



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 86 OF 2018

NITA SANGARI BALDEV.....CLAIMANT

VERSUS

MILLY GLASS WORKS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Nita Sangari Baldev, the Claimant in this case, was an employee of Milly Glass Works Limited. She brought this claim following the termination of her employment on 27th October 2017. Her claim is documented by a Memorandum of Claim dated 23rd February 2018 and filed in court on 26th February 2018. The Respondent's defence is contained in a Response dated 16th March 2018 and filed in court on 20th March 2018.

2. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Georgina Kilonzo.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent in October 2000 in the position of Receptionist/Telephone Operator. She was issued with an appointment letter on 15th March 2002.

4. The Claimant's employment was terminated on 27th October 2017, on the ground of refusing to proceed on a departmental transfer. She was thus deemed to have failed to obey lawful instructions from her supervisor.

5. The Claimant acknowledges having received instructions from the Human Resource Manager, to proceed on the departmental transfer. On receiving the directive, the Claimant requested the Human Resource Manager to reconsider the transfer on account of ill health. The Claimant stated that she had been diagnosed with bronchitis, which made it risky for her to work at the Stores Department, whose nature of work would adversely affect her health. She submitted a sick sheet dated 5th August 2017 as confirmation of her medical condition.

6. The Claimant further pointed out that she had worked as a Receptionist/Telephone Operator for 17 years and that a transfer to Stores was outside her job description. The Claimant considered herself as unqualified and inexperienced to work in Stores.

7. The Claimant states that she made these representations at the disciplinary hearing but the Respondent did not take them into consideration. She adds that the memorandum requiring her to attend the disciplinary hearing did not inform her of the charges levelled against her. She pleads that this prejudiced her right to a fair process before termination.

8. Following the disciplinary hearing, the Claimant was served with letter dated 27th October 2017, terminating her employment. The termination letter indicated that she was entitled to salary up to and including 28th October 2017, leave pay for 21.5 days and one month's salary in lieu of notice.

9. The Claimant claims that when paying her terminal dues, the Respondent did not release her leave pay.

10. It is the Claimant's case that her transfer to the Stores Department amounted to unilateral alteration of her employment contract, contrary to Section 10(5) of the Employment Act. She deems this as an unfair termination of her employment.

11. The Claimant's claim against the Respondent is as follows:

- a) 12 months' salary in compensation.....Kshs. 313,220.00
- b) 1 month's salary in lieu of notice.....26,101.70
- c) Leave pay for 21.5 days.....21,082.14
- d) Costs plus interest

The Respondent's Case

12. In its Response to Claim dated 16th March 2018 and filed in court on 20th March 2018, the Respondent admits having employed the Claimant from 17th October 2000.

13. The Respondent states that the Claimant's employment was terminated for refusing to obey lawful instructions from her supervisor, being transfer to the Weighbridge in the Stores Department. The Respondent maintains that the termination was within the law and that due process was followed in effecting it.

14. The Respondent denies the Claimant's averment that the nature of work at the Weighbridge in the Stores Department would adversely affect her health. The Respondent further denies that the transfer was outside the Claimant's job description.

15. The Respondent denies that the Claimant's right to fair process was prejudiced and states that the Claimant was served with a show cause letter on 16th October 2017, detailing the charges against her. The Respondent therefore contends that by the time the Claimant was served with the memorandum dated 19th October 2017, inviting her to the disciplinary hearing on 24th October 2017, the charges were well within her knowledge.

16. The Respondent denies the Claimant's averment that her employment contract was unilaterally altered, thus occasioning unfair termination of employment.

Findings and Determination

17. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

18. The termination of the Claimant's employment was effected by letter dated 27th October 2017, stating as follows:

"Dear Nita,

Re: Termination of Employment

The show cause memo dated 16/10/17 and the disciplinary hearing held on 24th October 2017 refers (sic).

On Monday 16th October 2017 you refused the departmental transfer to the Weighbridge in the Stores Department in the presence of the HRO and the undersigned. You stated that you were not ready to comply with these changes. Upon being issued with the show cause you declined to acknowledge receipt. In addition, you did not respond as was required. These clearly demonstrate your explicit insubordination towards HR Officer, your Supervisor and by extension the middle management team. During the hearing you elaborated that your refusal of the transfer was for personal reasons (sickness) and that you were not aware that you could be transferred to another department having been employed as a Receptionist.

It is on the above premise that management has decided to terminate your services for refusal to obey lawful instructions contrary to your employment terms and conditions in accordance with the Employment Act 2007 section 44-4-e.

Kindly arrange to return all company property before payment of your final dues which shall be paid as follows:

- Salary upto and including 28/10/17*
- Leave earned and not taken 21.5 days as at 28/10/17*
- One month's salary in lieu of notice*

Less:

- Any other monies owed to the company*

Yours faithfully,

For: Milly Glass Works Ltd.

(Signed)

Georgina Kilonzo

Human Resource Manager

19. In her testimony before the Court, the Claimant conceded that she had indeed been instructed to proceed on transfer to the Stores Department but stated that she suffered from bronchitis and the transfer would expose her to a work environment that would adversely affect her health. She further stated that she was unqualified and inexperienced to work in the Stores Department.

20. The question before the Court then is whether in light of this uncontested set of facts, the Respondent had a valid reason for terminating the Claimant's employment, as required under Section 43 of the

Employment Act.

21. It is now well settled in law that in answering this question, the Court does not seek to replace the employer's decision with its own. In other words, the Court does not ask what it would have done had it been in the employer's shoes. All the Court asks is whether in the circumstances of the case, the employer acted reasonably and if the answer is in the affirmative, then the Court will not interfere with the employer's decision.

22. In applying this principle, which is commonly known as the '*range of reasonable responses test*' the Court of Appeal in ***Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR*** cited with approval the following excerpt from the **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642:**

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably taken another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

23. It is true that the Claimant was sent on transfer; it is also true that she did not proceed on the transfer as instructed. In advancing her case, she relied on a sick sheet dated 9th August 2017 issued by Mily Health Care Clinic. However, all a sick sheet does is to confirm medical diagnosis and treatment plan. It is not a medical report by which the capacity of an employee to work in a certain environment can be gauged.

24. The Claimant also pursued the argument that the subject transfer amounted to unilateral alteration of her terms and conditions of employment. I respectfully disagree. Clause 5 of the Claimant's letter of appointment dated 15th March 2002 provided as follows:

“The Company may at its discretion or for any other reason transfer an employee from one department to another or any other member of the Milly Group of Companies without reduction of the terms and conditions of employment.”

25. The Claimant suggests that her transfer somehow diminished her terms and conditions of employment. I must disagree with the Claimant yet again; to state that the Respondent could not transfer the Claimant horizontally, without consulting her, would be to interfere with the employer's prerogative to organise and plan its operations.

26. That said, the Court finds and holds that by refusing to take up her transfer, the Claimant breached her contract of employment and the ensuing termination was therefore lawful.

27. The next question is whether, in effecting the termination, the Respondent complied with due procedure as set out under Section 41 of the Employment Act. From the evidence on record, the Claimant was issued with a show cause letter dated 16th October 2017, to which she chose not to respond. She was subsequently formally invited to a disciplinary hearing which she attended on 24th October 2017. It seems to me therefore that the dictates of Section 41 were satisfied.

28. My final conclusion is that the termination of the Claimant's employment was justifiable and fair and she had no reason to complain. The claim for compensation is therefore without basis and is dismissed.

29. According to the letter of termination, the Claimant was paid notice and leave pay. The claims thereon are therefore also without basis and are dismissed.

30. In the end, the Claimant's entire claim fails and is dismissed with costs to the Respondent.

31. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER 2019

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JUDGE

Appearance:

Mr. Mugambi h/b Miss Mango for the Appellant

Mr. Ngaine for the Respondent