expected to train regional managers, territory Executives, and territory sales Managers and track their performance to ensure the SEPs were fully dedicated and educated but he failed to do so. She cited REX2, the support was facilitation, analysts, and incentives and that the Respondent gave the claimant National Trainer KPIs and performance review plus emails showing that the claimant had failed to meet his targets despite the support given by the Respondent.

[7] She relied on the reason in *Stanbic Bank (U) Limited vs. Apollo Twinohangi Tayebwa* Labour Dispute Appeal No. 21 of 2020 to the effect that where an employer established a weakness in performance it would be sufficient reason to engage such an employee in a performance improvement plan which need not be in writing. Therefore, the conversations, emails, and appraisals between the Claimant and the Respondent in the instant case were enough to reveal the weakness in the performance of the Claimant which was lacking, therefore his termination was lawful.

In rejoinder, Counsel for the Claimant insisted that the Claimant was never subjected to a performance improvement plan and this was confirmed by RW1 during cross-examination when he had no document to adduce as evidence that indeed a performance improvement plan was never conducted onto the Claimant.

Decision of Court

Issue 1: Whether the claimant's termination was unjustified and unlawful?

[8] We have carefully analyzed the evidence adduced and the submissions of both Counsel and find as follows:

It is not in dispute that the Claimant was an employee of the Respondent and at the time of his termination on 29/08/2019, he was the Respondent's National Sales Trainer. According to his termination letter he had failed to meet the targets set as National sales trainer where he scored 686 as opposed to the set target of 1280. Although he argued that the targets were unrealistic and ambiguous, he testified that he was part of a meeting that set the targets and he signed them off. The termination letter reads in part as follows:

> "...26the August 2019
>
> George Kawemba
>
> National Sales Trainer
>
> Dear George,
>
> **RE: TERMINATION OF YOUR CONTRACT OF EMPLOYMENT**
>
> Reference is made to the performance discussion held on 12/07/2019 in the presence of the head of sales, Regional Managing Director, Country General Manager, and Human Resources.
>
> During the performance discussions, you were reminded of your responsibility as the National Trainer to ensure that the SEPs in the Country are fully dedicated and trained about D-light services and products. As per your targets:
>
> You were expected to increase the current rate of 85 daily active seps to:
>
> a)320 MTD by mid-July,
>
> b) 640 MTD by end of July,
>
> c) 1,280 MTD by end of August
>
> However, to date the current rate is 686 active SEPs vs a target of 1280 by end of August.
>
> Accordingly, the Company has decided to terminate your employment with immediate effect from 26th August 2019 due to failure to achieve the set targets during the agreed period. Therefore, your last date of employment is 26th of August 2019...."

[9] It is clear that the reason for the Claimant's termination was his failure to meet his targets. In the circumstances, the Respondent's reliance on Section 64 as the basis of his termination which is simply an expression of the terminating party's unwillingness to continue with the employment relationship with the other party cannot stand. This is because the termination was in this case for a reason relating to poor performance which therefore falls squarely within the ambit of section 65 (1) and (2) which requires an employer to notify the employee of the reason for dismissal or termination if the reason is related to poor performance or misconduct and an opportunity for the employee to respond to the reason accompanied by a person of his or her own choice.

The section provides as follows:

> "65. Notification and hearing before termination
>
> (1) Notwithstanding any other provision of this part, an employer shall before(our emphasis) reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal (emphasis ours) and the employee is entitled to have another person of his or her choice present during this explanation,
>
> (2) Notwithstanding any other provision of this part, an employer shall before be reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make."

[10] Section 67 (1) and (2) of the Employment Act further requires the employer to provide proof of the reason and provides as follows:

> "67. Proof of reason for termination
>
> (1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71
>
> (2) The reason or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee...."

The Claimant's Employment Contract under clause 11 provides that the termination of employment would be by either party in accordance with the employment laws of

Uganda. Therefore, the Respondent was expected to follow the procedure set up under the Employment Act under Sections 65 and 67 of the Act.

[11] The Claimant testified that the Company informed him of the importance of meeting his targets but he failed to meet them because they were unrealistic, and he was not given the required support. He stated thus: " ...the company informed me about the importance of meeting the target, I failed to meet them because they were unrealistic, the support was not given, as opposed to 4 on 2 cars, I was supposed to have 5 regional managers I had only 3, incentives to be put in place such as the wall of fame breakfast with the general manager did not materialize..., there were supposed to be temporary workers,...supposed to be 2 temps to support ... yes I reached out to immediate supervisor who failed to avail required support..."

It is clear from his testimony that contrary to his Advocate's submission, that he was not aware of any reminder, the Claimant admitted that he was part of the meeting that set his target, and he was reminded about the importance of achieving the targets, but he did not achieve them. He attributed his failure to the Respondent's failure to give him the required support.

[12] We associate ourselves with the reasoning in *Stanbic Bank (U) Limited vs. Apollo Twinohangi Tayebwa* (supra), that, where the employer establishes gaps in an employee's performance, he or she is at liberty to engage the employee in a performance improvement plan. And that it need not be a written agreement. It is possible that such a plan could involve discussions, conversations, and email exchanges. This notwithstanding, however, Section 67 of the Employment Act makes it mandatory for the employer to demonstrate with credible evidence that such conversations or exchanges took place before they can be used as a basis for dismissal. The employer is expected to establish the validity or correctness of the reasons before termination. In this case, the Respondent was expected to demonstrate that the Claimant failed to perform after being placed on improvement plan and that he was notified about his performance gaps and he was given the opportunity to improve himself. (see James v Waltham Holy Cross UDS [1973] IRLR 202). It is the position of the law that where the employee is given an opportunity to improve and he or she does not improve then he or she should be subjected to a disciplinary hearing. (see *Imakit Martin v Vivo Energy (U) Ltd*, LDC No. 034 of 2017). This Court in *Kiyingi Yasin v Post Bank Uganda Ltd,* LDR No. 014 of 2022, emphasized the requirement for fairness objectivity, and consistency in an appraisal process and the requirement for the process to be credible and verifiable. It is therefore not

sufficient for an employer to state that an employee's work performance was found wanting on the basis of conversations or appraisals regarding the performance, without demonstrating; first, the conversations did take place, second, the employee was notified about the performance gaps and third, given an opportunity to explain him or herself by according to him or her a hearing or an opportunity to defend him or herself. As stated in Kiyingi(supra) a PIP is aimed at improving the performance of an employee and is not a "veil or conduit to dismiss unwanted employees. It is a corrective tool that identifies performance gaps and specifies strategies for addressing these gaps, the roles of the parties, the improvement process, and the consequences where performance does not improve. Further in *Akeny Robert v Uganda Communications Commission*, LDC No.023 of 2015, this court stated that: "... Appraisal and discussions held between employees and their employers touching on the employee's work performance do not add up to a disciplinary hearing and can only be evidence in support of good or poor performance at a disciplinary hearing."

Whereas the Claimant in the instant case attributed his poor performance to the Respondent's failure to give him the required support, the Respondent insists that it gave it and terminated him after several performance improvement plans which he failed to perform.

[13] We had an opportunity to consider the email correspondences marked REX 6 on which the Respondent relied as evidence of reminders to the claimant regarding performance and established that, there was an undated Performance report on page 9 of the Respondent's trial bundle which only suggested to him the need to improve and to achieve a minimum of 70%, providing strategies for improvement such as " Double- Double SEP campaign, sales Manager staff sales and deliver a minimum of 90 incremental sales under campaign alone..." and issued a warning that, his role would be reviewed if there was no improvement. There are also reminders dated 15/04/2019 and 12/7/2019 which also noted his low score against the target and suggested means for improvement. The other email correspondences were in respect of matters that occurred in 2018 before the Claimant assumed the position of National Sales Trainer. It is also noteworthy that the reminder issued to him on 12/07/2019 culminated in his termination on 26/08/2019, 1 month and 2 weeks later. There is no evidence on the record to indicate that after issuing him with the last reminder on 12/07/2019 and guidance on how to improve, the Claimant was given the support required as stated or that he was assessed based on the guidelines issued to him.

Lord Denning in *British Leyland UK Ltd v Swift* I.R.L.R 91, stated, "The correct test is was it reasonable for the employers to dismiss him? If a reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair ..." The Claimant's contract as already stated under clause 11 provides that termination would be done in accordance with the laws of Uganda, therefore, the Respondent ought to have followed sections 65 and 67 of the Employment Act which require the employer to notify the employee about the reason for dismissal and in this case the poor performance gaps and to prove validity and correctness of the reasons for termination. In our considered opinion it was unreasonable for the Respondent to terminate the Claimant without assessing him based on the guidelines issued in the reminder of 12/07/2019 and without giving him an opportunity to defend himself.

[14] In the absence of evidence of the alleged performance improvement processes and an assessment based on the guidelines for improvement, and the support that was required during his improvement period was given to him, to enable him to improve, and this notwithstanding he did not improve, the Respondent did not comply with Section 67 which makes it mandatory for an employer to prove that the reason for dismissing an employee and to explicitly demonstrate that the reason existed at the time of the termination and the reason was justifiable, we are not satisfied that the Respondent in the instant case proved that it gave the Claimant the required support to enable him to improve his performance and that he failed to perform notwithstanding. It is also glaring clear that the claimant was not accorded a hearing, therefore he was not given an opportunity to explain his poor performance as he did during the hearing. Even if poor performance is a fundamental breach of contract for which the Respondent was at liberty to dismiss the Claimant in accordance with Section 69 (3) of the Employment Act, it was still a requirement for the Respondent to accord him a hearing as provided under section 66 (4), which is mandatory.

In the circumstances, it is the finding of this court that it was not procedurally fair for the Respondent not to give the Claimant an opportunity to explain his poor performance in accordance with Section 65(1) and (2) before terminating him. And by failing to substantiate that the Claimant was placed on a performance improvement process and given the required support to enable him improve his performance, and in the absence of evidence that in spite of the interventions he did not improve, we find

his dismissal was substantive unlawful. In conclusion, the termination of the Claimant's employment was both procedurally and substantively unlawful.

Issue 2: Whether the claimant is entitled to the remedies sought?

[15] It was the Respondent's submission that, the claimant having been paid his terminal benefits which included accrued salary as of August 2019, one month in lieu of notice, and leave accrued up to the date of his termination, was not entitled to any other remedies sought. We respectfully do not agree. Having found that his employment was procedurally and substantively unlawful, he is entitled to some remedies. According to his memorandum of claim, he prayed for the following remedies:

a) **The Claimant's dismissal was procedurally and substantively unlawful.**

b) **Severance Pay**

It was submitted for the Claimant that Sections 87 now 86, 88 now 87, 89 now 88, and 90 now 89 of the Employment Act and the holding on *Dona Kamuli v DFCU Bank Ltd,* No. 002 of 2015, entitled the Claimant to severance allowance. She argued that having served from 1/05/2019 to 29/08/2019 when he was terminated, he should be paid, Ugx.17,334,000/- as severance pay.

Section 86 provides that where an employee who has been serving an employer for more than 6 months is unlawfully terminated, he or she is entitled to severance pay. Section 88 is to the effect that the formula for calculating severance pay must be agreed upon by the parties. This Court in *Donna Kamuli*(supra), which is still good law, proposed that where no formula has been agreed by the parties, the employer should pay 1 month's salary for every year served. The Claimant having served from 1/05/2019 to 26/08/2019, had served the Respondent for less than 3 months therefore he would not qualify for severance pay as provided under section 86 of the Employment Act 2006. It is therefore denied.

c) **Compensatory award**

Section 76 mandates the Labour officer to award a compensatory order. The Section therefore applies to damages that can be granted by a labour office and not by the Industrial Court. This Court has the discretion to award damages for unlawful termination or dismissal based on the merits of each case. In the circumstances, this

section is not applicable and cannot be applied instead the Court would award general damages.

d) **General damages**

It was submitted for the Claimant that he would be entitled to an award of General damages amounting to Ugx. 150,000,000/- because by the time of his termination, he was the head of training. The Respondent on the other hand suggested that he was not entitled to an award of damages because he suffered no injury or inconvenience when his employment contract was terminated.

Authorities abound on the legal proposition that, General damages are assessed by court on the basis of injury, suffering, and inconvenience and they are intended to return the injured party in monetary terms, to the position he or she was in before the injury occasioned by the Respondent occurred. The Claimant in the instant case was serving under a contract that was expected to run from 1/05/2019 to 31/03/2021, a period of 1 year and 10 months. He had only served 3 months of the contract when he was unlawfully terminated at a salary of Ugx. 8,667,000/- per month. Although he is entitled to an award of General damages, for unlawful termination, we are of the considered opinion that his claim for Ugx. 150,000,000/- as general damages is excessive. Having already received payment in lieu of notice, accrued salary as of 26/08/2019, and accrued leave pay, and he had only served the Company as Head of Training for only 3 months, we believe an award of Ugx. 14,000,000/- is sufficient as general damages.

e) **Aggravated damages**

We are not satisfied that the claimant adduced any evidence of aggravating circumstances to warrant the grant of aggravated damages. The claimant did not adduce any evidence of the applications he made seeking alternative employment and evidence that he did not get alternative employment on account of his dismissal from the respondent company. In the circumstances, this claim cannot stand it is denied.

f) **Costs**

The Claimant submitted that he is entitled to costs as provided under Section 27(2) of the Civil Procedure Act.

It is the principle of this Court that costs are granted in exceptional circumstances. This is because of the unequal contract between the employer and the employee. Whereas the employer has power of capital and therefore he or she can afford to incur costs of litigation, the employee who has lost the means of earning is not in the position to do so. Therefore, to award costs against him or her would amount to condemning him to destitution. To ensure equality in justice the principle applies to the employer as well. In the circumstances, no order as to costs is made.

g) **Interest**

An Interest shall accrue on the award of damages from the date of filling this matter in this court until payment in full at a rate of 10% per annum.

Final orders:

1. It is declared that the Claimant's dismissal was procedurally and substantively unlawful.
2. The Claimant is awarded Ugx. 14,000,000/- as general damages at an interest rate of 10% per annum from the date of filing in the Industrial Court until payment in full.
3. No order as to costs is made.

In conclusion, this claim succeeds in the above terms.

Signed in Chambers at Kampala this **27th** day of **January 2025**.

Hon. Justice Linda Lillian Tumusiime Mugisha,
Head Judge

The Panelists Agree:

1. Hon. Mr. Ebyau Fidel,

2. Hon. Harriet Nganzi Mugambwa &

3. Hon. Frankie Xavier Mubuuke.