BANQUE RWANDAISE DE DEVELOPPEMENT (BRD) v. MWUBAHAMANA
MWUBAHAMANA v. BANQUE RWANDAISE DE DEVELOPPEMENT (BRD)

[Rwanda HIGH COURT – RSOCA 0194/13/HC/KIG - RSOCA 0202/13/HC/KIG (Hitimana, J.) June 13, 2014]

Unlawful dismissal – Termination of an employment contract in the course of merging of the enterprises – Damages – In case of modification due to enterprise's legal situation particularly by succession, re-naming, sale, merging, transformation of funds, incorporation of companies, all contracts of employment in progress on the day of the modification remain valid between the new employer and the workers of the enterprise – When the enterprises merge and it is necessary to carry out reorganization of the professional categories, that reorganization is considered as a reorganization due to economical reasons – Failure for the employer to demonstrate how he complied with article 34 of the Law regulating labour in Rwanda to explain the criteria he relied on for thelay-off of the employees due to economic reasons, it is regarded as unlawfully dismissal – When an employee has a work experience of ten years the moral damages cannot exceed nine months – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, articles 22, 33(2) and 34.

Laws regulating Labour – The obligation of the employer to pay the salary – In case the employment contract is still in progress, the obligation of the employer to pay the salary ceases only when the worker breaches his/her obligation to work, but when it is the employer who has notified the worker that it is not necessary for her/him to work, the obligation of payment remains – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, articles 6, 75, 60 and 75.

Unlawful dismissal – Reinstatement – Whether reinstatement at work is one of the remedies for unfair dismissal – Reinstatement is not provided for as one of the remedies for unfair dismissal by the Rwandan laws, instead they provide for the payment of damages by the one who has unfairly terminated the employment contract – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 33.

International Laws – International conventions, doctrines and jurisprudence from other jurisdictions – The application of the International conventions, doctrines and jurisprudence from other jurisdictions – International conventions, doctrine or the jurisprudence from other jurisdictions cannot be applied when they are contrary to the Rwandan laws, unless those scholars or Courts made those decisions pursuant to the international laws which were ratified by Rwanda and which binds it.

Contracts or obligations Law – Procedural and counsel fees – The party which initiated the lawsuit is the one which must be responsible for the expenses incurred by the other party.

Facts: After merging Rwanda Housing Bank (BHR) with the Development Bank of Rwanda (BRD), all its activities, assets, staff and obligations were transferred to the Development Bank of Rwandaweretransferred to the Development Bank of Rwanda (BRD). BRD wrote to Mwubahamana informing her that the employment contract she had with Rwanda Housing Bank was terminated with effect from 30 April 2011 due to the economic and technological

reasons, it also informed her that it had already given her the dismissal compensation and all other entitlements she is entitled to.

Mwubahamana lodged a claim in the Intermediate Court of Nyarugenge against BRD, claiming that she was unfairly dismissed, therefore requesting reinstatement on her post of work if not so they pay her the salary she was supposed to be paid until her retirement. On its behalf, BRD raised an objection of inadmissibility on the ground that the claim which was submitted to the labour inspector is a collective dispute and moreover other workers already settled the matter with BRD. That court overruled that objection and held that BRD dismissed her unfairly and awarded her various damages. BRD appealed in the High Court claiming that the Intermediate Court ruled that she was unfairly dismissed, awarded excessive damages, the salary for three month and ten days and procedural and counsel fees while she did not work during that period and has been the one who dragged herself and BRD into lawsuits. It continues adducing that there was a layoff of some workers in order to prevent the loss which might have been caused by the workers who shared the same responsibilities and this is considered as economic reasons which can lead to lay off of some workers by an enterprise. Mwubahamana submits that preventing the imminent loss cannot be regarded as an economic reason which can be based on to unlawfully dismiss employees. In her defence, Mwubahamana argues that preventing the loss which might have occurred cannot be considered as an economic reason which should be based on to unfairly dismiss the workers.

She adds on that she was put under uncertainty situation of waiting to be recalled at work, and the failure for BRD to fulfil its obligation of allocating her the work while it did not dismiss her, it should be the one held accountable. Regarding the procedural and counsel fees, she adduces that she was unfairly dismissed therefore she has the right to sue to the court so that she can get justice and the one who prejudiced her should bear the loss from those lawsuits.

Held: 1. In case of modification due to entreprise's legal situation particularly by succession, re-naming, sale, merging, transformation of funds, incorporation of companies, all the contracts of employment in progress on the day of the modification remain valid between the new employer and the workers of the enterprise.

2. When the enterprises merge and carry out reorganization of professional categories, that reorganization is considered as reorganization due to economic reasons.

3. Failure for the employer to comply with article 34 of the Law regulating labour in Rwanda and lack of explanations as of the criteria he relied on to lay off the employee due to economic reasons it is considered as unlawful dismissal.

4. When an employee has a work experience of ten years, moral damages cannot exceed nine months and the court does not error in law in case it awards such damages to her.

5. In case the employment contract is still in progress, the obligation of the employer to pay the salary ceases only when the worker breaches his/her obligation to work, but when it is the employer who has notified the worker that it is not necessary for her/him to work, the obligation of payment stays.

6. Reinstatement is not provided for as one of the redress for unfair dismissal by the Rwandan laws, instead they provide for the payment of damages by the one who has unfairly terminated the employment contract.

7. International conventions, doctrine or the jurisprudence from other jurisdictions cannot be applied when they are contrary to the Rwandan laws, unless those scholars or Courts made

those decisions pursuant to the international laws which were ratified by Rwanda and by which it abides.

8. The party who initiates the lawsuit is the one who should be responsible for the expenses incurred by the opponent.

The appeal of BRD has no merit;
The appeal of Mwubahamana has no merit;
The appealed judgment has only changed with regards to the procedural and counsel fees, with costs to both parties.

Statutes and statutory instruments referred to:
Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, articles 1, 6, 22, 33, 34, 48, 47, 59, 60 and 75.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Mwubahamana Béata was an employee of Rwanda Housing Bank. This Bank was merged with BRD. Mwubahamana Béata and other employees were transferred to BRD.

[2] On 11 August 2011, BRD wrote to Mwubahamana Béata a dismissal letter informing her that pursuant to the general extraordinary meeting of Rwanda Housing Bank (BHR) held on 30 March 2011, decided that the bank halts all of its activities and all its assets and duties be transferred to (Rwanda Development Bank) BRD. She was also notified that her employment contract with Rwanda Housing Bank was terminated from 30 April 2011. She was in addition reminded that she has already been paid the compensation for termination of employment contract and other benefits a dismissed employee is entitled to as provided by article 34 of the labor code relating to the termination of the employment contract due to economic and technological reasons.

[3] Mwubahamana Béata initiated a case to the Intermediate Court of Nyarugenge claiming that she was unfairly dismissed, therefore requesting that she be reinstated in her post and if not so, she be awarded the amount that she should have been paid up to her retirement.

[4] The counsel of BRD raised an objection that the claim of Mwubahamana Béata should not be admitted and heard on merits because it was filed before the labor inspector as a collective dispute and other employees reached the compromise with BRD, the dispute that was not settled is that of Rutagengwa Jean Paul.

[5] The court held that the objection has no merit and proceeded to hear the case on merits.

[6] In merits of the case, BRD argued that it dismissed Mwubahamana Béata basing on article 34 of the labor law because the contract was terminated due to economic reason since

the merging of Rwanda Housing Bank and BRD was due to economic reasons, therefore, the dismissal of some employees was a strategy to avoid the insolvency of those merged companies. It explained that there were some work positions in Rwanda Housing bank which were similar to other workers' positions in BRD therefore, it was necessary to choose among those employees the one who is more competent than others, who at turn were dismissed after being paid all benefits the law entitles them.

[7] The Court held that despite the argument of BRD that it based on article 34 of the labor law, it does not show in its oral submissions what constitutes the economic reason because it does not show that it was in austerity or it aimed at the recovery of the company on economic or technological grounds because it itself argues that it did not have any economic crisis, but rather the merger was made to avoid insolvency, therefore, it is obvious that economic and technological reasons asserted in this provision should not be based on because this was not the real cause the defendant based on in terminating the employment contract with Mwubahamana Béata, and even though there was that economic crisis in BRD, the new employer, after merging with Rwanda Housing Bank had to consider all employees and terminate their contracts in accordance with the provisions of article 34 of the labor code. However, this was not complied with because there is no list established by BRD based on competence, level of education, experience, dependents and notification to the labour inspector.

[8] The court held that the fact that BRD did not comply with the provision of article 34 of the labor law, implies that Mwubahamana Béatawas unfairly dismissed.

[9] The court held that though Mwubahamana Béata was unfairly dismissed her claim that she should be reinstated cannot be awarded because the sanction of unfair termination of the employment contract provided by article 33 of the labour law is the award of damages. It ordered that Mwubahamana Béata be awarded damages equal to 9 times of her monthly salary of 497,759Frw, to mean 4,479,831Frw because she has been an employee for more than 10 years. It held that she cannot be awarded the salaries up to her retirement because there is no evidence that she would remain in service until that time, especially that even article 33 of the labor law allows only for the award of damages that may be up to 9 months, and nothing would prevent her to look for another employment after her dismissal in BRD.

[10] Mwubahamana Béata claimed also for the salaries of 3 months and 10 days, meaning from 30 April 2011 up to the date she received her dismissal letter on 11 August 2011 and she was notified that she is dismissed from 30 April 2011; therefore she has to be paid that salary. The counsel of BRD argued that Mwubahamana cannot be awarded that salary because she did not work and as provided by article 1 of the labor code, the salary is the price of the work done.

[11] With regard to the salaries mentioned in the previous paragraph, the Court held that they cannot be paid to Mwubahamana because she did not work during that period she claims the salaries for. It however held that, even though she did not work during that time, her failure to work was not due to her own fault since BRD put her in dilemma and she could not work up to the day they were dismissed and during this period, she was considered to be the employee of BRD, because, though she did not work during that period for the salary to be due, she should be awarded remuneration of days she spent awaiting to be appointed in a given post as an employee of BRD because it was BRD which refused her to work as usual until her dismissal. It held that Mwubahamana Béata be awarded the money for that period from 30 April 2011 up to 11 August 2011 equal to 3 months and 10 days, to mean 1,493,277Frw

because her salary was 497,759Frw, in addition to 165,919Frw or ten days which in total equals to 1,659,191Frw.

[12] With regard to damages for the loss resulted from her dismissal, moral damages due to the violence, The court held that these damages are not provided for anywhere under the labour law and Mwubahamana Béata does not produce any evidence as of how these damages can be awarded along with those provided under article 33 of the labour law because damages that can be cumulative with those provided under article 33 of the labour law are dismissal compensation, notice compensation, leave compensation and damages of work certificate that was not delivered.

[13] The Intermediate Court also awarded to Mwubahamana Béata 100,000Frw for procedural fee and 300,000Frw of the counsel fees.

[14] BRD was not satisfied with the ruling and appealed to this Court; the appeal was recorded in court register on RSOCA 0194/13/HC/KIG. It appealed against the ruling of the Intermediate Court which held that Mwubahamana Béata was unfairly dismissed yet it is not the case, and awarded her enormous damages and the ruling of awarding her the amount of three months and 10 days yet she did not work during that time.

[15] Mwubahamana Béata was not also satisfied with the ruling and appealed against it. Her appeal was recorded in the book registers on RSOCA 0202/13/HC/KIG, her ground of appeal being that the court did not order her reinstatement yet it was her request.

[16] In this case, the court will examine the issue relating to whether Mwubahamana was dismissed unfairly as held by the Intermediate court or whether it was in compliance with the law as BRD alleges. In case the court finds that she was unfairly dismissed the court will examine whether damages was the only remedy to bestow her rights to her or whether she could have been reinstated as she requested the court. It will also be examined whether or not Mwubahamana Béata would have been awarded the remuneration for the period she spent without working.

II. ANALYSIS OF LEGAL ISSUES

A. THE APPEAL OF BRD

Whether Mwubahamana Béata was unfairly dismissed

[17] Counsel Mugeni Anita argues that the Intermediate Court held that BRD was not able to prove the economic reasons it alleged yet it proved them. She asserts that it explained that the merger of RHB and BRD in itself was due to economic reasons with the aim of recovery and improvement of their business in order to achieve the attributions of both institutions. She asserts that BRD after being merged with RHB, the need arises and the Board of Directors established a new organisational structure in order to avoid duplication of employment positions for different employees and to help the bank to compete with other financial institutions (the reorganization of the bank for safeguarding the competitiveness), which led to the layoff of some employees due to the loss that would result from the duplication of duties for the same employees (prevention of endangering the economic situation of the Bank). She explains that according to the opinions of the law scholars, the aforementioned statements constitute an economic reason that may lead a given company to reduce the number of employees. Therefore, the disregard of these grounds submitted by BRD by the Intermediate Court to disregard these reasons put forward by is unclear.

[18] Counsel Mugeni Anita also asserts that it is obvious that after the merger of employees in BRD, and a single post had more than one employee and due to technological reforms other posts were no longer necessary, remaining in that situation was leading BRD to paying several employees for the work that would have otherwise being performed by a single employee or paying employees whose posts were clearly no longer necessary after the organizational and technology reform. She asserted that these constitute economic reasons and the institution could not run smoothly while having unnecessary expenditures likely to trigger a loss. She argues that for the post of internal auditor after the reform BRD needed an employee with an ACCA level and Mwubahamana Béata did not have that level, hence it was necessary that she be dismissed.

[19] Counsel Bakashyaka Gérardine asserts that this ground of appeal has no merit because BRD itself puts it that it was merged with RHB and all its obligations and assets were transferred to BRD, this is the reason BRD had to comply with article 22 of the labor law, instead it avoided what is provided for by this article and contends to show that it based on article 34 of the labor law though it did not also comply with the provisions of that article, therefore, the termination of the employment contract between BRD and Mwubahamana Béata is not based on any law and arguments of BRD are the baseless pretext.

[20] Counsel Bakashyaka Gérardine explains further that the statements of the counsel for BRD asserting that the Board of Directors established a new organization chart in order to avoid the duplication of duties for the same employees and help them to compete with other financial institutions (the reorganization of the bank for safeguarding the competitiveness) which led to the reduction of some employees in order to avoid the loss that would result from the duplication of duties for the employees; are far from the truth because law scholars explain that the employer has to prove that there are serious grounds that would prejudice the employment in the future. They assert that he cannot only state in the dismissal letter that the restructure aims at the competitiveness of the institutions with other institutions on the market. Instead the employer has to prove that actual difficulties by putting forward palpable facts to prove those difficulties (the employer is bound to demonstrate the existence of a certain number of precise elements permitting to prove the future danger on employment. He cannot contend himself to invoke in the dismissal letter the existence of the reorganization aimed at the safeguarding of the competitiveness. The employer has to be able to prove the reality of the threat, concrets elements and circumstantial at support).[1] She further asserts that scholars state that the economic difficulties that the employer asserts that she was about to encounter have to be difficulties that would endanger the institution and the employment and has to be evident enough to the extent of requiring the restructure of the institution. Hence, the employment has to demonstrate empirical evidence that there are real difficulties that would endanger the employment, that the reduction of employees is done due to the fact that the failure to do so would eventually lead to the dismissal of a large number of employees, in French words "…les difficultés économiques à venir doivent être de nature à porter atteinte à la pérénnité de l'entreprise et des emplois, et doivent être suffisamment précis pour justifier la réorganisation. L'employeur est en effet, tenu de démontrer l'existence d'un certain nombre d'éléments précis permettant de prouver les difficultés à venir sur l'emploi, l'objectif étant de prendre des mesures de nature à éviter des licenciements ultérieurs plus importants"[2]

[1] http: //www.village-justice.com/actualites/id-83-pas-de-licenciement-economique-justifie-sans-menace-demontree.
[2] http : //www.village-justice.com/articles/licencier-prevision-difficultes,2037.html?var_recherche=homale#gQOamCMi8BR5yQEh.99

[21] On this ground, Counsel Bakashyaka Gérardine concludes by arguing that "the prevention of the loss that would result from…" cannot be considered to be the economic reason that justify the termination of the employment in the manner that BRD did because there is no unequivocal evidence proving the difficulty that would led it to irreversible loss.

[22] Counsel Bakashyaka Gérardine also argues that even in case laws of courts from other jurisdictions, it is obvious that the employer cannot base on his own reasons or non-existent reasons under the pretext of economic reasons in order to violate the rights of employees, in their french words they stated that "il est toutefois nécessaire pour l'entreprise qu'elle soit en mesure de démontrer l'existence de la menace sur la compétitivité. La jurisprudence considère ainsi que ne repose pas sur un juste motif économique la réorganisation destinée à améliorer les marges" (cass.soc. 13 septembre 2006, n° 05-41.665), les profits (cass.soc. 30 novembre 2011, n° 09-43.183) ou le niveau de rentabilité au détriment de l'emploi (cass.soc 6 mars 2007, n° 05-42.271).[3]

[23] With regard to the degree of ACCA the counsel for BRD asserts that Mwubahamana did not possess, Counsel Bakashyaka Gérardine asserts that this a groundless pretext because it is aimed at finding the cause of termination of the employment contract it concluded, yet there is no single law on which it was based. She further states that the first paragraph of article 21 explains that the failure to comply with the procedure provided by the law constitutes unfair dismissal. She asserts that article 34 of the labour law alleged to be the basis was not complied with since that article provides that" the dismissal of one or several employees due to economic reason, internal reorganization or consecutive restructuring for economic difficulties or technological transfers with the aim of protecting the competitiveness of the enterprise. In such a case the dismissal ranking shall be done in accordance with the performance, professional qualification, time spent in the enterprise and social charges of each worker. The employer informs the competent labour inspector in a written form". The fact that BRD did not comply with these implies that the dismissal was unfair.

[24] The Court finds that the argument of BRD counsels that the Intermediate Court ruling that BRD did not prove the economic reasons it alleged yet it proved them, since they explained that the merger of BRD and RHB itself was due to economic reasons in order to recover and improve the smooth running in order to ensure the achievements of the attributions of both institutions have merit, because the merger of two institutions for the smooth running of the business is acceptable, as even article 22 of the labour law provides that for the two enterprises to merge is a right of the employer but it also regulates how the employee's right is respected during that time. It provides that when the employer restructured the legal nature of the institution, like succession, change of the name, merger, cession, the change of the financial structure or changing it into a partnership, all continuing employment contracts at the time of those changes remain valid between the new employer and the existing employees. Hence, the merger of RHB and BRD is not an issue, instead the issue is to know whether that merger did not prejudice the rights of Mwubahamana Béata, yet her contract had to remain in force.

[25] The court finds that the letter dismissing Mwubahamana Béata demostrate that, the merger of two institutions immediately prejudiced her rights, and as explained above, this should not have affected her rights. However, she was informed in that letter that based on the resolution of extraordinary general assembly of RHB held on 30 March 2011, which

[3] http://www.pourseformer.fr/liste-d-articles/detail-liste-d-article/h/9fad762eb4/a/le-motif-économique-du-licenciement.html.

resolved that all activities of that bank are suspended and all its assets and obligations are transferred to BRD, she is notified that her employment contract with Rwanda Housing Bank is terminated with effect from 30 April 2011. These words indicate that the employment contract of Mwubahamana Béata and RHB was terminated by the resolution of the general assembly which resolved that all activities of that bank are extinguished and its assets and liabilities are transferred to BRD. However, as explained above these did not themselves constitute enough grounds likely to lead to the termination of Mwubahamana Béata and RHB's employment contract, rather that contract had to be transferred in its entirety to BRD, since article 22 of the labor code provides that "all contracts of employment in progress on the day of modification remain valid between the new employer and the workers of the enterprise".

[26] Even though the dismissal letter of Mwubahamana Béata first indicates that the termination of the contract is based on the fact that RHB is suspended and its assets and obligations transferred to BRD, that letter also states that the employment contract is terminated according to the provision of article 34 of the labour law relating to the dismissal due to economic and technological reasons, which lead to the fact that after the merger of RHB and BRD it was necessary to dismiss some employees including Mwubahamana Béata.

[27] The Court finds that the fact that these two institutions were merged to ensure their smooth running as explained above is their rights and the merger in itself does not prejudice the rights of the employees. But after their merger they can do a reorganization which may led to the removal of some posts or be merged, which would lead to the dismissal of some employees.

[28] The court finds that the argument of Counsel Bakashyaka for Mwubahamana Béata that the law scholar's opinion is that the employer has to demonstrate an empirical ground to support the existence of the problem likely to prejudice the work in the future, that those law scholars again state that the employer cannot only indicate in the dismissal letter that the reorganization was due to the competitiveness, instead he has to indicate that there is an actual problem demonstrated by facts thereto, would have merit only if it is the institution itself that has carried out the reorganization of the employment. In contrast, when the reorganization is due to the merger of institutions, the merger in itself suffices to justify the reorganization of employment because both institutions normally have different employment structure, different employees which have to be brought together. As the counsels for BRD argue, RHB already had its own employment structure and employees as well as BRD. The merger of these two institutions also requires the merger of their employment structure and employees (reorganization), and that reorganization is considered as the employment reorganization due to economic reasons. As argued by counsels for BRD, if after the merger of RHB and BRD it was found there were employees who fell in the same position yet the duties under that position can be performed by a lesser number of employees than all those employees that fall within that position, BRD would not be required to remain with all those employees since it would imply that it pays some employees yet it does not need them in its employment structure, and this would affect its economic situation. Therefore, after BRD merged with RHB was allowed to reorganize its employment structure so it could fit in that merger and it was allowed to layoff some employees due to that reorganization and that reorganization is considered to be due to economic reason. Instead, what has to be determined is whether the article 34 of the labour law was complied with in dismissing Mwubahamana Béata.

[29] The court finds that the counsels for BRD argue that after the reorganization, BRD required a candidate with ACCA diploma for the position of internal auditor which Mwubahamana Béata did not possess; and it was necessary to dismiss her. The court finds that the counsels for BRD failed to produce the document proving the resolution that the candidate in that position of internal auditor which Mwubahamana Béata occupied should hold an ACCA diploma and the organ that decided that. Moreover, even in the dismissal letter, that ground was not indicated because it stated that the basis is article 34 of the labour law without explanation about the dismissal of Mwubahamana Béata. The court finds again that the counsels for BRD do not even demonstrate the link between ACCA diploma and the merger of RHB and BRD since this merger has been their basis in arguing that there was economic reason that led to the reorganization of the employment structure. Hence, as the Intermediate Court held, even though there may be some economic reasons leading to the dismissal of some employees after the merger of BRD and RHB, but BRD did not prove how it complied with article 34 of the labour law in regards to Mwubahamana Béata, and demonstrates that the reorganization led to the requirement of a certain competence on the post of Mwubahamana that she did not possess. Therefore, she was unfairly dismissed because the dissatisfaction of BRD to the decision of the Intermediate Court is groundless.

Whether Mwubahamana Béata had to be awarded the salary of three months and ten days yet she did not work during that time

[30] Counsel Mugeni Anita argues that the Intermediate Court agreed that the plaintiff did not work during that period of three months and 10 days of which she claims the salary for, yet article 1 para. 42 and article 75 of the labour law provides that the salary is the price of the work done; therefore who did not work cannot claim the salary. But it went over board and held that it has awarded that amount basing on the dilemma in which Mwubahamana Béata went through as she was never notified that she is no longer an employee of BRD. She argues that the ruling of the Intermediate court was not right because as all employees when they are dismissed, they were informed in a general announcement and they were informed of that after they saw the list of the hierarchy and the conditions based on in their dismissal. It is obvious that from 30 April 2011 up to 11 August 2011 they were aware of their dismissal especially starting from that time they were not working. Hence, they were given letters as a mere formality of notification in writing. Therefore, it is not understandable how the court disregarded that article and awarded the salary to employees yet there is no evidence that they worked for BRD after their layoff.

[31] Counsel Bakashyaka Gérardine asserts that BRD admits that the letter dismissing Mwubahamana was handed to her for just complying with the formality of written notification. For her, she finds this as invoking its own turpitude. She asserts that Mwubahamana herself proves that she was put in dilemma waiting for being appointed and that is why she has to be considered as an employee of BRD, as failure for BRD to comply with its duty to give her an employment cannot be imputed to none than itself.

[32] The court finds that as explained, the contract that existed between BHR and Mwubahamana Béata was transferred to BRD. This means that Mwubahamana Béata continued to be an employee and BRD continued to be an employer up to the time the contract was terminated, that is to say 11 August 2011. During all this time that the contract was yet terminated, BRD was bound to provide Mwubahamana Béata with the employment in a manner, time and place agreed upon since this is among the obligations of an employer as provided under article 47 of the labour law. This obligation goes hand in hand with the obligation to pay the agreed salary to the employee at the agreed period of time.

Mwubahamana also had the duty to perform the agreed employment on time, place and manner agreed upon because it is her obligation as an employee as provided under article 48 of the labour law.

[33] The court finds that the arguments of BRD's counsels that Mwubahamana should not be paid the 3 months and 10 days salary she passed without working, relying on article 1 paragraph 42 and article 75 of the Rwandan labour law which provides that the salary is the price of the work done, the person who did not work cannot claim the salary, is groundless because they wrongly interpreted it. Article 75 of the labour law provides indeed that the salary is the price of the work done. That article also provides that unless agreed upon between the concerned parties or for cases provided for by this law, no salary is to be paid in the event of absence at work. This implies that the person this provision deprives the right to salary is an employee who refused to fulfil his/her obligation, instead of being an employee whose employer prevented from working yet he did not dismiss him. It means that Mwubahamana did not refuse to work the fact which would waive the obligation of BRD to pay her the salary. During the employment contract the obligation to pay the salary which befalls upon the employer is waived when the employee has not fulfilled her obligation to work. But as far as the employment contract is still in progress, the obligation of the employer to pay the remuneration is waived by the breach of his/her duty to work. In contrast, if it is the employer who informed his/her employee that it is not necessary to perform his/her duties, the obligation to pay the salary remains because it is their convenience that the employee shall not work, this is understandable that absence of the employee to work will not prevent the employer from paying him because failure to pay the salary is likely to result from the valid suspension of the contract or the termination of the contract and there is no single grounds among both, which is likely to waive from BRD the obligation to pay Mwubahamana the salary corresponding to the time she did not work while prevented from working without being dismissed.

[34] The court also finds that as provided under article 75 of the labour law, there are several circumstances in which the employee can be paid the salary without having worked due to the reasons beyond his control. Article 59 of the labour law reads that, the employee is paid on the leave yet he did not work. Article 60 provides "the absences caused by reasons to accomplish duty imposed by the law or authorized by the Minister in charge of Labour are paid". Article 6 also provides that the employee can be paid during a sick leave of 3 months without working. There are many other instances in this law.

[35] Due to the reasons explained above, BRD cannot just adduce that the salary is the price of the work done, in disregard of the fact that the failure for Mwubahamana Béata to work while she still had a valid employment contract is imputable to it. The court finds that even though in the judgment R.SOC.A 0193/13/HC/KIG rendered by this court on 22 November 2013, in which it was held that persons with the same issue like that of Mwubahamana, who spent a long period without working yet they were not dismissed, should not be awarded the salary of that period because "the salary is the price of the work done", for which BRD requests to be relied on as a precedence in this case cannot not be applied, because as explained, it was considered in that lawsuit, one part of the provision of article 75 of the labour law which really provides that the salary is "the price of the work done" while leaving aside the other part of that provision indicating that the salary can be paid even if the employee has not worked, but due to the reasons beyond his control.

[36] Due to the reasons explained, the appeal of BRD has no merit in regards to this ground.

Regarding whether the damages were computated in accordance with the law

[37] Counsel Mugeni Anita asserts that the Intermediate Court of Nyarugenge awarded moral damages to Mwubahamana Béata motivating that she was unfairly dismissed. She asserts that she should have not been awarded these damages because as explained she was not unfairly dismissed. She also argues that the awarded damages were calculated in contradiction with the provision of article 333 of the labor code, because this article provides that damages shall not be less than the salary of 3 months and not more than the salary of 6 months, and yet Mwubahamana Béata was awarded damages equal to the salary of 9 months. It is clear that it was based on experience which is rather considered in calculating the dismissal compensation.

[38] Counsel Bakashyaka Gérardine argues that the argument of the counsel for BRD that the damages awarded to Mwubahamana are contrary to article 33 of the labour law, but as explained by the court under paragraph 18, it calculated them on 9 months basing on article 33 paragraph 2 because she has a working experience of 15 years as provided for by this provision.

[39] The court finds that Mwubahamana Béata had to be awarded the damages for unfair dismissal because according to the holding of the Intermediate Court as well as the findings of the High Court, Mwubahamana Béata was unfairly dismissed, and should be awarded damages provided under article 33 of the Rwandan labor law.

[40] The court finds that with regard to the amount of damages awarded, as the counsel for Mwubahamana argues, the paragraph 2 of article 33 of the labour law provides that "where the worker has worked for the employer for a period which is longer than ten (10) years, damages shall not go beyond the salary of nine (9) months". Therefore, the Intermediate Court having awarded damages equal to the salary of 9 months to Mwubahamana Béata is by no means contrary to the law since it based it on her working experience, and BRD does not contest that.

With regard to counsel and procedural fees

[41] Counsel Mugeni Anita asserts that the Intermediate Court awarded damages of procedural and the counsel's fees to Mwubahamana Béatawhile she should have not been awarded them because she engaged herself in those proceedings and dragged BRD into them.

[42] Counsel Bakashyaka Gérardine retorts that the statements of the counsel for BRD that Mwubahamana initiated lawsuits and dragged BRD into them therefore should not be awarded procedural and counsel fees; are groundless because Mwubahamana was unfairly dismissed as no any provision of the law was complied with. Thus, that dismissal is unjustified as explained above, therefore it is her right to sue to the court in order to seek justice and it is obvious that the person who prejudiced her rights is responsible to bear the loss arising from those lawsuits.

[43] The court finds that there is no ground which is likely to prevent Mwubahamana Béata to be awarded the procedural and counsel fees because as explained, she was unfairly dismissed, hence BRD the causal link of the lawsuit has to bear all the expenses which Mwubahamana incurred in this case.

THE APPEAL OF MWUBAHAMANA Béata.

Whether after the court held that Mwubahamana Béata was unfairly dismissed, the last redress was to reinstate her in her employment position since this was her prayer to the court.

[44] Mwubahamana Béata argues in her appeal submission that she contests the ruling of the Intermediate Court whichheld that the decision of her dismissal was unfair, which is obvious that the decision of BRD was nullified, but did not make a decision to restitute her right of being reinstated in her employment position. She asserts that the court's response on her prayers whereby it held that her prayer to be restituted of her right to employment was in contradiction with the law is a violation of the law (paragraph 18 of the judgment). It relies on article 33 of the Rwandan labor law yet this article has some ambiguity and does not prohibit the reinstatement. She further asserts that this article begins by stating that "any unlawful termination of contract may result in damages". There is no other explanation as to when damages can be awarded. She argues that is the reason why there has to be a resort to the constitution, international law and law scholar writings.

[45] Mwubahamana relies on article 37 of the Constitution of the Republic of Rwanda, which states that every individual has the right to choose the employment that suits him or her. She also argues that under international law, the universal declaration of human rights of 10 October 1948, in its article 23 provides that any person has the right to employment, freedom of choice of his or her employment in fair and satisfying conditions and the protection from unemployment, but the intermediate court disregarded that.

[46] Mwubahamana Béata asserts that even law scholars have also had their opinion in this regard. For instance, Maillard Dalloz stated that in case of "a nul and void dismissal, the reinstatement is a right, since who says nullity says reinstatement. The employee who requests that will be reinstated, the reason is very simple, the nullified dismissal is considered to have never been pronounced and the employee is considered to have never been dismissed from her or his employment. If the employee requests that the judge pronounces her or his reinstatement with all acquired rights. She argue that there is another law scholar called Verkindt (Y-P) who commented on the labour case law, whereby he stated that "It shall be quashed, the judgment which, after finding that an employee was dismissed in fraud of his rights, decides that dismissal without real and serious cause is eligible for compensation, but refuses to allow the reinstatement of the employee, and the payment of wages he would have earned between his dismissal and reinstatement" (soc 15 Febuary 2006.BICC n° 640 of 15 may 2006).

[47] Counsel Mugeni Anita argues that Mwubahamana does not demonstrate the provisions of articles on which she relies her appeal, that she does not show where the decision of the Intermediate Court violates human rights provided under those articles since nothing was violated, as regards the fact that BRD terminated the employment contract of Mwubahamana deprived her of her rights to freedom of choice of employment and employer of her choice. Therefore, there is nowhere the right provided under article 37 of the constitution were violated.

[48] Counsel Mugeni Anita also argues that according to the provisions of articles 14 and 29 of the labor code, it is obvious that working with a given person is not compulsory, as the relationship between an employer and employee is proven by the contract they underwent, that contract being concluded with the consent of both parties and can be terminated anytime at the initiative of one of the parties. She further argues that the law does not allow the employment contract for the entire life period so that at least Mwubahamana may argue that

she could not work elsewhere than in BRD until her old age. She therefore asserts that the appeal has no merit with regard to this ground. She also says that in case the court finds that Mwubahamana was unfairly dismissed, what is provided for by that article 33 of the labor law are damages, and that is what is likely to be awarded to Mwubahamana since it is nowhere provided that the unfairly dismissed employee can be reinstated.

[49] The court finds that the argument of the counsel for BRD, which is also the same with the findings of the intermediate court, the way to redress the loss suffered by an employee due to unfair dismissal provided under article 33 of the labor code is the award of damages since the paragraph 1 of this article provides that "any unlawful termination of contract may result in damages. Damages paid to the unlawfully dismissed worker cannot go below his/her three months' salary but they cannot exceed the six (6) - month salary". The argument of Mwubahamana Béata that the intermediate court had to order her reinstatement is groundless since that redress and modalities of reinstatement are not provided under this law.

[50] The court finds that the assertion of Mwubahamana Béata that the words "may result in" used under this paragraph means that the employee can be awarded damages or be reinstated, is not founded since what these words mean instead that in case of unfair termination of employment contract, damages may or not be awarded, as they cannot be even in case the employee did not claim for them. Thus, it is nowhere stated that the sentence "may result in" creates an alternative between damages and reinstatement, since there is nowhere this reinstatement is provided. Should the legislator have provided for both redresses, it is obvious that he should have written that "it can lead to the award of damages or declared null". The reason why he did not do so is because there is only one single remedy provided, and that is the award of damages.

[51] The fact that the award of damages was the sole redress provided in case of unfair termination of employment contract, can be noticed from the debate held in the parliament at the time of enactment of this article, which was article 34 in the draft law, because what was clear is that some of the members of parliament were worried that employer who does not need the employee will dismiss her or him and undertake to pay him/her damages that would be ordered by the court, the reason why they were requesting that the establishment of the margin should be abandoned in that law and damages be awarded by the judge basing on the gravity of the fault committed and the loss suffered by the aggrieved party. However, that alternative was not accepted.[4]

[52] The court finds that the arguments of Mwubahamana that the Intermediate Court contradicted with the provision of article 37 of the Constitution which provides that "every person has the right to free choice of employment", is not founded since Mwubahamana was not forcibly employed, instead she chose the employment that suited her as provided under this article. What happened when she has been dismissed as explained is that BRD breached the contract concluded between them, and this breach is sanctioned by article 33 of the labour code by the payment of damages that cannot be more than the salary of 6 months or 9 months depending on the working experience.

[53] The court finds that the argument of Mwubahamana that the international law, the universal declaration of human rights of 10 October 1948, article 23 states that every person

[4] See the cession statement N° 34/PV/CD/ N.T/2009 plenary cession of parliament chamber of deputies of 04/2009 (Afternoon), page 55 and subsequent.

has the right to employment, the free choice of his or her employment in fair and satisfying conditions of employment and the protection from unemployment, does not resolve her dispute with BRD either since what it emphasizes is that the person has the right to choose his/her employment and this happened in the recruitment of Mwubahamana. The fact that she was unfairly dismissed, the court held that it constitutes a fault. However, this provision relied on by Mwubahamana provides for the right but does not provide for the sanctions of the person who violated that right, and it under Rwandan law, article 33 of the labour code which explains well that unfair termination of employment contract is sanctioned by the payment of damages by the party that terminated it. Hence, there is nowhere the Intermediate Court contravened this international treaty, since it does not provide for the sanction in case of unfair termination of employment contract so it can be asserted that the court failed to consider them.

[54] The court finds that Mwubahamana asserts that she also bases on law scholars writings like Maillard Dalloz who articulated that once the dismissal is nullified it is the right of the employee to be reinstated and this is the position held by courts in cases rendered about this issue. This is understandable because these law scholars and case laws are in line with the provisions of laws of countries about which those scholars wrote and laws on which courts that rendered those cases based on. What Mwubahamana has to prove is that the laws on which they based are similar to Rwandan laws especially article 33 of the labour code the Intermediate Court based on. In that case she may refer to those scholars in a bid to demonstrate how this article should be interpreted and applied. But as long as laws are different, law scholars' writings and courts decisions from other countries cannot replace Rwandan laws except in case those legal scholars and those courts ruled basing on international treaties to which Rwanda is a party.

[55] The Court finds that these foreign law scholars opinions and case laws on which Mwubahamana bases are in accordance with the provisions of their laws, since article L1235-3 of the French labour code states under its paragraph 1 that "If the dismissal of an employee occurs for a cause that is not real and serious, the judge may propose reinstatement of the employee in the company, while maintaining acquired benefits", and paragraph 2 provides that "if either party refuses, the judge made an award to the employee. This compensation at the expense of the employer cannot be less than the wages of the last six months. It is due without prejudice, if any, of the severance pay provided for in Article L. 1234-9". Mwubahamana Béata does not demonstrate the provision of the Rwandan labour law that provides that an unfairly dismissed employee can be reinstated upon the court order, therefore, the law scholars writings and case laws from French jurisdiction cannot be applied in Rwanda yet it is obvious that the legal provisions on which those law scholars relied on are different from the provisions of the Rwandan labour code.

[56] The court finds that in the context of international law relating to the unfair termination, what would have helped Mwubahamana Béata is the international convention n° 158 concerning termination of employment. But even though it is obvious under article 10 of that convention that the best way to give redress to the unfairly dismissed employee is the reinstatement if possible, this article also provides that this is done if it is allowed under domestic laws or when that has become local practice, otherwise the unfairly dismissed employee is awarded damages, in french words "si les organismes mentionnés à l'article 8 de la présente convention arrivent à la conclusion que le licenciement est injustifié, et si, compte tenu de la législation et de la pratique nationales, ils n'ont pas le pouvoir ou n'estiment pas possible dans les circonstances d'annuler le licenciement et/ou d'ordonner ou de proposer la

réintégration du travail, ils devront être habilités à ordonner le versement d'une indemnité adéquate ou toute autre forme de réparation considérée comme appropriée". Given that even this convention does not provide for the reinstatement of an unfairly dismissed employee in case she or he requests for that, but instead the provisions of domestic laws are considered, Rwanda has not ratified this convention so that it can be bound, rather, the court may refer to them in the context of persuasion in order to understand well Rwandan laws, therefore it is clear that the fact that article 33 of the labor code provides that the unfairly dismissed employee is awarded damages, is under no circumstances contrary to the rights of an employee. Therefore, the Intermediate Court having based on this article is by no means in contravention of either Rwandan or international law.

With regard to the counsel fees before this court

[57] The counsel for BRD requests that BRD be awarded 400,000Frw of procedural fees and 1,000,000Frw of the counsel fees.

[58] Counsel Bakashyaka Gérardine asserts that 400,000Frw of procedural fees and 1,000,000Frw of the counsel fees that the counsel for BRD claims is not founded because it is the one that dragged Mwubahamana into lawsuits.

[59] Counsel Bakashyaka Gérardine prays that the court awards to Mwubahamana 500,000 Frw of procedural fee and the counsel fees.

[60] The court finds that 400,000Frw of the procedural fee and 1,000,000Frw of the counsel fees claimed by the counsel for BRD cannot be awarded because its appeal is not founded.

[61] The court finds that 500,000 Frw of proceedings fees and counsel fees the counsel for Mwubahamana Béata claims on her behalf, cannot be awarded in its entirety because her appeal is has no merit and therefore has to bear all expenses she incuredon the appellate proceedings. Instead, they are awarded to her on the side of BRD's appeal since it also appealed but its appeal is groundless. Hence, upon the court's discretion, she is awarded 300,000Frw of the proceedings and counsel fees.

III. DECISION OF THE COURT

[62] Holds that the appeal of BRD has no merit.

[63] Holds that the appeal of MwubahamanaBéata has merit in some parts**.**

[64] Uphold the ruling of the judgment RSOC 0021/13/TGI/NYGE rendered by the Intermediate Court of Nyarugenge on 19 July 2013, except on the procedural and counsel fees.

[65] Orders BRD to pay Mwubahamana Béata 300,000Frw for procedural and counsel fees, in addition to damages awarded in the appealed judgment.

[66] Orders Mwubahamana Béata and BRD to pay the court fees equal to 150,000Frw, each having to pay 75,000Frw after deduction of the amount of the court fees deposited.