



Boniface v Teachers Service Commission & another (Cause E014 of 2023) [2024] KEELRC 2075 (KLR) (6 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2075 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E014 OF 2023
ON MAKAU, J
AUGUST 6, 2024**

BETWEEN

JANE WANGARE BONIFACE CLAIMANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Claimant and the 1st respondent are in an employer-employee relationship since 1997. The claimant brought this suit on 26th May 2023 seeking the following reliefs: -
 - a. A declaration that the interdiction, disciplinary action and suspension of the claimant were irregular and/illegal for not meeting the requirement of the TSC Code and the requirements of the *Fair Administrative Action Act* thus unlawful, null and void ab initio.
 - b. A declaration that the administrative action taken against the claimant was not fair and did not meet the threshold of the Fair Administrative Act under section 4 of the Act.
 - c. An order lifting the suspension and an order for the reinstatement of the claimant’s service of the respondent as a principal with effect from February, 2022 up to 14th December 2021 without a break in service with full benefits, as per prevailing terms of service and to continue in service till the due date of retirement or until otherwise date of lawful separation.
 - d. An order for payment of all salary which was irregularly recovered, withheld, the benefits, and annual increments and promotion for the period she was on interdiction and suspension from September 2020 up to December 2021 amounting to Kshs.3,665,990.00.
 - e. An order for payment of outstanding irregular recoveries of Kshs.321,370.50.



- f. An order for exemplary damages for mental anguish, torture, in human treatment and embarrassment.
 - g. Compensation for wrongful interdiction and suspension of 12 months wages and general damages emoluments/contingencies at a rate of 15%.
 - h. An order for payment of annual leave at Kshs.10,000 for the two years she was on interdiction and suspension amounting to Kshs.20,000.
 - i. An order for payment of her disturbance allowance on transfer (one-month salary) amounting to Kshs.171,144.00.
 - j. An order for payment of the claimant's disrupted medical cover when she was on interdiction and suspension amounting to Kshs.10,500.
 - k. An order that the costs consequent upon this claim be borne by the Respondents.
 - l. Any other orders that this Honorable court shall deem fit and just to grant.
2. The 1st respondent filed defence on 26th October 2023 opposing the suit on grounds that it is res judicata and that the disciplinary proceedings and action under review were lawful. Therefore, it prayed for the suit to be dismissed with costs.
 3. The 2nd respondent did not enter appearance probably because no allegations were made against it or any reliefs sought against it.

Claimant's case

4. The claimant averred that she was employed as a graduate teacher by the 1st respondent on 22nd December 1997 and on 14th March 2008 she was confirmed. Thereafter, she rose through the ranks to the position of Principal TSC No.388906.
5. By a letter dated 10th December 2019, she was transferred to Ncoroiboro Secondary in Meru from Laikipia Garrison Secondary School. The transfer took effect from 16th December 2019. She appealed the transfer but no response came immediately. She handed over the school to the new principal on 30th December 2019 and was released by the 1st respondent the County Director Laikipia on 20th January 2020.
6. On 27th January 2020, she went to take over the new school in Meru but the exercise was frustrated by the handing over team. To begin with the exercise was to start at 10.00am but on arrival she was told the time had been rescheduled to 2pm. She waited until 2pm when the team called her into the meeting. When she greeted them, no one responded.
7. The process went on well until the issue of finances was reached and she asked for cash Books and Bank Statements for the school. The Auditor became hostile and told her that there were no manual cash books because the school had accounting software system but it was down that time. She asked for a print out but it was not availed to her. There was a deadlock and she stepped out to call the County Director who was on transit and told her she would consult with the sub-county Director who was in the same team and return to her.
8. The handing over team did not heed to her demands for proper hand over of finances and she drove to the office of County Director and met the Deputy County Director and explained her frustrations. He then told her to wait for the County Director to call her as she had advised her earlier. Therefore, she entered her details in the Visitors Book and went away.



9. The Director never called her as promised but instead she wrote a letter dated 29th January 2020 to the 1st respondent's Head office requesting for another Principal for the school. During the said time she was going through difficulties in her marriage and was sick. Her sick off was lapsing on 14th February, 2020. Thereafter, Covid-10 Pandemic was declared and all schools were shut down until October 2020. During the said time she could not get sick off from both Laikipia and Meru County Directors because they had disowned her.
10. She visited the respondents Head office on 13th October 2020 and she was told to write down where she was, why she delayed going to the office and give her address. She was then told to wait for communication. Due to Covid-19 containment measures she was not to go past customer care desk.
11. She received no communication and went back on 16th October 2020, 16th November 2020 and 1st December 2020. On 11th January 2021, she visited the office again and she was given an interdiction letter for allegation that she had declined transfer to Ncoroiboro Secondary School. She was not served with a show cause letter or desertion letter before the interdiction. The procedure requires that a desertion letter be served after absence for 14 days but that procedure was not followed. It is her who visited the offices severally to seek direction after the Covid-19 lock-down was lifted.
12. She responded to the interdiction letter within the time lines and after waiting for 7 months she was called for a hearing on 9th August 2021. She was asked to provide documents but since it was a virtual meeting she was unable to produce any document and she was not allowed to refer to the documents during the hearing. No witnesses were called to testify against her including the members of the handing over team or the TSC Directors or even from the Ministry of Education.
13. After the hearing, she waited for the verdict which came after three months via WhatsApp. It was a letter suspending her for three months from 9th August 2021 for the same reasons cited in the interdiction letter. The letter also advised her that a posting letter would be sent before the lapse of the suspension period.
14. Three months passed but no posting letter was sent to the claimant and she wrote to the respondent and even visited the Head office for follow up. Again, she was told to wait for communication. On 30th November 2021, she served a demand letter through an Advocate and on 8th December 2021 she received a phone call from a Mr.Njeru who directed her to report to TSC County Director Nyeri to pick a posting letter and be ready to report to work the following day.
15. She complied with the directions and picked the letter posting her to Mere Secondary School as Principal. She then reported on 9th December 2021 where she is still working.
16. She maintained that the reason for the interdiction and the ensuing suspension was not valid because she went to take over the Ncoroiboro Secondary school on 27th January 2020 and was ready to perform her duties but she was frustrated by the handing over team. She prayed for refund of all the money recovered as overpayment for the period 27th January 2019 to 30th September 2020 totaling to Kshs.1,049,916.25 because the recovery was unlawful.
17. She further prayed for payment of salary from September 2020 to December 2021 totaling to Kshs.2,738,304. She further prayed for payment of leave allowance for 2020 and 2021 at the rate of Kshs.10,000 totaling to Kshs.20,000. She also prayed for Kshs.10,500 she paid to NHIF because her salary had been stopped unlawfully.
18. She contended that the employer treated her unfairly and unlawfully and denied her opportunity to work. She visited the office in 22 months seeking directions but instead, her salary was stopped and



she was interdicted. Thereafter, the disciplinary process took a long period of time before completion. As a result, she suffered mental anguish and her family was seriously affected including her daughter being forced to defer her studies at the Technical University, Nairobi where she was taking Engineering Course. She was denied income and she could not seek alternative job because she was still in respondent's employment. Therefore, she urged for award in prayer (a)- (l) of the claim.

19. On cross examination, she stated that she has been a principal since 2012 and it was not her first time to take over a school. She explained that taking over process involves school BOM members, TSC County Director or representative, Ministry of Education (Sub-county Director of Education), the two Principals, Ministry Auditor and School Accounts Clerk. The sub-county Director of Education presides over the exercise. The outgoing Principal hands over a Report including: -
 - a. Number of students.
 - b. Buildings.
 - c. Furnitures
 - d. Workers
 - e. Assets
 - f. List of liabilities-creditors and debtors
 - g. Finances-
 - i. Receipts
 - ii. Up to date Bank Statements
 - iii. Account details
 - iv. Signatories
 - v. Cash in hand
 - vi. Cash Book
 - vii. Fees registers etc.
20. Everybody in the team has to have a checklist prepared by the outgoing Principal for verification. They tick the spaces after verification and then all signs. In case of disagreement guidance is sought from higher authority.
21. She stated that she went to the school on 22nd January 2020 to register her willingness to take over the school and on 27th January 2020 to take over the school. She was given a checklist and a handover/ taking over documents prepared by the Ministry. They verified and ticked some items until they reached the Finance part when she noticed a problem. Only the Auditor had Bank statemenst and nobody else. She suggested that everyone should have a copy but only her was given the available copy.
22. Another problem was lack of a cash book of which she was told that the school had an Accounting Software and the system was down. She asked for a print out but none was availed. There was a stalemate about the financial records which is a function of the Ministry. Her demands for financial records were not responded to since both the TSC and Ministry representatives kept quiet. She then stepped out to consult with the TSC County Director who promised to talk to her Sub -county Director.



23. She returned to the meeting and the Sub-county Director went out to speak to the County Director over the phone. When sub-county Director returned she asked her whether she had declined to take over the school and she replied, no. The meeting was stopped and she went to consult with the County Director.
24. She admitted that from 27th January 2020 to September 2020 she never worked but she was paid salary. She was waiting for directions from the employer and she was also sick. She had sick leave from 29th January 2020. She sought another sick leave from both Meru and Laikipia Counties but she was told that she belongs to none of the two Counties. She admitted that absence from work for 14 days continuously is considered as desertion but stated that desertion must be viewed in context of a specific work station. She was no longer a Principal of Ncoroiboro Secondary School and there was also a lock down due to Covid-19 Pandemic from March -October 2020.
25. She admitted having appealed the transfer on 13th January 2020 but when no response came she proceeded to take over the school on 27th January 2020. She never received the letter dated 10th February 2020 by Njeru TSC Headquarters which acknowledged receipt of her appeal. The letter was addressed to her former school.
26. She maintained that during the disciplinary hearing she had sick sheets but because it was virtual session she was not allowed to produce or refer to the same and the panel wrongly indicated that she never sought sick leave. She reiterated that due to lock down from March-October 2020 due to Covid-19 pandemic, it was not even necessary to seek for a sick leave.
27. She admitted that she never wrote a letter about the difficulties she faced in taking over Ncoroiboro Secondary school but reiterated that she spoke to the TSC County Director and also registered the same in the visitors book at the office of the Deputy Director.
28. She admitted that she was given an interdiction letter and wrote a defence. Thereafter she attended a virtual hearing and told the panel her story. She was asked questions by a Mr.Oyoo alone and thereafter the decision was sent to her via WhatsApp and later went for the letter from the County Office. She was not satisfied but she never appealed because she felt mistreated.
29. In re-examination, she stated that the letter dated 10th February 2020 was not genuine and must have been backdated because another Principal had already been posted to the school. She contended that her demand for accounting books or computer print out of the same was a genuine demand in order for her to get a proper taking over of the school because she could not take over without accounting documents. She faulted the TSC County Director for not addressing her grievance and instead wrote a letter on 29th January 2020 requesting for another Principal to be posted to the school.
30. She denied being absent from work and stated that she could not allocate herself another school after Ncoroiboro Secondary was given another Principal. She was willing to work but there was no posting. She was also given sick sheet but both Meru and Laikipia offices refused to sign and told her she was not in their respective counties. She denied that she breached the contract and law.

1st Respondents case

31. The 1st respondent admitted that it employed the claimant on 22nd December 1997 as a graduate teacher and later rose to the position of School Principal. Her contract of employment is regulated inter alia, the [Employment Act](#), Teachers Service Commission (TSC) Act and the Code of Regulation for Teachers (CORT), 2015.



32. It averred that the claimant was transferred from Garrison Secondary school to Ncoroiboro Secondary as a Principal with effect from 16th December 2019 and she was released on 20th January 2020. However, she refused to cooperate during handing over/taking over exercise citing unresolved appeal for re-routing and/or re-consideration of the transfer to the new station. As a result, she was interdicted vide the letter dated 11th January 2021 for defying lawful direction by declining transfer, and refusing to take up the new station. The said conduct violated the CORT hence the interdiction to pave way for disciplinary process.
33. She responded vide her letter dated 24th January 2021 and she was invited to a hearing by the letter dated 7th July 2021. The disciplinary hearing was conducted on 9th August 2021 and upon consideration of the documents attached to the response to the interdiction letter and the claimant's oral evidence, it was determined that she had breached the CORT and she was sentenced to three months suspension from duty and recovery of any salary over payment she may have received. The decision was communicated by a letter dated 25th August 2021.
34. The 1st respondent contended that the disciplinary process was fair and the claimant fully participated in every critical stage. The interdiction, disciplinary action and suspension of the claimant met the threshold set under the law and *the Constitution*. The administrative action by the 1st respondent was fair and cannot be faulted in any way. Regulation 148 (b) did not permit payment of salary to any teacher interdicted for absence from work without permission. The prayer sought are contrary to public policy and granting the same would create a bad precedent.
35. Justin Mugambi testified for the respondent as RW1 and adopted his statement dated 7th March 2024. He testified that on 27th January 2020 he went to hand over Ncoroiboro Secondary to the claimant but she protested at the financial stage demanding manual cash books. The demand could not be met because the school had Accounting system unlike Garrison secondary school which was using manual books. She had had exchange with the Auditor and then she stormed out saying that she has been harassed. He therefore handed over the school to the Deputy Principal.
36. On cross examination, he admitted that he never gave evidence during the disciplinary hearing. He contended that copies of all the documents required for handing over including cash book and trial balances were generated from the Accounting System. However, he admitted that he did not indicate that in the handing/taking over report. He also did not report the said documents in court.
37. He admitted that the claimant attended the meeting ready to take over the school. He further admitted that he had not sent to her an advance copy of the report in soft copy. The County Director never called him and the claimant together.
38. RW1 was Doreen Munene, Assistant Director TSC-Discipline. She adopted her written statement dated 6th March 2024 as her evidence. The statement is duplicate of the averments pleaded in the Defence.
39. On cross examination, she confirmed that she was not in the panel that heard the claimant and also never attended the hearing. However, she read the proceedings of the hearing and contended that the hearing was physical not virtual. She admitted that she has never dealt with handing over/taking over documents but contended that the claimant never took over and she wrote to the TSC Headquarters.
40. She stated that the hearing delayed because the claimant was at large. She explained that the reason for not taking over was family issues and lack of accounting books. She wanted hard copies of what was in the software system. RW1 contended that the claimant should have taken over the school minus the finances.



41. She was unaware that the County Director wrote a letter on 29th January 2020, 2 days after the meeting, requesting for a new Principal. However, she stated that a Principal is replaced immediately because a school cannot proceed without a Principal. She admitted that schools were closed from March 2020 to October 2020 due to Covid-19 but contended that Principals were supposed to be in school to manage government property.
42. She admitted that they recovered salary from the claimant for the period when the schools were closed and contended that she refused to take over the school even before schools were closed down due to Covid-19.
43. In re-examination, she clarified that her duties involve discipline and not handing/taking over schools. Finally, she contended that claimant complained of sickness and that the transfer was affected by ethnicity of her husband who came from a different place.

Submissions

44. It was submitted for the claimant that she had discharged the burden of proof of her case. It was urged that the standard of proof for civil cases is on a balance of probability. Therefore, the court was urged to enter judgment for the claimant as prayed in prayer (a) to (l) of the claim.
45. It was also submitted that the claimant is entitled to aggravated damages to compensate her for the distress caused on her by the employer plus exemplary damages to punish the employer and deter others from doing the same thing. For emphasis, reliance was placed on the case of Dr.Odhiambo Olel v Attorney General, Kisumu HCC 366 of 1995 where the court awarded exemplary damages of Kshs.4 million.
46. In the instant case, it was submitted that an award of Kshs.20 million is reasonable for mental anguish, torture, inhuman treatment and embarrassment. It was argued that the claimant's medical cover was cancelled when she was sick; her full salary was stopped without notice or justification for 16 months; no show cause letter was served before stopping the salary; her daughter dropped from the University because of the salary stoppage.
47. On the other hand, it was submitted for the 1st respondent that the claimant failed to cooperate during the taking over of her new station as the Principal. It was submitted that RW1 testified that print out of all the school's financial records required for taking over were availed to the claimant but she insisted on manual books of accounts. It was further argued that RW2 testified that the claimant refused to take over the school citing family/personal issues.
48. It was further submitted that at the disciplinary hearing, the 1st respondent's panel considered the defence by the claimant but found the evidence submitted by the witnesses persuasive, consistent, compelling and coherent, and punished her with a suspension.
49. It was further submitted that the disciplinary proceedings against the claimant were not tainted with procedural impropriety. It was argued that the procedure in part XI of CORT was complied with in that investigation was done; followed by interdiction notice; claimant responded to the interdiction letter; invitation to a hearing; disciplinary hearing was conducted and communicated the verdict to the claimant.
50. In view of the foregoing, it was urged that the claimant is not entitled to the reliefs sought and the same should be dismissed with costs. It was submitted that salary is a compensation for services rendered by an employee in a contract of service.



51. It was further urged that the prayer for exemplary damages lacks merits because the suspension of the claimant was not actuated by malice but was grounded on justifiable reasons envisaged in the *Employment Act*.

Analysis

52. Having considered the pleadings, evidence and submissions by the two sides, the following issues fall for determination: -
- a. Whether the disciplinary action against the claimant was grounded on valid reasons.
 - b. Whether fair procedure was followed.
 - c. Whether the reliefs sought are merited.

Reasons for disciplinary action

53. The interdiction letter dated 11th January 2021 set out the following two grounds for the interdiction: -
- a. The claimant declined to complete the handing over/taking over process at Ncoroiboro Secondary School.
 - b. The claimant failed to report and take duties after transfer to the school and therefore deserted duty from 27th January 2020.
54. The claimant responded vide letter dated 24th January 2020 denying the allegations. During the disciplinary hearing, no witnesses were called to give evidence but she was still found guilty based on her evidence. She was then punished by suspension for three months and recovery of all the salary paid to her during the period of the alleged desertion.
55. Before this court she denied the alleged offences again and expounded on the circumstances under which the handing over/taking over exercise was not completed, and why thereafter she could not take over duties. She explained that after receipt of the transfer letter, she handed over to the new principal (RW1) on 30th December 2019 but appealed seeking rerouting to another county on account of family issues. She was released from the former school on 29th January 2020 and on 22nd January 2020 she visited her new school in Meru.
56. On 27th January 2020 she reported to the school at 10.00am ready to take over from the outgoing principal but she was kept waiting until 2pm. To that extent it is clear that she actually reported to her new station ready to perform her duties as per the transfer letter dated 10th December 2019. The question that arises is, what prevented her from taking up the duties?
57. She explained that she was frustrated from completing the taking over by the team she found and when she registered her grievance with the TSC County Director Meru, it was not resolved. The County Director informed her over the phone that she was travelling and she would talk to TSC Sub-county Director and get back to her but she never called back.
58. The grievance was about financial records which had not been availed to her and the other members of the team. She was told that the records are in an Accounting system which was down during that exercise. She asked for a print out but it was not availed to her. There was only one copy of bank statements with the Auditor and nobody else. The Auditor was reading to them the statements and when she indicated that every member of the team should procedurally have a copy of the statements for verification, the Auditor became hostile and openly berated her before everyone.



59. He then handed over the copies of the statements in his hands to the Accounts clerk to pass to her. Upon checking, she then noticed that the school's infrastructure Account Number 01139075211301 Cooperative Bank had a zero balance and had been opened a few days before the meeting. Feeling intimidated by the mood in the meeting and the denial of the crucial financial records, she walked out to consult the TSC County Director, and rightly so because that was the person to supervise the handing over/taking over as per the transfer letter.
60. Unfortunately, on the day of that most important exercise, the County Director travelled. She even did not delegate to her deputy in the office but left it to the Sub-County Director to supervise the exercise. She did not even ensure that the outgoing Principal had prepared all the documents for the exercise. The meeting delayed from 10am to 2pm without any notice to the claimant. When claimant was let into the meeting, she greeted them but none of the team members responded.
61. I would be right to say that all the other people did their part wrongly and blamed the claimant for standing on what is substantively and procedurally right. Article 236 of *the Constitution* of Kenya, 2010 states that: -
- “A public officer shall not be:
- a. Victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law or
 - b. Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”
62. In this case, the claimant's woes resulted from making reasonable demands which were grounded on *the Constitution* and handing over procedures established by the 1st respondent. *The Constitution* of Kenya provides for national values and principles of good governance under Article 10 which include integrity, transparency and accountability. Again, Article 73 of *the Constitution* provides for guiding principles of leadership and integrity which includes accountability to the public for decisions and actions taken. Finally, Article 232 of *the Constitution* provides for the values and principles of Public Service which includes: -
- a. “High standards of professional ethics;
 - b. Efficient, effective and economic use of resources
 - e. Accountability for administrative acts;
 - f. Transparency and provision to the public of timely, accurate information.”
63. The above values and principles are mandatory and binds all state organs, state officers, public officers and all persons including the claimant, the respondents and all the officers of the respondents and Ncoroiboro secondary school and its Board of Management. None in the handing/taking over committee and the TSC County Director was exempted from observing the aforesaid Constitutional edicts.
64. As observed above, the respondents decided to sweep their constitutional obligations under the carpet and turned against the claimant for demanding transparency, accountability through information which was the right thing to do before completing the taking/handing over of Ncoroiboro secondary school from RW1. I have considered the incomplete taking over Report (Exh.18) and it is clear that the claimant was justified to demand financial records. Consequently, I find and hold that the allegation that she declined to complete the handing over/taking over process at Ncoroiboro secondary school



was not true. It was a cover up of negligence of duty on the part of the TSC County Director who chose to travel instead of supervising the said exercise. Further, when she was alerted there was a problem she ignored and within two days requested for another Principal to be posted before investigating the issue and addressing the grievance.

65. As regards the alleged desertion of duty from 27th January 2020, the claimant explained that the TSC County Director failed to call her back and instead requested for another principal to be posted to the school. The claimant, who was in ill health was exposed to mental torture due to the in action by the TSC County Director, Meru.
66. It would appear that since the claimant had appealed for rerouting to another county, she was unfairly judged by the County Director and the handing over/taking over team as having refused to take over the school. That was a wrong judgment since the claimant had reported to school ready to work while awaiting a decision on her appeal. However, that was frustrated by withholding of crucial financial information by the RW1 and the handing over team. Secondly, the claimant was prevented from reporting to work due to ill health and soon thereafter Covid-19 Pandemic came and schools were closed down up to October 2020. In addition, the County Director having requested for another Principal in the place of the claimant, one wonders how the claimant could have reported to work as principal of the same school.
67. I have said a lot about the reasons for the disciplinary action against the claimant. Suffice it to say that the reasons were not valid but unfair, unreasonable and contrary to *the Constitution* and the procedures for handing over/taking over of schools by Principals. The claimant as a Public officer was entitled to register her grievance during handing over process if something was not right or clear to her. I say so because transfer of an officer should be dignified and not a sort of condemnation into abyss to suffer. Officers are posted to stations to serve and not to suffer. An officer of government ought to be treated with dignity in order to be respected in the new work station. You cannot humiliate an officer and expect him/her to be treated with respect by others or expect stellar performance from a humiliated and berated officer on the day she reports to work for the first time.
68. My opinion, which I believe to be correct, is that an officer on transfer should be fully supported and facilitated to quickly settle down to work and not to punish him/her for the negligence of the officers who are supposed to ensure that the transfer or posting is effected seamlessly. Turning the heat on the claimant as opposed to the TSC County Director the outgoing Principal and the Auditor from the Ministry, amounted to unfair victimization.

Procedure followed

69. The claimant faulted the procedure followed in the disciplinary process because it was initiated before conducting any prior investigations; she was not given a show cause letter to explain herself; stopping all the salary and medical cover when she was sick and before giving her a hearing; general laxity in concluding the disciplinary process which led to a delay of one year after interdiction and 16 months of salary stoppage; unfair and embarrassing hearing by a panel with no quorum. The respondent maintained that the process was in accordance with the provisions of Part XI of the CORT and that it was not tainted with procedural impropriety.
70. I have considered Part XI of the CORT which provides the procedure for disciplinary proceedings against teachers and Principals/Heads of Institutions. Regulation 139 provides that a teacher shall be presumed innocent until proved guilty; be informed the offences against him and be afforded reasonable chance to present his defence; and be accorded opportunity to be heard in person.



71. Regulation 140 set out the offences upon which disciplinary action can be taken including desertion while Regulation 144 provides for reporting of allegation against a teacher. Regulation 146 (3) provides for investigation upon receipt of a complaint against a head of an institution which is to be done by the County Director in liaison with the BOM and where there is no BOM, the County Director will constitute a team of not less than three technical officers to do the investigations.
72. The investigation panel shall accord the head of institution a fair hearing during the investigation process which shall include being: -
- a. Presumed innocent until proved guilty.
 - b. Informed of the allegations with sufficient details to answer.
 - c. Given at least seven days to prepare a defence.
 - d. Given an opportunity to appear in person before the investigation panel.
 - e. Present when the witnesses are being interviewed by the investigation panel.
 - f. Warned that any incriminating evidence may be used against him during disciplinary proceedings; and
 - g. Given an opportunity to adduce and challenge any adverse evidence.
73. The investigation panel is then required to compile a written Report and present to the Board of Management, the County Director and the Commission Secretary. If the Report of the investigation discloses that an offence has been committed, the BOM, County Director or the Secretary shall: -
- a. Issue an administrative warning.
 - b. Where the misconduct is due to a medical condition, recommend to the Commission secretary for approval of leave or further direction; or
 - c. Interdiction using an interdiction letter set out in Thirty Fourth Schedule.
74. The Commission or an officer acting under its direction may undertake direct investigation into any allegation and may recommend the interdiction of a teacher in accordance with the Regulations.
75. Regulation 147 provides that the Commission or BOM shall serve the teacher with a letter of interdiction specifying the allegations against him and ensure he clears and leaves the institution within 48 hours of receipt of the letter of interdiction. Regulation 148 (1) bars payment of half salary to a teacher during interdiction if the offence involved including desertion of duty.
76. Regulation 149 then provides that a teacher on interdiction shall be invited for hearing in writing at least one month before the date of the hearing. The notice shall be delivered to the teacher's last known address; or address of his next of kin; or hand delivery; or through teachers' permanent address; or through last station of work; or through cellphone; or teacher's email address; or by short text message through the teacher's mobile phone known to the Commission or any other mode.
77. Regulation 150 provides that the commission shall consider all the evidence; the investigation report and determine the case where it is alleged that a teacher should be disciplined in accordance with the Regulations.
78. Regulation 151 provides that disciplinary process will be administered at the Headquarters or County Level depending on the offences involved. According to Regulation 151(2), Disciplinary panel at the Headquarters shall comprise;



- a. Chairperson of the panel shall be a member of the Commission;
 - b. Two directors or their representatives appointed by the Commission Secretary;
 - c. An officer representing the division dealing with discipline;
 - d. Any technical officer whose attendance is deemed necessary.
79. Regulation 152 provides that during the disciplinary hearing the commission shall administer oaths; and invite any person to attend, give evidence and produce any relevant documents. Regulation 153 (2) provides that, where a teacher denies the allegations read to him during the hearing, the panel shall examine the commission witnesses and allow the teacher to cross-examine the witnesses and then allow the teacher to give his statement or submissions in mitigation.
80. The commission is required by Regulation 154 to inform the teacher its decision within 28 days after the hearing, and is required to set out the reasons for the decision. If the commission finds the teacher guilty of an offence that does not require removal from the Register, it may surcharge the teacher, suspend him for not more than six months without salary and allowances, among other punishments set out under Regulation 154 2(b) of the COURT.
81. Section 34 (3) of the TSC Act lists down the disciplinary actions that may be taken against a teacher including;
- a. Issue a warning letter.
 - b. Surcharge.
 - c. Suspend for such period not exceeding six months.
 - d. Cancel a registration certificate and remove the name of a teacher from the register.
 - e. Retire in the public interest.
 - f. Dismiss.
 - g. Terminate services or
 - h. Undertake any other lawful action as the commission considers appropriate.
82. Evaluating the evidence before me as against the procedure set out above, I have no doubt that the procedure followed in the proceedings against the claimant did not comply with Part XI of the COURT. First, no investigations were done before the interdiction as required under Regulation 146 of the COURT. Second, stoppage of salary and allowances was effected three months before interdiction contrary to Regulation 148 (1) of COURT. Third, during the disciplinary hearing, the claimant pleaded not guilty to the offences charged but the commission failed to call witnesses to adduce evidence towards proving the offences as required under Regulation 153 (2) of COURT. The claimant was therefore denied a fair hearing. She was not allowed to see the Investigation Report if any was done; she was denied the opportunity to meet her accuser and challenge their allegations; and she was denied a chance to produce or refer to her medical records which she intended to refer to as part of evidence in her defence.
83. Fifth, the language used to her by the interviewer was derogatory and embarrassing to her as a woman for example asking her, whether she was declining transfer so as to continue enjoying the warmth of her husband. That was unfair considering that she never declined the transfer and that she had indeed



handed her former school and gone to report to her new school in another County. The sentiments amounted to sexual harassment against the claimant.

84. Finally, the whole process took unreasonably long time to be concluded. The first salvo was fired by the employer in September when it stopped payment of the claimant's salary and allowances. Thereafter, no investigations were done and no responses were given to the claimant's persistent correspondences and even her visits to the 1st respondent's office until 11th January 2021, three months down the line, when during her visit to the offices, she was served with the interdiction letter dated 11th January 2021.
85. Despite her prompt response on 24th January 2021, no hearing was conducted six months thereafter. After the hearing and the punishment on 25th August 2021, she was again kept in limbo despite her persistent correspondences and visits to the employer's offices. Finally, she served demand notice through a lawyer and the employer seemed to understand the language of the lawyers very well because she received a call shortly thereafter to collect a posting letter.
86. The said delay was uncalled for and exposed the claimant to anxiety, mental torture embarrassment and financial loss considering that all her salary and allowances had been stopped for 16 months.

Reliefs sought

87. In view of the finding above that the reason for the disciplinary action against the claimant was invalid and unreasonable, and that fair procedure was not followed, the claimant is entitled to declaration that the interdiction, disciplinary proceedings and the punishment of suspension were irregular, unlawful and null and void ab initio because they did not meet the requirements of the 1st respondent's CORT, 2015 and section 4 of the Fair Administrative Actions Act. The proceedings were conducted in breach of express provisions of the CORT and they took an unreasonably long time before completion due to the 1st respondent's laxity.
88. Section 4 of the FAA Act basically illuminates Article 47 of *the Constitution* in the following terms: -
 - “Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”
89. In view of the foregoing declarations of nullity of the whole proceedings, I grant prayer (c) in the Statement of Claim to the extent that the suspension of the claimant is nullified and she is deemed to have been in continuous service of the 1st respondent with full benefits and between February 2020 and December 2021 when she was posted to another school. Accordingly, the claimant is entitled to salary for the time it was stopped from September 2020 to December 2021, 16 months equalling to Kshs.2,738,304.00.



90. She is also entitled to refund of the salary recoveries made by the employer in respect of the period she was accused of earning without working. The money was recovered between February 2022 and April 2023 equalling to Kshs.1,057,912.50 plus a further Kshs.321,370.50 recovered between May 2023 and February 2024 as per the payslips filed on 6th March 2024.
91. She prayed for transfer allowance equalling to one-month gross salary but I award basic salary of Kshs.112,058 based on her payslip of February 2024. However, the claim for leave allowance for two years is declined because she never went for any leave during the two years.
92. Likewise, the claim for wrongful interdiction is declined because that breach of her contract is adequately compensated by the award of full salary for the period of the unlawful interdiction. However, I award the claimant exemplary damages for hardship, mental anguish and inhuman treatment she was subjected to by the unlawful and irregular treatment by the 1st respondent and its senior officers. I have already made a finding of fact that she was victimized for doing what was right. She was denied work, income, medical cover when she was sick, her daughter dropped from the University and then she was dragged in an irregular disciplinary process for 16 months. I award a sum of Kshs.2,000,000.00 for the same.

In conclusion

93. I have found that the interdiction and the disciplinary action against the claimant was not grounded on valid and just reasons, and the procedure followed was not fair. I have also found that the claimant is entitled to the reliefs sought in the statement of claim. Consequently, I enter judgment for her as against the 1st Respondent in the following terms: -
- i. A declaration that the interdiction, disciplinary action and suspension of the claimant were contrary to the requirement of the TSC Code and section 4 of the [Fair Administrative Action Act](#) and therefore unfair, unlawful, null and void ab initio.
 - ii. An order lifting the suspension and reinstating the claimant's service to the 1st respondent as a principal with effect from February, 2020 when she was deemed to have deserted, without a break in service and with full benefits, as per prevailing terms of service.
 - iii. An order for payment or refund of all salary which was irregularly recovered, withheld, the benefits, and annual increments and promotion for the period she was on interdiction and suspension from September 2020 up to December being Kshs.3,796,216 but because she prayed for Kshs.3,665,990 that is what I award.
 - iv. An order for payment of outstanding irregular recoveries of Kshs.321,370.50 which has since been recovered as per the pay slips filed.
 - v. An order for payment of exemplary damages for mental anguish, torture, inhuman treatment and embarrassment totaling to Kshs.2,000,000.
 - vi. An order for payment of her disturbance allowance on transfer (one-month salary) amounting to Kshs.112,058.00.
 - vii. The claimant is awarded costs plus interest from the date of this judgment.
 - viii. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF AUGUST, 2024.

ONESMUS N MAKAU



JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

onesmus n makau

judge

