



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Cause 520 of 2012**

**SAMSON BULUMA MUMIA .....CLAIMANT**

**DPL FESTIVE LIMITED.....RESPONDENT**

**AWARD**

1. Samson Buluma Mumia (the Claimant) filed a Memorandum of Claim on 28 March 2012 against DPL Festive Ltd (the Respondent) and the issue in dispute was stated as **wrongful, unlawful and/or unfair termination of employment.**
2. The Respondent was served and it filed a Memorandum of Reply on 24 July 2012.
3. On 2 October 2012, the parties Advocates, Mr. Macharia for Claimant and Mr. Onyony for the Respondent appeared before me and signalled their agreement to my determining the Cause on the basis of pleadings and written submissions. I directed the Claimant to file his submissions within 14 days and further directed the Respondent to file and serve its submissions within 14 days of service by the Claimant.
4. By the time I embarked on the preparation of this award none of the parties had filed submissions, despite their request and agreement and my order made on 2 October 2012 that written submissions be exchanged. The consequence is that the Cause has been determined purely on the basis of pleadings, a very unsatisfactory state of affairs, but for which the blame must fall on the respective parties Counsels on record. I say unsatisfactory but noting that rule 14(4) of the Industrial Court (Procedure) Rules 2010 allow pleadings to contain evidence which may be verified by affidavit and rule 21 of the same rules which allow the Court to proceed on the basis of pleadings, affidavits, documents and submissions.

***Claimant's case***

5. The Claimant pleaded he was employed by the Respondent in April 2008 as a baker and flour mixer at a salary of Kshs 8,330/-. He served the Respondent diligently and faithfully until 30 December 2010 when his services were terminated.
6. The Claimant termed his termination as unlawful and grossly unfair. This is so because after serving his shift from 2 pm to 9 pm he was requested to work the next shift from 9 pm to 6 am which he accepted. Before the end of this further shift he was accused of falling asleep in the workplace and dismissed. He was not given any warning, notice or opportunity to be heard nor was his union, the Bakery Confectionary, Food Manufacturing & Allied Workers Union (Kenya).He pleaded that the Union also refused to intercede on his behalf.
7. The Claimant therefore seeks one month's pay in lieu of notice, accrued house allowance, service pay, and payment in lieu of leave accrued for 2 years, underpayments and compensation for unlawful

termination all totalling Kshs 310,706.13.

8. The Claimant annexed several documents to the Memorandum of Claim and I will refer to them whenever necessary.

### ***Respondent's case***

9. The Respondent pleaded that on 30 December 2010 the Claimant was found asleep while at work and when asked why he was sleeping in the workplace, he displayed disrespect and gross misconduct by verbally threatening and using foul language against his seniors thus meriting summary dismissal.

10. The Respondent further pleaded that internal mechanisms to settle the dispute were tried after which the Claimant deserted duty and therefore is not entitled to claim any benefits and the Claim should be dismissed.

### ***Issues for determination***

11. From the foregoing the main issue for determination are:

(a) Whether the termination of the Claimant was unfair/wrongful or unlawful

(b) What are the appropriate remedies should the answer to the first issue be in the affirmative.

12. Before dealing with the issues I must repeat what I have stated in other decisions by again expressing my disappointment with the fact that the parties herein represented by Counsel did not deem it necessary to set out any *principle or policy, convention, law or industrial relations issue or management practice* relied on as required by rule 4 (e) of the Industrial Court (Procedure) Rules 2010.

13. I am aware that the Court has been commanded by the Constitution in Article 159 (2) (e) to administer justice without undue regard to procedural technicalities and that this constitutional command has been taken up by the Industrial Court Act at section 20 but I also observe that the nature of the employment relationship and the statutory remedies which may be awarded are inextricably linked to the principles or policies, conventions, laws or industrial relations issues relied on. I say this because the remedies for wrongful dismissal/termination are not always the same as the remedies for unfair dismissal/termination.

14. Some of the remedies are common law based and some are statutorily based. Setting out the details required by rule 4 of the Industrial Court (Procedure) Rules 2010 will clarify and direct the Court to the principles which it should apply in making a just and fair determination. Of course the Industrial Court has a significant number of lay persons with no legal training or experience handling their own Causes but they can always be excused, if they do not comply with the rules.

### ***Whether the termination of the Claimant was unfair/wrongful or unlawful***

15. According to the Claimant, his services were terminated because it was alleged he was found sleeping in the workplace and that before the decision to terminate his services was taken, he was not given an opportunity to be heard

16. For the Respondent, the services of the Claimant were terminated because he was found sleeping in the workplace, used abusive/insulting language towards his seniors and lastly because he absented himself from work immediately after the events of 30 December 2010.

17. It is not difficult to dispose of the '*sleeping at work*' ground for termination. I say so because the Respondent has not denied that the Claimant's shift for the material day was from 2 pm to 9 pm. The Respondent has also not disputed the fact that at the end of his shift, the Claimant was asked and he dutifully accepted to work another shift straight away, starting from 9 pm to 6 am.

18.If I accept which I am inclined to accept these factual narration, and considering the biological reality of which sleep is a natural component, that the Claimant was found asleep, was termination justified in the circumstances? The only fair and logical answer to this ‘*sleeping at work*’ ground for termination is that it was not justifiable in the circumstances of this case. In any case ‘*sleeping at work*’ is not explicitly enumerated in section 44(4) of the Employment Act, 2007 as one of the grounds for summary dismissal. But this is not to state that a case cannot be made for ‘*sleeping at work*’ to fall under section 44(4) on wilful neglect to perform work if it was an employee’s duty to perform or indeed any of the listed grounds.

19.The other ground relied on by the Respondent was that the Claimant used abusive or insulting language against his seniors. The Respondent however did not give any details to identify the supervisor whom the Claimant used abusive language on or insulted. The Respondent did not confront the Claimant with the details of the supervisor nor give particulars of the abuses. Neither did the Respondent call the supervisor who found the Claimant asleep, who was insulted, provide his/her witness statement or inform the Court of his/her whereabouts. This ground therefore remains a mere allegation and I am afraid I am unable to accept its veracity.

20.The third ground relied on by the Respondent to meet the gross misconduct requirement was that the Claimant absented himself from work without any explanation immediately after the events of 30 December 2010.No evidence either through documentation or oral evidence was led to support this ground. An employer would ordinarily be expected to a record of employees’ attendance as a management practice.

21.But looking at the pre-litigation documentation annexed to the Memorandum of Claim and the Memorandum of Reply I note that the question of the Claimant absconding was never raised. A letter dated 28 January 2011 and marked *annexure 1* in the Memorandum of Reply from the Respondent to the Bakery Confectionary, Food Manufacturing & Allied Workers Union (Kenya) did not mention any desertion of the Claimant.

22.Equally, letters dated 3 March 2011, 10 March 2011,21 March 2011 from the Ministry of Labour to the Respondent and marked as annexure *SBM 3, SBM 5 and SBM 6* in the Memorandum of Claim seeking information on the dismissal of the Claimant elicited no response from the Respondent.

23.In my view nothing would have been easier for the Respondent to do than provide the Ministry of Labour with the attendance records it maintained to establish the validity of its claim that the Claimant had absented himself from work without permission or deserted.

24.Section 45 of the Employment Act, 2007 places a duty on an employer to prove the validity and fairness of a reason for termination. The Respondent has failed to discharge this onus. Section 10 of the Employment Act similarly expects an employer to produce in legal proceedings certain written particulars regarding the contract while section 74 also sets out records to be kept by an employer. I would have expected the Respondent to produce records to establish that the Claimant deserted.

25.Confronted with the conflicting assertions by the Claimant that he was terminated and by the Respondent that he deserted I do find as a fact that the Claimant’s services was terminated and that he did not desert work.

26.It has not been demonstrated or established that the mandatory requirements of section 41, 43 and 45 of the Employment Act were complied with and I therefore find that as a matter of law the termination of the Claimant was unfair and unjustified for the purposes of sections 45 and 49 of the aforesaid Act. I now proceed to deal with the issue of appropriate remedies.

### **Appropriate remedies**

*One month pay in lieu of Notice*

27.Considering that I have determined that the termination of the Claimant was unfair for the purposes of

section 45 of the Employment Act, I have no hesitation in invoking the provisions of sections 35(1)(c), 49(1) (a) as read with section 50 of the same Act in finding that the Claimant is entitled to the payment of one month's wages in lieu of notice. It was not disputed that at the time of the termination the Claimant was earning Kshs 8330/- and I would award him this head of claim.

#### *Accrued House allowance for 33 months*

28.The Claimant did not lay any evidentiary basis for this particular claim. It was not even pleaded that the monthly wages of Kshs 8330/- was inclusive or exclusive of house allowance. There was an allegation by the Claimant that he was a member of the Bakery, Confectionary, Food Manufacturing & Allied Workers Union. But he did not produce the Collective Agreement for the material time to establish what was due to him as house allowance or that his salary was not inclusive of house allowance. The Respondent produced a copy of a Collective Agreement for 1 July 2011 to June 2013 but this is of little help to the Claimants case.

29.Even if the Court were to fall back to the statutory minimums as set out in the Labour Institutions Act and the Wages Regulations made under it, the Claimant did not argue or establish his entitlement to house allowance as pleaded and I decline to make an award under this head.

#### *Service pay*

30.The Claimant sought Kshs 16,660/- as service pay for 2 years and Kshs 6,247.50 as proportionate service pay for the 9 months worked in 2010.I have held that the termination of the Claimant was unfair. A keen perusal of section 49 of the Employment Act will show that payment of service pay is not one of the remedies expressly contemplated for unfair termination but it is provided for under section 35(5) of the Employment Act.

31.The question therefore arises whether the hands of the Court are tied by section 49 of the Employment Act as to the remedies it can grant, or to put it another way, whether the remedies set out in section 49 are exclusive to the award of service pay under section 35(5) of the Employment Act.

32.The Court has been given wide powers under section 12(3) of the Industrial Court Act, 2011 to make a wide array of orders. The Court under this quoted section has been given the power to make any other appropriate order as the Court may deem fit to grant.

33.In my view therefore the hands of the Court are not tied to the remedies set out in section 49 of the Employment Act when deciding on a remedy. It can grant any other remedy provided the remedy is appropriate and I may add lawful and fair. A remedy should be an effective remedy to ensure that the ends of justice are met.

34.Calculation of service pay can be based on two grounds. The first ground is contractual and this could be embodied in the contract of employment or a Collective Agreement. In fact the Collective Agreement would in most instances serve to amend the terms of the contract of employment. The Claimant did not lay any contractual basis for the calculation or payment of this head of claim. A copy of the Collective Agreement for the material time was not produced. The Respondent produced a Collective Agreement for the period after the termination of the Claimant.

35.The second ground for the calculation/payment of service pay would have a statutory underpinning. Section 35(5) of the Employment Act has left it open to be fixed by contract. No applicable contract was brought to my attention.

36.In the course of writing this Award I established that there is a Regulation of Wages (Baking, Flour Confectionary and Biscuit Making Trades Wages Council Establishment) Order which covers the Respondents undertaking but it has no provision for payment of service pay. The Regulation of Wages (General) Order does also not make provision for service pay.

37. Under these circumstances, I would have turned to practice in the industry but unfortunately none was laid before me. I therefore decline to make an award under this head because the Claimant did not lay sufficient material to enable me make a determination in his favour.

#### *Leave and underpayments*

38. The Claimant sought Kshs 16,660/- on account of payment in lieu of leave, Kshs 10,933.13 on account pro rata leave for 9 months and Kshs 110,682/- on account of underpayments.

39. I must confess that apart from the pleadings the Claimant did not even make submissions to lay a basis for these claims. My invitation to file and serve written submissions was not heeded and I must therefore dismiss these heads of Claim. A Claimant should not just throw allegations in the face of the Court and expect the Court to grant him remedies based on those mere allegations without laying an evidentiary basis for the same.

#### *12 months compensation for unfair termination*

40. The last head of relief sought by the Claimant is Kshs 99,960/- being the maximum twelve months compensation for unfair termination. The statutory basis for this relief is found in section 49(1)(c) of the Employment Act, 2007. In my considered view an award of compensation under this section is discretionary. Indeed the Court is allowed the latitude to grant any or all of the three different remedies set out in section 49(1)(a);(b) and or (c). And because the grant of any or all of these three remedies is discretionary, it is not automatic that whenever the Court holds that a summary dismissal or termination of contract was unjustified, it is under an obligation to award the any or maximum compensation. The discretion must be exercised within the 13 parameters set out in section 49(4) of the Employment Act and also judiciously. And being an exercise of judicial discretion the effect of the compensation upon an employer need also to be considered.

41. The Claimant had served with the Respondent for only two years before the termination. This was a relative short period of service. Again the duties of the Claimant were such that it did not require any specialized or technical skills. Putting these and the other factors set out in section 49(4) of the Employment Act it is my opinion that an award of six months' salary in compensation would be just and fair order. I therefore award the Claimant Kshs 49,980/- under this head.

#### **Conclusion and Orders**

42. In the circumstances I do hold that the termination of the services of the Claimant was unfair and unjustified and award him:

(a) One month salary in lieu of Notice	Kshs 8330/-
(b) Six months compensation for unfair termination	Kshs 49980/-
<b>TOTAL</b>	<b>Kshs 58,310/-</b>

43. The prayers for accrued house allowance, service pay, leave and underpayments are dismissed.

44. There will be no order as to costs.

Dated and delivered in open Court at Nairobi this 23<sup>rd</sup> day of November 2012.

Radido Stephen

**Judge of the Industrial Court**

**Representations**

Mr. Macharia instructed by

Macharia Odongo & Kosgei Advocates

For Claimant

Mr. Onyony instructed by Onyony & Co. Advocates

For Respondent