



**Barmao v G4S Kenya Limited (Cause E184 of 2021)
[2024] KEELRC 1141 (KLR) (17 May 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E184 OF 2021**

**SC RUTTO, J
MAY 17, 2024**

BETWEEN

DANIEL KIPROP BARMAO CLAIMANT

AND

G4S KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent on 1st October 2014 as a Vetting Manager and was graded D2. He avers that on 13th June 2017, he was promoted to the position of Senior Human Resource Business Partner. According to the Claimant, he diligently and dutifully worked until when he was issued with a Notice to Show Cause dated 13th November 2020 and a termination letter dated 15th December 2020. The Claimant contends that the Respondent did not follow a fair process in terminating him. Consequently, he seeks the following reliefs against the Respondent:
 - a. A declaration that the termination of the Claimant's employment by the Respondent was unlawful, unprocedural and unfair in the circumstances, unprocedural, wrongful and unjust.
 - b. A declaration that the suspension, disciplinary proceedings and ultimate dismissal of the Claimant were a sham, unfair.
 - c. One month salary in lieu of notice, Ksh174,050/=.
 - d. Days worked up to 15th December 2020.
 - e. Leave days for year 2014 (4 days).
 - f. Leave days for year 2016 (24 days).
 - g. Unpaid Bonus for the year 2019 and 2020 at the rate of 20% of his salary.
 - h. Gratuity/Severance pay $Ksh174,050 \times 20 \times 6/30 = Ksh696,200/=$.



- i. An order for the Respondent to pay the Claimant all his terminal dues and compensatory damages.
 - j. 12 months compensation for wrongful termination of employment Ksh174,050 x 12 months = Ksh2,088,000.00/=.
 - k. Certificate of service.
 - l. Costs of the suit plus interests therein.
2. The Respondent has countered the Claim through its Response dated 13th May 2021, in which it denies that the Claimant was promoted to the role of Senior Human Resource Business Partner. The Respondent contends that the Claimant executed a new contract for the role of Senior Human Resource Business Partner after the role of the Vetting Manager was declared redundant in 2017. According to the Respondent, the Claimant exhibited gross negligence in the course of his employment as a Senior Human Resource Business Partner. It is the Respondent's assertion that the Claimant was terminated for cause and in accordance with due process. On account of the foregoing, the Respondent has asked the Court to dismiss the suit with costs.
 3. The matter proceeded for hearing on 20th June 2023 and 29th November 2023, during which both parties called oral evidence.

Claimant's Case

4. The Claimant testified in support of his case and for starters, he sought to adopt his witness statement and documents filed on his behalf, to constitute his evidence in chief.
5. It was the Claimant's testimony that on 13th November 2020, he was served with a show cause letter requiring him to respond to poor handling of disciplinary cases, poor leave reporting and reconciliations, poor work attitude and teamwork and late reporting. He responded to the allegations comprehensively and with supporting evidence.
6. On 23rd November 2020, he was suspended from duty and in the same letter he was instructed to hand over all his responsibilities to Agnes Wakio. He contended that the suspension was illegal by the fact that he was not furnished with the verdict of the suspension and the report of the investigations conducted.
7. That before the suspension from duty, his line manager had never made any complaints in regard to his job performance.
8. While he was away on suspension, he was not provided with any investigation report, proceedings and minutes of the disciplinary hearing and that made it difficult for him to frame a conclusive defense during the disciplinary hearing.
9. According to the termination letter, the first reason raised by the Respondent was that he poorly executed disciplinary hearings and constantly provided incomplete work to his manager. He stated that on 9th November 2020, he was invited to attend a disciplinary hearing for 10th November 2020. He contacted James Muthike on email and informed him about his predicament as he was required to report at the courier hub on a training together with the Human Resource Director.
10. Muthike canceled the said meeting without consulting him. Further on 12th November 2020, the Human Resource Manager was aware that he had a crucial exercise at Magadi and therefore there was need to reschedule the meetings.



11. The second reason for termination was poor leave management and reporting which contributed to unresolved leave. On this issue, the Claimant averred that on 22nd July 2020, the Regional Operations Manager emailed him indicating the need to close the gap between the Easy Roster (ER) system and RAMCO System.
12. That in his email, he suggested that he makes changes on Customer Services Manager's leave reports but when he explained that there would be no data integrity and that the shared drive would be manipulated, he was issued with a Notice to Show Cause and later suspended from duty.
13. That further, the Respondent did not provide all reasonable assistance, which included suitable training, coaching/mentoring to enable him achieve the required standards when dealing with leave management.
14. The Claimant further contended that the Respondent did not offer him any support in discharging his duties. That the Respondent did not portray any evaluations of his job performance and Performance Improvement Plan (PIP) was not conducted before making the decision to terminate his employment.
15. According to the Claimant, the reason for termination in this case did not amount to gross misconduct.
16. He further averred that the Respondent did not raise any issues on the performance objectives settings by the fact that he had not recorded low performance and there were no prior complaints and dissatisfaction from the Human Resource Director.
17. The Claimant averred that the third alleged reason was that he failed to give timely feedback to his supervisor. According to him, this was not a justified reason for termination since he had never received any complaint whatsoever from his supervisor.
18. It was the Claimant's further contention that according to the Disciplinary Policy, he ought to have been given a first written warning, second written warning, and final written warning, and therefore the termination ought to be the last resort.
19. The fourth reason for termination was that he reported to work late. On this issue, he averred that he had never reported late for work and that during the Covid-19 pandemic, the guards were not allowed to enter the office and their issues were handled at the cafeteria area starting at 8:00 a.m. That he used to log in to his computer and attend to the guards and he was not aware that the login time was the same as the reporting time. This way of reporting was never communicated to him or anyone in his department.
20. He further averred that the charges raised in the notice to show cause, suspension letter, GD3 Form, Termination letter and Review of the Appeal letter were different and contradicting and that he was not given an opportunity to respond to the allegations raised and all the evidence produced by him was not put into consideration by the Respondent before making the decision of terminating him.
21. The Claimant further averred that the panel created to hear the appeal was biased and the response for the appeal and review was in the handwriting of the Human Resource Director who was the complainant and prosecutor at the same time.
22. That the appeal review was conducted more than 10 days contrary to the disciplinary, procedure-process flow chart. That the appeal was lodged on 21st December 2020 and the same was received by the Respondent on 22nd December 2020, he received the response dated 22nd January 2020 raising other new allegations of insubordination, negligence in regards to performing duties, rebellious attitude and not upholding G4S values.



23. He contended that the Respondent failed to decide on the outcome of the appeal within two (2) days of the conclusion of the appeal hearing and provide written reasons.
24. That further, the Chairperson appointed to handle the appeal review was junior to the person who initially handled the disciplinary hearing, and therefore he could not overturn the decisions made by his Line Manager.

Respondent's Case

25. The Respondent called oral evidence through Ms. Anne Gitonga who testified as RW1. She identified herself as the Respondent's Human Resource Business Partner. At the outset, RW1 adopted her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits.
26. It was RW1's testimony that in his new role, the Claimant was not entitled to a bonus payment in accordance with the Respondent's grading structure. That it is not correct that the Respondent has denied the Claimant bonus payments in 2019 and 2020.
27. She stated that the Claimant was required to undertake the following tasks, among others; To undertake leave management; Management of disciplinary cases; Weekly preparation of human resources metrics for employees in the region assigned to him; and Induction of new employees.
28. It was her evidence that on or around November 2020, it became apparent that the Claimant had become increasingly negligent in the performance of his duties leading to his eventual termination on 15th December 2020 for negligence in handling disciplinary cases and leave reconciliation, poor work attitude and teamwork and reporting late to duty.
29. That the Respondent has a large workforce of over 10,000 employees and at any one time, there are many disciplinary matters to be handled by the Human Resources team.
30. As a Senior Human Resources Business Partner, the Claimant was required to conduct disciplinary hearings, prepare minutes of the hearing, recommend a verdict, and seek approval from Elijah Sitimah, the Human Resources Director (his "supervisor") on the verdict.
31. RW1 stated that sometime in November 2020, the Claimant postponed hearings without good reason and failed to engage his colleagues to collaborate and assist him. She averred that postponed hearings present a challenge to the Respondent as justice is delayed for the employees and their pay is affected.
32. That on 10th November 2020, the Claimant had seven (7) disciplinary cases to attend to, one (1) of which had been pending since 5th November 2020. The Claimant reported to the courier office on that date at 9:22 a.m. but did not appear for the hearings. He wrote to the Customer Service Manager on that date and informed him that he was in training all morning, and this was the reason why he could not attend the hearings.
33. The training that the Claimant attended was scheduled from 9:00 a.m. to 11:00 a.m. and ended before the allocated two (2) hours were over. The Claimant had six (6) more hours in the day within which to attend the hearings, but he failed to do so.
34. The Claimant suggested that the hearings be undertaken online but besides making that suggestion, he did not make a serious effort to proceed online, and the hearings had to be postponed to 12th November 2020 for no good reason.



35. On 11th November 2020, the Claimant wrote to his supervisor requesting him to nominate someone else to handle the hearings of 12th November 2020 because he was going for an assignment in Magadi.
36. The Claimant's trip was not made at the last minute. He had been aware of it since 9th September 2020, and he had ample time since 10th November 2020 to make alternative arrangements when he was made aware that the disciplinary hearings were postponed to 12th November 2020.
37. It was RW1's evidence that in his capacity as the Senior Human Resources Business Partner, the Claimant was responsible for independently managing disciplinary hearings and working collaboratively with other Human Resource Business Partners. The Claimant neglected to designate a colleague who could assume his responsibilities, instead choosing to delegate the task upwards to his supervisor. As a result, his supervisor had to hastily enlist assistance at the 11th hour to ensure the hearings were conducted punctually.
38. That the Claimant, was also required to prepare minutes of the disciplinary hearings that he attended for record purposes.
39. It was her evidence that the Claimant prepared poorly written minutes and at times failed to provide sufficient documentation needed for a professionally and properly handled hearing.
40. On 2nd October 2020, the Claimant forwarded to his supervisor an appeal case relating to three (3) employees. That ordinarily, when a disciplinary matter is handled, the investigation report and minutes are forwarded to his supervisor with a recommendation of the verdict to take which the supervisor is required to give guidance on. That in that matter, following the conclusion of the hearing the Claimant went ahead and implemented the verdict without his supervisor's approval. He did not provide any valid reason for undertaking this action.
41. On 5th October 2020 the Claimant sent an email to his supervisor to review and approve disciplinary action and verdict for an employee. The minutes shared by the Claimant were of poor quality with many spelling mistakes and inadequate content. This was not the first time the Claimant had submitted minutes of this nature.
42. On 29th October 2020, the Claimant was requested to submit documentation substantiating a dismissal verdict for an employee who was accused of insubordination. The Claimant had recommended dismissal for the employee and when asked to share the investigation report and/or evidence showing the insubordination to approve the verdict, he failed to do so.
43. In another matter on 5th November 2020, the Claimant wrote an email to his supervisor to review disciplinary hearings for two employees. When the minutes were reviewed, it was noted that the Claimant had merely copied the investigation report and had not recorded the statements made during the disciplinary hearing. He was cautioned against doing so because it did not reflect the hearing that took place and the explanations given.
44. RW1 further stated that the Claimant is responsible for proper leave recording and reconciliation of leave for employees in his area of responsibility. This is a key performance indicator in the Claimant's performance contract. The matter of leave was critical in 2020 as it was a business objective to ensure that leave days were utilized to reduce liabilities.
45. The Claimant was required to ensure that the opening balances, leave taken and closing balances on the ER and RAMCO systems were accurate.
46. Instead of performing these duties himself as was his mandate, the Claimant delegated this duty to the Operations Department and insisted that it was not his work but that of the operations team.



47. That the Regional Operations Manager wrote to the Claimant on 24th July 2020 requesting that a leave tracker be saved in the shared drive visible to both Human Resource and Operations teams to be used for updates and reports. The Claimant refused to do so and stated that he preferred to use excel sheets.
48. The Regional Operations Manager wrote to his supervisor on 25th July 2020 requesting for another Human Resources Business Partner to work with because the Claimant was being uncooperative.
49. The Claimant's supervisor had to intervene to ensure the completion of leave reconciliation for that region as the Claimant displayed reluctance in working harmoniously with colleagues.
50. RW1 further stated that on or around 21st October 2020 the Claimant was asked to provide a leave plan for 544 employees who had pending leave balances and a schedule for 2021 leave. He did not undertake this duty and instead delegated it to operations. That the Claimant did not take this task seriously.
51. She further stated that on many occasions, the Claimant refused to sit in for his colleagues when they were on leave forcing them to hold hearings online when on leave.
52. That further, the Claimant failed to provide information and documents requested by a colleague for a matter where a claim had been filed in court. He complained that it was not his responsibility.
53. It was RW1's further evidence that when the Claimant sought for leave in early November 2020, he was asked how he would handle pending items. He had a new contract matter coming up and some minutes that he had been asked by his supervisor to re-submit. He did not identify any of his colleagues who would relieve him while he was away, and his supervisor was thus forced to decline his request until a time he had a plan to handle pending items.
54. That further, the Claimant was required to work between 8:00 a.m. to 5:00 p.m. as per the Respondent's policy. However, he habitually reported late to work on various dates between August and November 2020 and departed early.
55. RW1 stated that the Claimant's performance overall was poor and of unacceptable standards.
56. He was issued with a Notice to Show Cause on 13th November 2020 and was suspended from duty on 23rd November 2020 pending a disciplinary hearing.
57. The Claimant's disciplinary hearing was held virtually on 7th December 2020. She (RW1) attended the hearing as the secretary to the disciplinary committee.
58. According to RW1, the hearing was conducted in a fair manner and the Claimant made his representations to the panel. The Claimant's witnesses who were present were also allowed to state the case on his behalf.
59. She is aware that following the hearing, the disciplinary committee resolved to terminate the Claimant from employment. She is also aware that the Claimant appealed the finding, but his appeal did not succeed.
60. In RW1's view, the Claimant was terminated fairly in accordance with the internal disciplinary process and Section 41 of the *Employment Act*.

Submissions

61. On his part, the Claimant submitted that the material placed before the Court clearly shows that he had never received any warning as regards performance and that he was even awarded a bonus for his



exemplary performance. He argued that the Respondent did not prove that his performance became poor abruptly to warrant an immediate exit.

62. Citing the case of *Jane Samba Mukula v Oltukai Lodge* (2010) and *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR, it was the Claimant's submission that the Respondent failed to prove on a balance of probability that the reason for terminating his contract of service was valid as required by Section 45 of the *Employment Act*.
63. The Claimant further submitted that the Respondent's action flouted the *Constitution*, the *Employment Act*, the tenets of good Labour practice and the principles of natural justice.
64. The Respondent on the other hand submitted that the Claimant's termination was based on misconduct and not on account of poor performance. In this regard, the Respondent posited that the procedure to be followed in the disciplinary process leading up to termination is that of termination on account of misconduct and not for poor performance as submitted by the Claimant. On this score, the Respondent placed reliance on the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* (2015) eKLR and *Kenya Revenue Authority v Reuwel Waitbaka Gitahi & 2 Others* (2019) eKLR.
65. It was the Respondent's position that in their totality, the Claimant's actions amounted to negligent performance of his duties and these were valid grounds for terminating his employment.
66. The Respondent further posited that having established that the Claimant's employment was terminated on account of misconduct and not for poor performance, there was no obligation to place him under a Performance Improvement Plan prior to his termination.

Analysis and Determination

67. I have considered the pleadings by both parties, the evidentiary material on record, together with the rival submissions, and isolated the following issues for determination: -
 - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

68. In determining this question, regard must be had to the provisions of Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Connected to the aforementioned statutory provision, is Section 45 (2) (a) and (b) which provides that a termination of employment is unfair if the employer fails to prove: -
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
69. The Claimant herein was terminated on grounds of gross misconduct constituting the following reasons:



- i. Poor execution of disciplinary hearings and constantly providing incomplete work to his manager;
 - ii. Poor leave record management and reporting which contributed to unresolved leave issues and inaccurate leave provision for Nairobi South and MSS in general;
 - iii. Failure to give timely feedback to his supervisor as required in several instances e.g 6th November 2020;
 - iv. Constantly reporting to work late which contributed to work neglect and poor quality of work.
70. It is the Claimant's contention that the grounds leading to his termination were performance related issues. The Respondent has disagreed with that position and avers that the Claimant's termination from employment was based on gross misconduct and not on account of poor performance.
71. Revisiting the first three grounds of termination, it is apparent that the same relates to the manner in which the Claimant executed his work and delivered on his assignments. It is thus clear that this had to do with improper performance of duty under Section 44(4) (c) of the *Act*. This is quite distinct from poor performance which relates to failure to meet assigned targets over a specific period.
72. Regarding the allegation of poor execution of disciplinary hearings and providing incomplete work to his supervisor, the Respondent averred that the Claimant would postpone disciplinary hearings without good reason and fail to engage his colleagues to collaborate and assist him. It was the Respondent's case that on 10th November 2020, the Claimant had seven (7) disciplinary hearings to attend. That he reported to the courier office on that date and did not report for the hearings. That the Claimant's defence was that he was in training all morning. According to the Respondent, the training was scheduled from 9:00 am to 11:00 am and ended before the allocated two (2) hours were over hence the Claimant had six (6) hours in the day within which to attend the hearings but failed to do so.
73. On his part, the Claimant averred that he informed James Muthike by email that he was held up in training. That further, he informed him when he was done but got no response hence the disciplinary hearing was cancelled without consulting him even after he had requested his manager to find someone else to stand in for him. He further averred that on 12th November 2020, his manager knew that he had a crucial exercise at Magadi hence there was need to reschedule the meetings.
74. Turning to the record, it is apparent that in an email dated 10th November 2020, the Claimant addressed James Muthike as follows:
- “I was in training for the better part of the morning. Let's do this online. Please nominate someone to take minutes from that side. Tell me when you are ready.”
75. Further, in his email of 11th November 2020, the Claimant notified his immediate supervisor that he had informed the operations team that they do the hearing online at 1025 hours but they did not respond. He further stated that the Operations team had later rescheduled the meeting to 12th November 2020, a date he was unavailable as he was undertaking another assignment at Magadi.
76. From the record, it is not apparent whether it was the Claimant's office or the Operation's office that was responsible for convening and spearheading disciplinary hearings. Having reviewed the Claimant's performance objectives, I note that handling and management of disciplinary hearings is not listed as part of his performance objectives. Therefore, the Respondent's assertion that the Claimant was responsible for independently managing disciplinary hearings was not supported by the evidence on record. If I may say, the Claimant's level of responsibility in this regard is not evident from the record.



77. Be that as it may, judging from the email correspondence on record, I am led to conclude that this was a shared responsibility seeing that the Respondent has not refuted the Claimant's assertions that the Operations office rescheduled the hearings to 12th November 2020, a date he was not available.
78. Therefore, placing blame at the Claimant's doorstep with regard to the management of the disciplinary hearings, does not in my view, constitute a fair and valid reason for termination of his employment.
79. With regards to the quality of the disciplinary proceedings taken by the Claimant, it is notable that the Respondent did not indicate, much less suggest that there was an approved standard way of recording disciplinary proceedings. It is also notable that through an email of 6th November 2020, the Claimant's supervisor instructed him to rework the minutes and guided him accordingly. There is no evidence that the Claimant disregarded the guidance from his supervisor and repeated the same mistakes in subsequent disciplinary proceedings.
80. Again, it is my view that this was not a valid and fair ground to terminate the Claimant's employment.
81. The Claimant was further accused of constantly reporting to work late. I must say that this allegation was not substantiated by the Respondent as no evidence confirming the Claimant's lateness to work was adduced. Further, it is noteworthy that the specific dates the Claimant was alleged to have reported to work late were not specified. As such, it is not possible to ascertain whether the said reason meets the fairness and validity test.
82. Turning to the allegation of poor leave record management and reporting, the Respondent averred that the Claimant delegated this duty to the Operations Department and insisted that it was not his work.
83. On his part, the Claimant stated that the Respondent failed to provide him with all reasonable assistance including suitable training, coaching, and mentoring.
84. From the record, the Claimant's performance objectives constituted leave management and in this regard, he was responsible for RAMCO. Therefore, it is clear that this responsibility fell within his docket.
85. The manner in which the Claimant handled his assignment is evident from the email correspondence he exchanged with his counterparts. I will sample a few.
86. In an email dated 24th July 2020, David Muthee addressed the Claimant as follows:

“Daniel,

My team finished updating the leave dates in the shared drive awaiting you to capture in RAMCO. After you are done, please share another report on Monday for final reconciliation.

Agneta of Nairobi North has developed an excellent leave tracker which the Northern team operates in the shared drive. This has been very successful and the region has one of the lowest differences between ER and RAMCO. We can learn this best practice from them, they have also learnt a lot of best practices from us.

Agneta, thanks for taking me through the Northern Region shared leave management tracker. Looks excellent.

Regards.



87. The Claimant reverted as follows:

“That drive doesn’t work for me. It is subject to abuse and has no accountability. I am looking forward to each of the csm’s sending the leaves directly to me on excel. If this is achieved I will be able to trace and correct anything if need be and I can know specifically which Manager to address. I cannot do that in a shared drive where everyone has edit rights. We have been doing this with your team since 2017 and I don’t see the need to change this now.

I am the one who is consuming the data and sending a direct excel file works for me.

The disparities in ER and Ramco is not caused by a drive or an excel sheet. It is caused by human beings, so let’s not waste time on non-issues.

Please communicate with your team what I require so that we can close on Monday.”

88. In response to the Claimant’s email, David Muthee stated as follows:

“Dear Elijah and Jane,

I do not wish to engage further with Daniel on this matter. A lot of writing does not solve a problem and blame games are not the way forward. All of the other Nairobi South performance parameters are excellent apart from this one which Daniel manages Nairobi area is not like other regions and it requires a serious HR business partner who is a great team player. We religiously send weekly excel leave reports but am always in darkness in knowing whether the same has been captured in RAMCO. A well-managed shared drive leave management report will provide visibility to all of how leave is captured. From 2017, we have done very tedious leave reconciliation reports which wastes a lot of management time.

There is a lot of pressure to deliver on all deliverables and I transform secure solutions and I would like to deal with a HR business partner who is result oriented and not the one who is defensive to portray himself as perfect. Please let me deal with another HR business partner.

Regards.”

89. In this Court’s view, the foregoing email correspondence discounts the Claimant’s assertions that he was not accorded reasonable assistance to deliver on the task. From the record, he did not need any coaching or mentorship in the area. He merely needed to synergize with the rest of the group so as to undertake the assignment in a proper manner. Quite the contrary, it is apparent that the Claimant was pulling in a different direction and wanted to do the assignment his own way.

90. Indeed, the lack of synergy by the Claimant became apparent in an email dated 24th September 2020, from the Compensation and Benefits Manager, which noted that as per the report of leave taken between ER and RAMCO (which was under the Claimant), there was a large difference and needed explanation. She noted that overall, there was a 10% difference between ER and RAMCO with ER being higher.

91. The foregoing confirms that the Claimant did not undertake his assignment with regards to leave management in a proper manner.

92. Section 44(4) (c) of the Act, justifies an employer to summarily dismiss an employee where he or she willfully neglects to perform any work which it was his duty to perform, or if he or she carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.



93. Applying the aforesaid provision to the instant case, it is evident that the Claimant's improper performance of duty with regards to leave management rendered him liable to dismissal from employment. This is more so noting that management of leave had a financial bearing. I say so because, during the Claimant's disciplinary hearing, it was noted that leave costs for the organization in 2020 was over 50 Million. This is a clear indication of the need for the Claimant to undertake his assignment of leave management in a proper manner.
94. To this end, it is my finding that by his own actions and omissions, the Claimant availed the Respondent a valid and fair reason to terminate his employment on account of failure to undertake his assignment with regards to leave management in a proper manner.

Procedural fairness?

95. The requirement for compliance with a fair procedure in termination of employment is generally provided for under Section 45 (2) (c) of the Act. The specific requirements encompassing a fair hearing are provided under Section 41 of the Act.
96. With respect to this, an employer is required to notify an employee of the intended termination in a language he or she understands. Further to that, the employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her and in so doing he or she is entitled to have a fellow employee or a union representative of own choice.
97. In the instant case, the Claimant was issued with a Notice to Show Cause dated 13th November 2020 detailing the allegations against him. He responded through his letter dated 16th November 2020. Subsequently, he was issued with a Notification of Disciplinary Enquiry dated 23rd November 2020. He was notified *inter alia* of his right to call any witnesses and to challenge all evidence presented.
98. On 7th December 2020, the Claimant appeared for a virtual disciplinary hearing accompanied by his witnesses. The record of the disciplinary hearing reveals that he was given an opportunity to present his case. His witnesses were further given an opportunity to make representations before the disciplinary panel.
99. The Claimant's contention is that he was not issued with a formal warning of his misconduct. On this score, the Claimant has placed reliance on the provisions of Clause 8 of the Respondent's Disciplinary Policy.
100. The aforementioned Clause 8 provides as follows:

“Depending on the circumstances and the seriousness of the offense in question, disciplinary action may take one of the following forms:

Verbal explanation or informal reprimand; Cautionary letter/first written warning
Second written warning
Termination of service; Summary dismissal...” underlined for emphasis
101. My understanding of the aforementioned clause is that the disciplinary actions enumerated were not to be applied in a sequential manner and that any action could be undertaken depending on the circumstances and seriousness of the offence in question. Therefore, the Respondent cannot be faulted for not issuing the Claimant with warnings prior to terminating his employment. It had the liberty to bypass that process.
102. The Claimant's further contention is that the panel was not neutral since the complainant was also the prosecutor.



103. Revisiting the record, it is clear that the Claimant's supervisor Elijah Sitimah is the one who issued him with the Notice to Show Cause. Looking at the allegations set out in the said Notice to Show Cause, it is apparent that all of them related to the issues that had constantly come up for discussion between the Claimant and the said Elijah Sitimah.
104. Indeed, the allegations levelled against the Claimant fall within the context of the bulk of the email correspondence exchanged between him and Elijah Sitimah. Therefore, it may very well be said that the Claimant's supervisor, Elijah Sitimah was the complainant in this case, as well as a potential witness.
105. A perusal of the disciplinary proceedings reveals that Elijah Sitimah sat as one of the panelists and was identified as the company representative. Therefore, he fully participated in the decision-making process leading up to the Claimant's termination from employment.
106. As it is, Elijah Sitimah was the complainant, the prosecutor, a potential key witness and the decision maker. Needless to say, his participation albeit in an official capacity, portrayed a sense of bias and a conflict of interest. Being a complainant against the Claimant, it was only fair and just, that he keeps off the proceedings relating to the Claimant's disciplinary case. This is further noting that his relationship with the Claimant was very strained if the record is anything to go by.
107. This scenario brings to mind the determination in the oft cited case of *Ridge v Baldwin* 1964 A.C 40 in which Lord Hudson identified the principles of natural justice as being: -
 - i. The right to be heard by an un-biased Tribunal;
 - ii. The right to have notice of the charge of misconduct; and
 - iii. The right to be heard in answer to these charges.
108. The principle with regards to bias prohibits a person from deciding any case in which he or she may be, or may fairly be suspected to be, biased. What is apparent in the instant case, is that there was a likelihood of bias in view of the role and the level of participation by Elijah Sitimah.
109. Subsequently, in as much as the Respondent appeared to have complied with the statutory requirements of Section 41 of the Act, the level of participation of Elijah Sitimah who was a complainant against the Claimant marred the entire disciplinary process and presented a likelihood of bias. To this end, and when viewed in a holistic manner, the process did not seem fair against the Claimant.
110. In the end, and taking all factors into consideration, I cannot help but find that the Claimant's dismissal was not procedurally fair.
111. What reliefs then avail the Claimant?

Reliefs?

112. Having found that the Respondent had a fair and valid reason to terminate the employment of the Claimant but failed to accord him a fair hearing, the Court awards him compensatory damages equivalent to three (3) months of his salary. In arriving at this award, the Court has considered the length of the employment relationship and most of all, the contribution of the Claimant to the termination of his employment.
113. From the record, the Claimant was paid salary in lieu of notice, days worked, and leave days. He admitted receiving the payments during cross-examination. Therefore, this prayer collapses.



114. With regards to bonus for the years 2019 and 2020, the Claimant did not provide a basis for grant of the same. In this case, there was no evidence that a bonus was declared for the said years. Further, the Claimant's letter of appointment of Senior Human Resource Business Partner is clear that the appointment was a fresh appointment. Indeed, there was no indication in the said letter that this was a lateral move from his previous position as Vetting Manager. Further, it is imperative to note that the said letter did not indicate that he was entitled to bonus pay.
115. The claim for severance pay is declined as the same is only payable under Section 40(1) (g) of the Act where termination is on account of redundancy. This was not the case herein. Equally, the claim for gratuity is declined as the same was not contractually provided for.

Orders

116. The total sum of my consideration is that Judgment is entered in favour of the Claimant against the Respondent and the Court makes the following award:
- a. Compensatory damages in the sum of Kshs 522,150.00 which sum is equivalent to three (3) months of the Claimant's gross salary.
 - b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
 - c. The Claimant shall also have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of May 2024.

STELLA RUTTO

JUDGE

In the presence of:

Ms. Muthiani instructed by Mr. Makori for the Claimant

Ms. Kwamboka for the Respondent

Millicent Kibet Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

