THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 36 OF 2018
(Arising from Labour Dispute Complaint No. KCCA/MAK/LC/048/2017)

AUGUSTINE KAMAGERO::CLAIMANT

VERSUS

MARIE STOPES UGANDA LTD::RESPONDENT

Before:
The Hon. Mr. Justice Anthony Wabwire Musana

Panelists:
1. Hon. Adrine Namara
2. Hon. Suzan Nabirye &
3. Hon. Michael Matovu

Representation:
1. Mr. Allan Mulindwa of M/s. Mulindwa & Co. Advocates for the Claimant.
2. Mr. James Samuel Zeere of M/s. S & L Advocates for the Respondent.

AWARD

Introduction

[1] Augustine Kamagero (*'the Claimant'*) was employed as the Respondent's National Sales and Marketing Manager on a two-year contract on the 10th of June 2013. On the 29th of September 2014, he was invited to attend a disciplinary hearing on charges of obtaining funds from subordinates, contracting non-staff to carry out the Respondent's activities, and failure to account for social marketing stock. He was also asked to provide a written explanation stating why disciplinary action should not be taken against him. In a letter dated the 30th of September 2014, he denied the allegations and provided his account of events. A disciplinary hearing was convened on the

7th of October 2014. The Disciplinary Committee (*from now 'DC')* found him culpable for gross misconduct. By a letter dated 10th October 2014, he was summarily dismissed from the Respondent's employment. He was paid outstanding salary until the date of dismissal, leave pay, and advised of his entitlement to issuance of a certificate of service. He exercised his right of appeal. When the appeal outcome was not forthcoming, he complained to the Labour Officer at Makindye Urban Council. Unresolved, the matter to this Court.

[2] In his amended memorandum of claim dated the 12th of July 2019, the Claimant sought a declaration that he was unfairly and unlawfully terminated, special damages of UGX 200,104,000/= payment in lieu of notice of UGX 11,400,000/=, punitive damages of UGX 20,000,000/= general damages of UGX 300,000,000/=, interest, and costs of the claim.

[3] The Respondent opposed the claim, contending that the Claimant's action was barred by limitation. Alternatively, the Claimant did not have a cause of action, and his dismissal was procedurally and substantively fair. He was invited to the disciplinary hearing, submitted a written response, was allowed to appear before a competent and impartial disciplinary committee, and attended the hearing before his summary dismissal. The Claimant also exercised the right of appeal.

[4] The parties filed a Joint Scheduling Memorandum (*from now JSM*) on the 18th of February, 2020. On the 6th of March 2023, the JSM was adopted, and the following issues were settled for determination:

(i) Whether the Claimant's dismissal by the Respondent was wrongful, unfair, and or unlawful?

(ii) What remedies are available to the parties?

The Proceedings and evidence of the parties

[5] The parties called one witness each.

The Claimant's Evidence

[6] By his witness statement that was adopted as his evidence in chief on the 19th of April 2023, the Claimant testified that on the 29th of September 2014, he received a summons to attend a disciplinary hearing. He submitted a written reply and participated in a hearing on the 7th of October 2014. He was

summarily dismissed on 10th October 2014 because he had obtained funds meant to facilitate the Respondent's sales activities from subordinates, thus hampering the success of those sales activities. It was his evidence that the minutes were approved on 16th October 2014 after the decision to terminate him had been taken. He testified that the Respondent declined to present witnesses, and he was not availed of a copy of the investigation report, which was referred to in the disciplinary hearing. He filed an appeal and has not received any feedback.

[7] Under cross-examination, the Claimant confirmed that he had a fixed-term contract of two years. He testified that he should have served the remainder of his contract at the time of his termination. He confirmed attending the disciplinary meeting on 7th October 2014 and confirmed the accuracy of the minutes, which were admitted as "CEX6". He confirmed that the disciplinary hearing was conducted before his dismissal, and he picked up his dismissal letter after he had been dismissed. He testified that the minutes were the basis of the decision. He did not recall a decision being taken during the committee meeting. It was his evidence that the decision to dismiss him was not stated in the minutes. He also testified that he was unhappy that witnesses were absent but conceded that he did not ask to present witnesses. He confirmed his written explanation and testified that he did not ask for any further information on the allegations raised. He also did not inform the Committee that he did not understand the allegations. He suggested that he only got to see the investigation report after dismissal. It was his evidence that if he had the details of the investigation report, his answer to the allegations would have been different. The minutes did not capture his request for the people making the allegations to be brought.

[8] In re-examination, he testified that it was unfair to sign the minutes after deciding to terminate his services. He clarified that he did not ask for further information because the allegations were baseless. None of the people alleged to have given him money came to the hearing. He found the investigation report in Court and did not know the names of the persons who had made allegations against him. He confirmed that he had yet to receive feedback on his appeal.

The Respondent's evidence

[9] The Respondent called one witness. Ms. Halima Namatovu, the Respondent's Director for Human Resources and Administration Manager. She confirmed the Claimant's employment terms, subject to the Human Resource policies and guidelines. She testified that in 2014, whistleblowers raised allegations

of misappropriation of the Respondent's funds, use of unapproved personnel to sell the Respondent's stock, and failure to account for stock against the Claimant. The Respondent commissioned an investigation, and a report was made. The Claimant was summoned to a disciplinary hearing, and the summons clearly stated the allegations and possible sanctions. The Claimant made a written explanation and appeared before a committee on 7th October 2014. He was questioned and offered his responses. Minutes were prepared, and the Claimant signed them. It was found that the Claimant had obtained funds meant to facilitate the Respondent's sales activities from his subordinates, thereby hampering the success of activities. The Claimant was informed that this amounted to gross misconduct and was summarily dismissed. He appealed to the Country Director, who upheld the committee's recommendation and confirmed the dismissal. Ms. Namatovu also confirmed that the Claimant had sued the Respondent for a refund of the money he paid towards purchasing a motor vehicle, and that suit was settled by consent.

[10] In cross-examination, Ms. Namatovu testified that she was employed in August 2015. She confirmed that the allegations against the Claimant fell under Section 5, breach of fraud policy, Section 8, demanding kickbacks, and Section 3, violent, abusive, and intimidating behaviour. She confirmed that she did not have proof that REX1 and REX2 were put to the Claimant at the hearing. She said this was not a breach of the Human Resources Manual. She conceded that she did not have any communication of the outcome of the appeal meeting. She confirmed that a dismissal stands pending an appeal to the Country Director.

[11] In the re-examination, Ms. Namatovu confirmed that there was nothing in the record to show that the dismissal was upheld.

Analysis and Decision of the Court

Issue 1. ***Whether the Claimant's dismissal by the Respondent was wrongful, unfair, or unfair?***

Submissions of the Claimant

[12] Mr. Mulindwa, appearing for the Claimant, submitted that the Claimant's dismissal was unfair and unlawful. He made two principal propositions;

[1] First, Counsel cited **Sections 68(1)** and **69** of the **Employment Act, 2006***(from now EA),* and the cases of **Barclays Bank Ltd v Godfrey Mubiru S.C.C.A No. 1 of 1998** and **Bank of Uganda v Betty Tinkamanyire S.C.C.A No. 12 of 2007**

for the proposition that the Respondent had failed to prove that the Claimant was in fundamental breach of his duty and;

[2] Secondly, there was no fair hearing because the whistleblower reports (REX1 and REX2) were baseless and devoid of merit, and no documents, including the investigation report, were put to the Claimant. He was not allowed to cross-examine the whistleblowers. He was dismissed on unapproved and unsigned minutes. Counsel cited **Bakaluba Peter Mukasa v Nambooze Betty Bakireke E.P.A No 04 of 2009, Grace Tibihikira Makoko v Standard Chartered Bank(U) Ltd LDR 315 of 2015, Kapio Simon v Centenary Bank LDR** and **Blacks Law Dictionary(6th Edn)** in support of this proposition.

Respondent's Submissions

[13] Mr. James Zeere, appearing for the Respondent, submitted that the Claimant was accorded substantive and procedural fairness and was justifiably and lawfully dismissed. He was found to have obtained funds meant to facilitate the Respondent's sales activities from subordinates, thus hampering the success of the activities. This amounted to gross misconduct. On the authority of **Robert Mukembo v Ecolab Ltd H.C.C.S No. 54 of 2007**, Counsel submitted that an employer discharges the burden under **Section 68(1)** and **(2) EA** if they can prove that they had a genuine belief in the circumstances of the case that the employee had done wrong. Counsel submitted that when the allegations were raised, an investigation ensued. Whistleblowers reported requests of UGX 1,500,000/=, UGX 1,440,000, UGX 300,000/=, and other demands for kickbacks on 50% of funds for sales activities and per diem. It was submitted that the DC was justified to believe that the Claimant asked for kickbacks.

[14] Regarding the whistleblowers' reports, it was submitted that the Respondent complied with Section 8 of the Whistleblowers Protection Act, 2010. An independent investigation verified the allegations. Counsel cited **Patrick Outa v Barclays Bank of Uganda Ltd LDC 79 of 2014**. The whistleblower's information was made available to the Claimant, and he did not request their attendance before the DC. It was also suggested that the Respondent's Human Resource Manual entitled whistleblowers to anonymity.

[15] Counsel also submitted that the DC meeting conformed to the statutory requirements under **Section 66 EA** and the case of **Ebiju James v Umeme Ltd HCCS No. 0133 of 2012.** It was submitted that a disciplinary hearing does not

act like a Court of law[1]. It was submitted that the charges against the claimant had been well laid out, and he provided a written response. He did not request any additional information.

[16] On the minutes signed after the dismissal, Mr. Zeere argued that this did not violate the right to a fair hearing. Minutes were a record of the hearing, and the decision to dismiss the Claimant was based on the hearing, not the minutes.

[17] It was also submitted that the Respondent was not obligated to call witnesses for the Claimant to cross-examine and that **S.66 EA** allows an employee to respond to the allegations raised. We were asked to find that the Claimant was given a fair hearing before his dismissal.

Rejoinder

[18] In rejoinder, the Claimant submitted that the Respondent did not conduct an investigation under Section 8 of the Whistleblowers Protection Act, 2010, to establish that the whistleblower made the disclosure in good faith and that the allegations were substantially true. It was the Claimant's view that the investigation report did not show any interviews with the whistleblowers. It was also submitted that the HR manual did not include demanding kickbacks from staff as an act of gross misconduct.

[19] Regarding statutory compliance, Counsel for the Claimant contended that the cardinal principle of a right to a fair hearing applies to all tribunals, be it a disciplinary committee or a quasi-judicial tribunal. Counsel cited **Section 66 EA**, restated the standards set out in the Ebiju case (supra), and suggested that the Respondent did not comply with these standards. It was also submitted that the Claimant's appeal was not heard, and Ms. Namatovu had conceded so under cross-examination.

Decision of the Court

[20] The position of the law concerning claims founded on unlawful summary dismissal is, as correctly restated by Counsel for the Respondent, whether there has been procedural and substantive fairness. The Claimant asserts that his summary dismissal was unlawful, while the Respondent contends it

[1] Counsel relied on Ekemy Jimmy v Stanbic Bank Uganda Ltd LDC No. 308 of 2014 for the proposition that the failure to provide an investigation report is not fatal if the facts revealed in the report were put to the employee in the invitation.

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was lawful and justified. In the oft cited case of **Hilda Musinguzi Vs Stanbic Bank (U) Ltd S.C.C.A 05 of 2016,** it was held that:

> *"... the right of the employer to terminate a contract cannot be fettered by the Court so long as the procedure for termination is followed to ensure that no employee contract is terminated at the whims of the employer and if it were to happen the employee would be entitled to compensation..."*

[21] This case set a golden standard. The employer can terminate an employee but must follow procedure. From these dicta, the Industrial Court has held that procedural and substantive fairness are twin tests[2]. The absence of one or the other renders the dismissal unlawful. Therefore, there are two tests in determining the lawfulness of a termination: whether the employer adhered to or followed the termination procedure and whether the termination was substantially fair. These tests are also intertwined in some cases, where a procedural defect can impact substantive fairness. We will, therefore, in considering the lawfulness of the termination in the instant case, resolve the questions as they unfold and not necessarily as procedural vis a viz substantive fairness.

[22] Procedural fairness relates to the process and procedure leading to termination, as observed in **Ogwal Jaspher *v* Kampala Pharmaceutical Ltd.**[3] Under **Section 66EA,** before deciding to dismiss an employee on the grounds of misconduct, the employer must explain to the employee why the employer is considering dismissal. The employee is entitled to have another person of their choice present during this explanation. **Section 66(2) EA** requires the employer to hear and consider the employee's representations. This is what is regarded as the right to a fair hearing. In **Ebiju James v Umeme Ltd**[4] case, Musoke J(as she then was) held:

> *" On the right to be heard, it is now trite that the defendant would have complied if the following was done.*
>
> *(i) Notice of Allegations against the plaintiff was served on him, and sufficient time allowed for the plaintiff to prepare a defence.*

[2] Nicholas Mugisha V Equity Bank Uganda Ltd LDR 281 Of 2021
[3] LDR 035 of 2021
[4] H.C.C.S No. 0133 of 2012

(ii) The notice should set out clearly what the allegations against the plaintiff and his rights at the hearing where such rights would include the right to respond to the allegations against him orally and or in writing, the right to be accompanied to the hearing and the right to cross-examine the defendant's witness or call witnesses of his own.

(iii) The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the defendant."

[23] We reiterated the threshold in the Ebiju case in our decision in the case of **Kabagambe Rogers v PostBank Ltd**[5]**.** In that case, we preferred subjecting the invitation notice to what we can now safely be regarded as the Ebiju test, by which we would lay the contents of the invitation letter against the requirements for a fair hearing. For emphasis, these requirements are; a notice in writing, sufficient time to prepare a defence, clearly laid allegations, an indication of employee rights at the hearing, the right to respond, to be accompanied, to cross-examine, to produce witnesses, to appear and present their case before an impartial committee.

[24] In the matter before us; the invitation letter was admitted as CEX4. It read as follows:

"September 29th, 2014

Mr. Augustine Kamagero,
MSU/516/06/13/2013
National Sales & Marketing Manager
Support Office.

Dear Augustine

RE: SUMMONS TO A DISCIPLINARY (sic) HEARING

[5] LDR

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Following investigations by management into whistle blown reports that you defraud MSU and have consequently failed to account for Social Marketing stock, you are hereby summoned to attend a disciplinary hearing on the 6th of October 2014 at 2:00 pm. Specifically, you have:

1. *Obtained funds meant to facilitate MSU Sales activities from your subordinate thus hampering the success activities.*

2. *Contracted MSU sales personnel to carry out life guard sales activities as a lower price within territories designated to MSU Sales Personnel thus contributing to non-achievement of MSU sales team targets.*

3. *Failed to account for Social Marketing stock advanced to you despite several reminders from your supervisor.*

The actions above, amount to fundamental breach of your contract of Employment with MSU and is also categorized as gross misconduct attracting summary dismissal as per your terms of service if confirmed.

You are therefore required to provide a written explanation stating reasons why disciplinary action should not be taken against you for the aforesaid allegations, before ***5:00pm*** *on* ***3rd day of October 2014****.*

You are further reminded of your right to attend the hearing with the personal representative of your choice who may make representations on your behalf but shall not be permitted to respond to questions directed to you.

In the event that you do not attend the above disciplinary hearing, the committee shall proceed

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to hear and determine the above matter in your absence based on the information so far received.

Please acknowledge receipt of this letter by signing in the space below.

Yours faithfully,

_____

Richard Kitonsa
Senior Manager; Business Unit

I, Augustine Kamagero, hereby acknowledge receipt of the above summons

*Signature:*_____
*Date:*_____

Cc: Personnnel File, Senior Manager: People and Development"

[25] Our examination of this invitation, when tested against the Ebiju standard establishes beyond dispute that it was in writing. It stated the purpose as a summons to attend a disciplinary hearing. It was dated the 29th of September 2014, and the disciplinary hearing was set for the 6th of October 2014. This was a clear seven days between the date of the notice and the date of a hearing. The notice stated three (03) infractions for which the Claimant was expected to answer and asked the Claimant to prepare his defence and submit a written response by the 3rd of October 2014. Further, the notice advised the Claimant of his right to attend with a person of his choice. To the above extent, the notice was compliant with the Ebiju test.

[26] The notice fell short of the Ebiju test in not providing for the right to cross-examine witnesses or bring any witnesses or for the Claimant to bring witnesses of his own. The Claimant suggests that he was not allowed to cross-examine witnesses. This matter concerned whistle-blow reports, and we will return to this point later in this award.

[27] The other complaint was that the disciplinary hearing minutes were signed after the decision to dismiss the Claimant had been taken. According to Black's Law Dictionary, minutes are memoranda or notes of a transaction,

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proceeding, or meeting. It is a formal record of a meeting. They contain mainly a record of what was done at the meeting and not what was said by the members. They are not the decision of a meeting but may have reduced therein a minute on the decision. It is, therefore, not uncustomary for the same to be signed well after the decision has been taken or communicated to the employee. We would not fault the Respondent in that regard.

[28] The other procedural difficulty complained of is that the Appeal outcome was not communicated to the Claimant. The Respondent's Human Resource Manual (HRM), which was admitted as CEX10, provided for the Appeals Procedure. Under Clause 3.5.5(iii) of the HRM, it is provided for the Country Director to determine if it is necessary to hear further evidence or to allow further submission to be made and may confirm, vary, and uphold the original decision by the disciplinary committee. The Claimant testified that he had not received any communication regarding the appeal. A series of emails contained in CEX8 indicated that on 20th October 2014, the Claimant wrote to Deepmala Mahla, submitting his appeal. He also asked for feedback on 21st October 2014. The Senior Manager of People and Development advised him to await the Country Director's response. By an email dated 22nd October 2021, the Country Director agreed to meet the Claimant on the 27th October 2014. In an email dated 27th October 2014 at 5:15 p.m., the Claimant thanked the Country Director for meeting him and awaited a response. There is no record of the outcome. Ms. Namatovu testified that the Country Director upheld the recommendation of the disciplinary committee and confirmed the Claimant's dismissal. However, there was no document in proof thereof. In these circumstances, **Paragraph 1(11)(b) of Schedule 1 of the Employment Act, 2006** provides that the employer shall ensure that the employee is fully aware of the form the disciplinary proceedings shall take, including the possibility of appeals. Further, under **Paragraph 1(7) of Schedule 1 of the Employment Act, 2006**, the employer is required to keep a record of the nature of any offences, the consequential actions taken, the reasons for taking action, the **lodging of an appeal, and outcome of any such appeal**, and any other further developments. The Respondent did not adduce any evidence regarding the appeal and its outcome and would be faulted for a procedural fault therein.

[29] The Claimant also testified that if the notice had been more detailed in the allegations against him, his written explanation, which was admitted as CEX5, would have been different. He testified that he found the investigation report in Court. He, therefore, did not have ample opportunity to address the findings of that report in the disciplinary hearing. Mr. Zeere argued on the authority of **Ekemu Jimmy v Stanbic Bank LDC 308 of 2014** that failure to

present an investigation report before a disciplinary hearing is not fatal to the case of the employer if the facts revealed in the report were put to the employee in the notification of hearing. The Respondent countered that the cardinal principle of a right to a fair hearing applies to all manner of tribunals, including disciplinary committees.

[30] There have been various decisions on this point, and we will examine a few cases for a better appreciation of the point:

(i) In **Douglas Lukwago v Uganda Registration Services Bureau** [6] the Respondent's letter directing the claimant to show cause why his employment should not be terminated did not indicate that the IGG's report had been availed to him for his consideration before the hearing. The Industrial Court observed that it is well-settled that where the termination of an employee is based on an investigation, principles of natural justice dictate that the employee in issue must be given the report before the disciplinary hearing to enable them to respond to its findings. The Court held the omission to be a breach of the principles of natural justice and declared the hearing unfair.

(ii) In **Allan Kwagala Balese v Soliton Telmec Uganda,**[7] the documentary evidence of a report on the allegations against the Claimant, which was allegedly made to the managers of the Respondent, was not put on the record. The Court found that the Respondent had not proven the reason for termination.

(iii) In **Namyalo Dorothy v Stanbic Bank Ltd,**[8] the Court observed that the investigation report should have been availed to the Claimant before the hearing. However, that was not fatal because the Claimant admitted the infractions.

(iv) In **Stephen Mukooba v Opportunity Bank Ltd,**[9] the Respondent commissioned an audit and made a report. The Industrial Court found that by failing to share sections of the investigation report that concerned his alleged charges, the respondent infringed on his rights to a fair hearing.

[6] Labour Dispute No. 057 of 2016
[7] Labour Dispute Claim 13 of 2017
[8] Labour Dispute Claim 166 of 2014
[9] Labour Dispute Claim 051 of 2015

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(v) Further afield, in **Kibobbery Ltd v John Van ber Voort,**[10] the Court of Appeal of Tanzania held that the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity.

(vi) In **Mweru & Another v Uganda Electricity Distribution Company Ltd, the**[11] High Court of Uganda cited **Union of India v. E. Bashyan AIR 1988 2 SCC 196,** where a two-judge Bench of the Supreme Court held that failure to supply the inquiry report to the delinquent before the disciplinary authority took a final decision would constitute a violation of the principle of natural justice. Ssekaana J. found it was important that there should have been a full disclosure of the pre-hearing report to the plaintiffs. The contents of the report ought to have been disclosed to the plaintiffs as this report was to be taken into consideration by the decision-making authority. By so doing, the defendant breached the principle of fair hearing. The plaintiffs ought to have been availed with detailed copies of all the evidence of the purported allegations before the hearing to enable them to prepare sufficient evidence to defend themselves.

[31] In the matter before us, it is common cause that there were whistle-blow reports of the Claimant taking funds meant for the Respondent's activities. An investigation was commenced, and a report was produced. It is also common cause that the report was not shared with the Claimant prior to the hearing. Mr. Zeere conceded to this point. On the dicta of the cases cited above, we would find that the failure to furnish the Claimant with a copy of the report prior to the hearing was unfair.

[32] Mr. Zeere argued, and rightly so, that under Section 8 of the Whistle Blower Protection Act, 2010, the Respondent complied with the standard of treatment of whistle-blowers' information to ascertain the credibility and sincerity of the allegations.
Section 8(1) provides:

> *" 8. Investigation.*
>
> *(1)Where a disclosure of impropriety is made to a person specified under section 4, the authorised person shall investigate or cause an investigation into the matter and take appropriate action."*

[10] Civil Appeal No. 248 of 2021
[11] H.C.C.S No 270 of 2011 Per Ssekaana J.

Mr. Zeere also cited the case of **Patrick Outa v Barclays Bank Ltd** for the proposition that the requirement to present a whistleblower as a witness in a disciplinary hearing is dispensed with if the content of the whistleblower report is provided in the invitation to the disciplinary hearing. He suggested that the Respondent did do so in the invitation. We think not. In our view, attaching the report was important. The report itself, REX3 was signed by the Respondent's Senior Manager, People and Development. Such a report afforded sufficient protection of the whistleblowers as provided for under Section 9 of the Whistle Blowers Protection Act, 2010, which regards disclosures as protected and generally underpins the protection of whistleblowers from potential retaliatory victimization. According to David Banisar,[12] whistle-blowing is described as a four-step process. The triggering event involves questionable, unethical, or illegal activities, and an employee who witnesses or is aware of the questionable activity assesses the activity and evaluates whether it involves wrongdoing, the employee reveals the wrongful event, and the superiors, colleagues, or other persons react to the revelation. It follows, therefore, that the whistleblowers must be afforded some protection. In the instant case, Judith Nsamba prepared a report. She was available at the disciplinary meeting to be cross-examined.

[33] Indeed, in **Nantayi Lois v Marie Stopes Uganda,**[13] the Industrial Court considered circumstances where a whistleblower report was brought against an employee. The Court observed that:

> *"The position of the law, in our view is that a person accused by a whistle-blower appears before a disciplinary committee after an investigation has been completed and the results of the investigation are put to the claimant/accused during the hearing for him or her to be able to defend himself or herself. He or She would need sufficient time to be able to prepare his or her defense"*

What is clear from the above decision is that in whistle-blower cases, an investigation ought to be conducted in accordance with Section 8 of the Whistleblower Protection Act 2010, and a report shared with the employee accused of the infractions.

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[12] David Banisar, "Whistleblowing: International Standards and Developments", Corruption and Transparency: Debating the Frontiers between State, Market and Society, ed. I. Sandoval (World Bank Institute for Social Research, 2011) as quoted in https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_853876.pdf last accessed on 10.12.2023 8.41 pm

[13] Labour Dispute Claim No. 193 of 2014

[34] In the matter before us, we do not readily agree with Counsel for the Respondent that the decision in the Ekemu case where the Industrial Court found that the facts which were stated in the report were couched in the same terms as the findings in the investigation report. On the facts of the present matter, we think that the Nantayi case, which related to a whistle-blow report, applies to the present matter. In the case before us, whistle-blow reports were filed, and the Respondent commenced an investigation. It did not indicate in the invitation notice that there was a report nor provide it to the Claimant at the hearing. He found the same in Court. Therefore, the Claimant did not have ample opportunity to respond to any specific elements of the findings in the report that were the basis for the disciplinary hearing and his subsequent dismissal. We think the dicta of the Nantayi case to be more appropriate to this case and would find, in the circumstances of the case, that the Claimant's dismissal was procedurally unfair.

[35] The cases cited above demonstrate judicial concurrence and consensus that the failure to furnish a report is a serious procedural irregularity. There is also unanimity that this procedural defect invalidates the disciplinary proceedings as it erodes the employee's right to a fair hearing. This means that procedural unfairness results in substantive unfairness. It would not be possible to suggest that the Respondent had fully disclosed all the evidence to the Claimant if the report was withheld and only produced before this Court. Indeed, in the Kenyan case of **Mathew Lucy Chesura v Poverelle Sisters of Belgamo t/a Blessed Louis Palazzalo Health Centre,**[14] it was observed that it is not the role of the Court to supervise the internal grievance handling process between the employee and employees. The role of the court is to ensure that such processes are undertaken within the law. It would, therefore, be incumbent upon the Respondent to demonstrate that they had complied with the law in holding a fair disciplinary process and that they had furnished the Claimant with all the evidence against him in accordance with **Section 66(1)** and **(2) EA.** It is this Court's finding that by not furnishing the Claimant with the investigation report, the Respondent was procedurally unfair. We are not satisfied that the Respondent has discharged the burden of proving the reason for dismissal under **Section 68(1) EA** and, as such, determine that the summary dismissal was unfair and unlawful.

[36] In sum, concerning the lack of the report, the failure to provide for cross-examination in the least of the author of the investigation report, coupled with the failure to communicate the outcome of the appeal, rendered the disciplinary hearing procedurally defective. Under Section 78(1) EA, an

[14] Industrial Cause No. 1845 of 2011[2011] LLR 178

unfairly terminated employee is entitled to a basic compensatory order. In **Uganda Breweries Ltd v Robert Kigula and 4 Others**[15] failure to comply with procedural fairness irrespective of substantive fairness makes the employer liable to pay four weeks' wages, to which we shall return in our consideration of remedies.

Substantive fairness

[37] Earlier in this award, we observed the correlation between procedural irregularities and substantive unfairness. The onus to establish substantive fairness lies on the employer. Substantive fairness relates to the reason for dismissal and proof of the reason for termination. Under **Section 68 EA**, an employer is required to prove the reason for termination. **Section 68(2) EA** provides that the reason or reasons for dismissal shall be matters that the employer genuinely believed existed at the time of dismissal. Mr. Zeere argued on the authority of **Robert Mukembo v Ecolab East Africa(U) Ltd H.C.C.S No. 54 of 2007** that the employer discharges the burden if they can prove that they had a genuine belief that in the circumstances of the case, the employee had done wrong. In **Uganda Breweries Ltd v Robert Kigula and 4 Others,**[16] the Court of Appeal holds that substantive fairness requires the employer to show that the employee had repudiated the contract or any of its essential conditions to warrant summary dismissal. Gross and fundamental misconduct must be verified for summary dismissal. Mere allegations do not suffice. The allegations must be provable to a reasonable standard.[17]

[38] In the matter before us, the Respondent made the case that they had received whistleblower reports of activities against the Respondent's Human Resource Manual. An investigation was commenced. A report was issued, and the Claimant was invited to make written representations to the allegations. The invitation was admitted as CEX4, the written explanation as CEX5, and the disciplinary hearing minutes were adduced in proof of a hearing as CEX6. They were signed by the Claimant together with the Respondent officers. The Respondent's witness testified that the offences for which the Claimant had been charged were in the Human Resource Manual, which was admitted as CEX10.

[15] C.A.C.A 183 of 2016
[16] C.A.C.A 183 of 2016
[17] See Kabagambe v Posta Uganda LDR

The offences fell under Section 5, breach of fraud policy; Section 8, demanding kickbacks; and Section 3, violent, abusive, and intimidating behaviour.

[39] In the Kigula case (ibid), the court of appeal emphasized verification of the allegations. The reason for dismissal must be valid, well-grounded, and not based on the suppositions or whims of the employer. In the **Ogwal Japsher v KPI case,**[18] we observed that the employer must demonstrate that the employee was guilty of misconduct and not that the balance is akin to a civil trial before a court of law but on some reasonable grounds. The Respondent received whistle-blow reports, conducted an investigation, and invited the Claimant to make his responses. A disciplinary hearing was convened, and the Respondent's officers asked the Claimant several questions, and he offered his responses. According to the dismissal letter, the disciplinary committee established that the Claimant had obtained funds meant to facilitate activities and made its observations. While the Respondent may have genuinely believed a reason for dismissal existed and carried out the necessary investigations, these disciplinary proceedings fall short of being substantively fair for failure to furnish the Claimant with all the evidence, particularly the investigation report. At the beginning of this award, we suggested that procedural and substantive fairness are twin tenets. In **Nicholas Mugisha v Equity Bank Ltd,** we observed that an employer must observe procedural fairness to have substantive fairness and vice versa. The absence of one or the other would render the dismissal unjustified and, therefore, unlawful. In the present case, the procedural defects render the Claimant's summary dismissal unlawful. We find that while the Respondent may have had a genuine belief in the existence of a wrong by the Claimant, it did not adhere to procedure. For this reason, we would answer issue one in the affirmative.

Issue II. What remedies are available to the parties?

[40] Having found, as we have on issue 1 above, the Claimant would be entitled to remedies as below.

Declarations

[41] We declare that the Claimant was unfairly and unlawfully dismissed from his employment with the Respondent.

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[18] LDR. No. 035 Of 2021

Certificate of service

[42] Under **Section 61 EA**, a certificate of service shall be issued if so requested by the employee. We direct the Respondent to issue a certificate of service within 30 days from the date hereof.

Special damages

[43] Citing **Asuman Mutekanga v Equator Growers (U) Ltd S.C.C.A No 7 of 1995,** Counsel the Claimant prayed for UGX 55,404,000/= being salary for the remaining nine months of the contract. Counsel for the Respondent countered that it is established that salary is for work done. Counsel cited **Stanbic Bank v Kiyemba Mutale S.C.C.A No. 10 of 2010.** We agree with Counsel for the Respondent. The Industrial Court has applied the Kiyemba Mutale decision in a plethora of cases[19] before it. Salary for the remaining contract period is futuristic, and we would decline to award the same.

[44] Counsel for the Respondent sought UGX 50,000,000/= as terminal benefits, vehicle fuel allowance of UGX 13,500,000/=, Per Diem of UGX 16,200,000/=, a performance incentive of UGX 28,800,000/= and medical insurance of UGX 3,500,000/=. Counsel for the Respondent countered that the Claimant had not adduced any evidence to support these claims. We agree. The position of the law is that special damages are specially pleaded and specifically proven. [20] In the absence of any proof, this claim is denied.

General Damages

[45] The Claimant sought UGX 300,000,000/= in general damages as a direct consequence of the wrongful act complained of, including pain, suffering, inconvenience, and anticipated future loss. Counsel for the Respondent countered on the authority of **Maruri Venkata v Bank of India (Uganda) Ltd HCCS No. 804 of 2014** that there was no reason to restore the Claimant to any position. In **Stroms v Hutchinson (1905) A.C 515**, general damages are damages such as the law will presume to be the direct natural consequence of the action complained of[21]. In **Stanbic Bank (U) Ltd v Constant Okou**[22] Madrama, JA (*as he then was*) held that general damages are based on the

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[19] See LDC 67 of 2014 Birungu v NLS Waste Services Ltd and C.A.C.A No. 138 of 2014 Florence Mufumbo v Uganda Development Banck Ltd

[20] See Musoke v. Departed Asians Custodian Board [1990-1994] EA; Uganda Telecom v. Tanzanite Corporation [2005] EA 351; Mutekanga v. Equator Growers (U) Ltd [1995-1998] 2 EA 219; Uganda Breweries Ltd. v. Uganda Railways Corporation Supreme Court Civil Appeal No.
6/2001

[21] Stroms v Hutchinson[1950]A.C 515

[22] Civil Appeal No. 60 of 2020

common law principle of *restituto in integrum*. Appropriate general damages should be assessed on the prospects of the employee getting alternative employment or employability, how the services were terminated, and the inconvenience and uncertainty of future employment prospects. On the quantum of damages in **Donna Kamuli v DFCU Bank Ltd** [23] the Industrial Court considered the earnings of the Claimant, the age, the position of responsibility, and the duration of the contract. In the case now before us, our assessment, the Claimant was earning **UGX 5,700,000/=** per month and had worked for the Respondent for one year, four months, and 11 days. Considering all circumstances, we determine that based on his monthly salary, the sum of **UGX 17,100,000/=** as general damages will suffice.

Payment for lack of a fair hearing

[46] Under **Section 66(4) EA**, it is provided that irrespective of whether any dismissal, which is a summary dismissal, is justified or whether the dismissal of the employee is fair, an employer who fails to comply with the requirement for hearing is liable to pay the employee four weeks' pay. Further, Musoke. J (*as she then was*) in **Uganda Breweries Ltd v Robert Kigula and 4 Others**[24] held that a failure to comply with procedural fairness, irrespective of whether the summary dismissal was justified or not, makes the employer liable to pay four weeks wages. According to the appointment letter which was admitted in evidence as **"CEX1"**, the Claimant earned **UGX 5,700,000/=** per month, and on that basis, we award the Claimant four weeks net pay in the sum of **UGX 5,700,000/=**.

Severance Allowance

[47] Mr. Mulindwa was contending for UGX 80,000,000/= as severance pay. That claim is without foundation. Under **Section 87(a) EA,** an unfairly dismissed employee is entitled to a severance allowance. Having found that the claimant was unfairly dismissed, he would be entitled to severance pay. The Industrial Court, in **Donna Kamuli v DFCU Bank Ltd,**[25] held that the Claimant's calculation of severance shall be at the rate of his monthly pay for each year worked. The Claimant was employed on 29th May 2013 and dismissed on 10th October 2014. This was a period of 1 year and four months and 11 days. Based on his earnings, we award the sum of **UGX. 7,964,167/=** as severance allowance.

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[23] LDC No. 002 of 2015
[24] C.A.C.A 183 of 2016
[25] See also DFCU Bank Ltd vs Donna Kamuli C.A.C.A No 121 of 2016.

Payment in lieu of notice of termination

[48] Under **Section 58 EA**, payment in lieu of notice is provided for. Counsel for the Claimant sought payment of **UGX 11,400,000/=**. We have found that the claimant was unfairly and unlawfully dismissed. He had worked for one year, four months, and 11 days. **Section 58(3)(b)EA** provides notice of not less than one month where an employee has served for over 12 months but less than five years. Accordingly, we award the sum of **UGX 5,700,000/=**.

Punitive damages

[49] The Claimant sought punitive damages of UGX 20,000,000/=. Citing **Rookes v Barnard (1964) 1 ALL E.R 367 at 410,** Counsel for the Respondent submitted that punitive damages are a deterrent. In **DFCU Bank Ltd v Donna Kamuli,** [26] the Court of Appeal held that punitive damages are awardable in employment disputes but with restraint as punishment is not for the civil and contract law. We have not found any circumstances that would invite an award of punitive damages. We agree with the Respondent that there was an attempt at due process save for procedural defects. We are bound by the decision of the Court of Appeal and decline to grant the claim for punitive damages.

Interest

[50] The Claimant sought interest on the sums above at 23% from the date of termination until payment in full. He suggested that on the authority of **Charles Lwanga v Centenary Bank Ltd,** interest is awardable from the date of dismissal until payment in full. That is not a very accurate reading because, in that case, Okello J. A awarded interest from the date of dismissal until the filing of the suit. We therefore award the Claimant interest of 18% per annum to run from the date of dismissal on 10th October 2014 until the 26th February 2018 on the date of filing before this Court.

Final orders

[51] In the final analysis, we make the following orders.

(i) We declare that the Claimant was unfairly dismissed from the Respondent's service.

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[26] Ibid

(ii) The Respondent shall issue a certificate of service within 30 days from the date hereof.

(iii) The Respondent is ordered to pay the Claimant the following sums:

a) **UGX 5,700,000/=./=**as basic compensation for lack of a fair hearing,

b) **UGX 7,964,167/=/=** as severance pay,

c) **UGX 5,700,000/=** as payment in lieu of notice,

d) **UGX 17,100,000/=**as general damages,

(iv) The sums above shall carry interest at 18% p.a. from the date of dismissal until the date of filing in this Court.

(v) There shall be no order as to costs.

It is so ordered this 13th day of October 2023.

Anthony Wabwire Musana,
Judge, Industrial Court

THE PANELISTS AGREE:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

Award delivered in open Court on the **13th day** of **October 2023** at **10.52** a.m in the fore/noon in the presence of:

1. For the Claimant, **Mr. Ronald Mulondo holding brief for Mr. Allan Mulindwa.**
2. For the Respondent, **Mr. James Samuel Zeere**
3. Parties absent.

Court Clerk: **Mr. Samuel Mukiza.**

Anthony Wabwire Musana,
Judge, Industrial Court

Industrial Court of Uganda