THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE APPEAL NO. 0072 OF 2018

(ARISING FROM KCCA/CEN/LC160/2016 NO. 36 OF 2014)

UMEME LIMITED……..CLAIMANT

VERSUS

HARRIET NEGESA……..……..…RESPONDENT

BEFORE

1. HON. CHIEF JUDGE RUHINDA ASAPH NTENGYE
2. HON. LADY JUSTICE LINDA TUMUSIIME MUGISHA

PANELISTS

1. MS. ADRINE NAMARA
2. MS. SUSAN NABIRYE
3. MR. MICHEALMATOVU

AWARD

This is an appeal against the Award and orders of the Labour Officer in KCCA/CEN/LC/160/2016. The following grounds were stipulated in the record of appeal:

1. The District Labour Officer erred in Law and in fact when he failed to properly evaluate the evidence and arrived at the wrong finding that the complainant was unfairly and unlawfully terminated.

2. The District Labour Officer erred in Law when he granted remedies that were neither pleaded nor proved by the complainant thereby arriving at the wrong finding.

3. The District Labour Officer erred in Law in invoking **Section 92(2) of the Employment Act** thereby holding that the respondent willfully and without good cause, refused to pay the severance allowance and thereby ordered a fine in the sum Ugx. 70,017,376.

4. The District Labour Officer erred in Law referring the issue of remedies to the industrial court after having considered the same and granted reliefs as envisaged under the Employment Act.

5. The District Labour Officer erred in Law in determining that the complainant was entitled to more than what is provided under **Section 78 of the Employment Act, 2006.**

The appellant was represented by Mr. Ferdinand Musimenta of Ms. Sebalu & Lule Advocates while the respondent was represented by Mr. Jacob Kalabi from M/s. KSMO Advocates.

The background and facts of the appeal from the record of appeal are:

The appellant was an employer of the respondent from 1st March 2005 up to 28/6/2016 when she was terminated.

Due to performance related issues she had been put on a performance improvement plan in 2014 and 2015 in which according to the appellant, she did not improve. Various appraisals showed that she was not a good

performer and eventually on 28/6/2016 basing on these appraisals, she was terminated. On 14/7/2016 she appealed the termination decision which appeal was subsequently dismissed. She lodged a complaint to the labour officer who held that the termination was unfair because she was not given opportunity for a fair hearing and ordered the respondent to pay her 4 weeks net pay of 2,000,000/=; severance allowance of 35,008,688/= and also ordered the respondent to pay a fine of 70,017,376/= for failure to pay severance.

The appellant was not satisfied with the findings and orders of the labour officer and hence this Appeal.

On 19/03/2019, the appellant filed conference notes and on 15/04/2019 the respondent filed conference notes as well. Both of these were later on referred to as submissions which led to the appellant's filing of submissions in rejoinder on 26/04/2019.

The first ground of appeal relates to the way the Labour Officer evaluated evidence on the record so as to reach a decision that the appellant unlawfully and unfairly terminated the respondent.

It was strongly argued for the appellant that in accordance with **section 68(2) and Section 69(3) of the Employment Act,** the reason for terminating the respondent was clearly for the failure to perform as indicated in her appraisal forms which was an elaborate hearing at which she explained herself. According to the appellant the process allowed her to appeal and she indeed appealed before a fresh panel which dismissed the appeal.

On the other hand, the respondent strongly argued that the claimant was only subjected to a performance appraisal hearing and not a **disciplinary** hearing envisaged under **Section 66 of the Employment Act.**

We do not have to emphasize the right for any person to be heard on any allegations before he/she is condemned. The right is expressed elaborately under the **Constitution Article 28**. It is also echoed in the **Employment Act** under **Section 66.** This court has also emphasized this constitutional right in various cases.

The evidence adduced before the labour officer concerning the hearing of the respondent by the appellant before termination was evidence of the appellant having been put on an improvement performance plan after appraisals were shown to have revealed poor performance. While considering this evidence the labour officer observed:

"Evidence was led to show that the complainant underwent a system of appraisals/performance reviews/performance hearing. The record shows that the complainant had been put on performance improvement plan and she had scored 48% at the end of 2015. According to evidence adduced by one Samuel Omoding…… following her persistent poor performance the complainant was warned with a notice to attend a disciplinary hearing concerning her performance ratings on 14th June 2016. The hearing was postponed to 21/6/2016.

On record the respondent issued a notice to attend formal performance hearing of even reference PM/HR/5/16/LM dated 6th June 2016 at 9.00am at Rwenzori Board room though the same was postponed by letter dated 7/6/2016 to the 21st June 2016…. The rights mentioned in the notice were:

a) **The right to be told the nature of the hearing.**
b) **The right to have the hearing take place timeously.**
c) **The right to be given adequate time to prepare for the hearing**.

d) The right to an interpreter.

Throughout the evidence of the respondent and in submission of Counsel for the respondent, no other notice inviting the complainant for disciplinary hearing is mentioned. When asked whether she had ever been invited to appear before a disciplinary committee the complainant answered in the negative and continued that the only hearing she attended was related to her performance."

The Labour officer went ahead to expound on what constitutes a right to a hearing by quoting the decision in **EBIJU JAMES VS UMEME (U) LTD HCCS 133/2012 and DONNA KAMULI VS DFCU BANK LDC 002/2015**, of this court which relied on **QUEEN VELLE ATIENO OWELA VS CENTRE FOR CORPORATE GOVERNANCE, Industrial Court of Kenya, Cause 81/2012**.

The labour officer concluded

> **"I take the position that if the complainant had performance related issues, then the said performance hearing should have had her line or immediate supervisor in attendance. And that the report of the formal performance hearing and other related performance documents would have been used to accord her a disciplinary hearing. It therefore defeats justice if the labour officer equates performance hearing to a disciplinary hearing."**
>
> We have perused the evidence adduced. We find a letter dated 7/10/2015 addressed to the respondent notifying her that her performance was rated "**improvement"** in the midterm review of 2015. She was therefore placed on a performance improvement plan with her immediate supervisor. The evidence on the record does not show the

performance of the claimant after undergoing a performance improvement plan as compared to her previous performance. The evidence only reveals performance hearing reports signed on 21/06/2016 recommending termination for non-performance.

The performance improvement plan (referred to as performance improvement undertaking) dated 4/11/2015 on page 28 of the record of appeal has in tabulated form **performance concern/gap, performance expectation, agreed action, time frame, and outcome/accomplishments**. It is signed by both the respondent and her supervisor.

Surprisingly the performance hearing report(s) do not include a report of one Michael Kabanda who was assigned as the supervisor of the respondent as per the performance improvement plan. Although one of the reports is signed by one Samuel Omoding, the performance management & OD Manager who invited the claimant for the hearing, the capacity of the others who signed off the performance hearing reports is not disclosed. The question whether they were supervisors of the claimant is not answered.

The performance hearing reports do not show any measure as against the targets of the Performance Improvement plan. Consequently we found a huge discrepancy and lacuna between the initial appraisals and appraisals as against the performance improvement plan.

Even if there was no lacuna or discrepancy in the appraisals, we do not accept the submission of the appellant that a performance hearing as presented on the court record constituted a hearing as envisaged under

Section 66 the Employment Act or the Constitution of the Republic of Uganda. The reports had only comments of those assessing the respondent and nothing suggests that the respondent had any input into the reports so as to indicate that she was heard. It is not acceptable for counsel for the appellant in distinguishing **"performance appraisal"** from "**performance hearing"** to equate the latter to a hearing envisaged under the law.

Consequently we insist as we did in the case of **Donna Kamuli Vs DFCU (supra)** that the appraisals and any other documentary evidence or oral evidence in support of poor performance must be put to the claimant in a fair hearing process where the claimant has opportunity to defend himself/herself.

In the instant case the performance hearing could not be a disciplinary hearing as envisaged under the law because:

1) The notice of hearing did not state exactly what was wrong with the performance of the respondent so that she prepares to respond to the same.
2) The supervisor of the respondent was not involved in the hearing.
3) Nothing suggest that the respondent was asked and indeed gave a defense to the alleged non-performance.
4) Nothing suggested that the respondent was advised to call witnesses or anybody to accompany her to the performance hearing as envisaged under **Section 66 of the Employment Act.**

We therefore have no reason to disassociate ourselves with the finding of the labour officer, given the evidence on the record and the law, that the

termination of the respondent was unfair and unlawful. This finding of the Labour officer is therefore sustained.

The second ground of appeal was that **the labour officer erred in law when he granted remedies that were neither pleaded nor proved by the complainant thereby arriving at a wrong decision.**

This ground attacks the labour officer for granting severance and a fine for non-payment of severance . On reading and internalizing the submissions, it dawns on us that the question whether severance was payable was not in contention. This is probably both counsel realized that **Section 87** provides for circumstances which render the employer liable to pay severance one of them being unfair dismissal. The severance payment being a statutory provision, and the labour officer having found that the claimant was unlawfully dismissed, he had jurisdiction to grant this remedy. It is our opinion that the limitation of jurisdiction of the labour officer under **Section 78 of the Employment Act** relates to additional compensation and not compensation authorized by statute. The Act gives the labour officer a discretion having granted payment in lieu of notice under /section 58, severance under Section 87, salary due to the complaint and any other specific remedy under the Act, to consider any other circumstances that may warrant additional compensation which should not add up to beyond three months**.**

Section 78 provides:

'78 compensatory order

1) **An order of compensation to an employee who has been unfairly terminated shall, in all cases, include a basic compensatory order for four weeks' wages.**

2) An order of compensation to an employee whose services have been unfairly terminated may include additional compensation at the discretion of the labour officer, which shall be calculated taking into account the following:-

(a) The employee's length of service with the employer;

(b) The reasonable expectation of the employee as to the length of time for which his or her employment with that employer might have continued but for the termination;

(c) The opportunities available to the employee for securing comparable or suitable employment with another employer;

(d) The value of any severance allowance to which an employee is entitled under part IX.

(e) The right to press claims for any unpaid wages, expenses or other claims owing to the employee;

(f) Any expenses reasonably incurred by the employee as a consequence of the termination;

(g) Any conduct of the employee which, to any extent caused or contributed to the termination;

(h) Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(i) Any compensation, including ex gratia payments, in respect of termination of employment paid by the employer and received by the employee.

3) The maximum amount of additional compensation which may be awarded under subsection (2) shall be three month's wages of the dismissed employee, and the minimum shall be one month's wages.

We therefore do not find any fault in the fact that the labour officer awarded the respondent severance allowance.

Section 91(1) of the Employment Act 2006 provides

> **"Where severance allowance is payable to an employee, it shall be paid on cessation of employment or on the grant of any leave of absence pending the cessation of employment whichever occurs earlier".**

Section 92(2) of the Employment Act provides

> **"Any employer who commits an offence under this Section shall pay a fine calculated at two times the amount of severance allowance payable and the fine shall be payable to the same person and in the same way as the severance allowance is payable".**

The circumstances under which severance as payable are explicitly pronounced under **Section 87 of the Employment Act**. However once the question whether the employee was terminated unlawfully becomes a legal question determinable by court, the question whether severance is payable also becomes a question determinable by court. It follows therefore that severance becomes payable from the date that the court declares the termination unlawful. Consequently no employer can be said to have committed an offence under **Section 92(2) of the Employment Act** during the period when both the question of unlawful termination and severance were undergoing the court process. It is only after the employer refuses to pay severance allowance after the court has ordered him to pay, that he/she can be liable to pay a fine under **Section 92(2) of the Employment Act.** We therefore find that the labour officer erred in law to have imposed a fine arising from the failure of the

appellant to pay severance before he determined the question whether or not in the first place such allowance was payable. The order to pay a fine is hereby set aside. This disposes of ground 2 and 3 of the appeal.

Ground 4 and 5 of the appeal will be discussed together. The appellant conceded that the labour officer had a right to refer the issue of damages to this court. This is the correct position since the pronouncement of this court in the case of **Netis Vs Charles Walakira – LD Appeal 022/2016** which held

> **"In the event that the labour officer considers that the compensation deserved by a dismissed employee is beyond what he/she is empowered to give under Section 78,he/she has the option to refer the issue to the Industrial Court for determination…"**

The contestation of the appellant, as we understand it, is that the labour officer having determined the compensation due to the respondent under **Section 78**, he had no right to refer the same question of compensation/damages to this court. We think this is not the right position. We affirm our position in the above case that the labour officer has the mandate to refer any issue that he/she may not be comfortable to decide for determination by this court. In any case this court under **Section 94 of the employment Act** is empowered on appeal to confirm, modify or overturn any decision of the Labour officer. Accordingly both grounds 4 and 5 fail.

However, the grant of general damages being a discretion exercised by the court at the instance of the successful party, the respondent was under an obligation to address this court on the issue of damages the labour officer having rightly referred the same to this Court. We do not consider it appropriate for this court to move itself on the grant and justification of

general damages not considered by the labour officer for lack of jurisdiction or for any other reason. It is pertinent that in order for this Court to determine any issue referred to it, the party referring the same addresses the court on the justification of the reference and how the same affects the justice of the matter. Accordingly since the respondent had nothing to say about the damages we shall have nothing to say as well. The appeal is allowed in the following orders

1) **The decision of the labour officer that the respondent was unlawfully terminated is sustained**.
2) **The labour officer had the mandate to determine the question of severance and his award of severance allowance is sustained**.
3) **The labour officer erred in law to impose a fine on the appellant for failure to pay severance and such order of fine is hereby set aside.**
4) **The labour officer was mandated to refer the issues of general damages and any other compensatory issues that he/she was not comfortable or legally entitled to award and the respondent was under a duty to satisfy the Court on the justification of such reference**
5) **No order as to costs is made**

SIGNED BY:

1. HON. CHIEF JUDGE RUHINDA ASAPH NTENGYE

2. HON. LADY JUSTICE LINDA TUMUSIIME MUGISHA

PANELISTS

1. MS. ADRINE NAMARA
2. MS. SUSAN NABIRYE
3. MR. MICHEAL MATOVU

DATED: 26/07/2019