



Scott Bowerbank Day v Victory Farms Limited (Employment and Labour Relations Cause E181 of 2022) [2025] KEELRC 299 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 299 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E181 OF 2022**

**K OCHARO, J
JANUARY 31, 2025**

BETWEEN

SCOTT BOWERBANK DAY CLAIMANT

AND

VICTORY FARMS LIMITED RESPONDENT

JUDGMENT

Introduction

1. By Statement of Claim dated 21st March 2022, the Claimant sued the Respondent seeking a declaration that the termination of his employment was wrongful, unfair, and unlawful and as such entitled to the remedies and terminal benefits outlined in Paragraphs 19 and 20 of the Statement of Claim; a declaration that he is entitled to 70% of the Management Incentive equivalent to USD 154,350; interest thereon from the date of filing Suit; and costs of this suit.
2. The benefits outlined in Paragraph 20 of the Statement of Claim are;
 - a) Prorated Severance pay for the period between 1st September 2021 to 25th January 2022- -----USD 1,614.58
 - b) Service Pay for the period between 1st September 2017 to 25th January 2022 (USD.7750 (monthly salary x 1/2x 4 years and 5months) -----USD. 17,114.58.
 - c) Housing Allowance for the Period 24th October 2021 to 25th January 2022 (USD 7750x15/100x3 months)- -----USD,3,487.50
 - d) 70% of the vested Management Incentive-----USD 154,350
 - e) Relocation Allowance- --USD 1,500



3. The Respondent resisted the Claimant's Claim through a Memorandum of Defence dated 9th May 2022. It denied the Claimant's claim that the termination of his employment was unfair, wrongful, and unlawful. It further denied that he is entitled to any of those reliefs he has sought.
4. At the hearing, the parties adopted their respective witness statements filed herein, as their evidence in chief. After hearing the parties' respective cases, this Court directed them to file written submissions. They obliged.

Claimant's case

5. It was his case that by its letter of offer dated 29th August 2017, the Respondent offered to employ him and subsequently, employed him under a letter dated 1st September 2007 as a Production Assistant Manager at a monthly salary of USD 3,250. The Respondent assigned him to work at ROO Bay Farm in Homabay. After the successful completion of his probationary period, he was confirmed into employment through a letter dated 28th February 2018.
6. The Claimant was promoted to the position of Farm Manager from 1st February 2019 and later to Farm Manager at job group level Group C with a monthly salary of USD 7750/-
7. As part of his remuneration, the Respondent enrolled him on a Management Incentive Program in which his entitlement was to progressively accumulate and vest in him cumulatively. The incentive was part of the contractual remuneration and it greatly influenced his decision to join the Respondent's employment.
8. The terms and conditions of the Management Incentive (MI) program, dated 12th December 2017, were;
 - i. If the Company achieves 10,000MT [Metric Tonne] production, participating managers will receive a full payout, subject to statutory taxes.
 - ii. Upon leaving the Company, an employee will be classified either as a Good Leaver or a Bad Leaver. Good Leavers may receive a portion of their earned MI at management's discretion, while Bad Leavers, would forfeit their entire share back to the Respondent. Bad Leavers could be those who may have committed infractions like theft, insubordination, or failure of duty inter alia.
9. The vesting schedule was spread out thus;
 - i. Year 1..... 0%
 - ii. Year 2.....20%
 - iii. Year 3.....30%
 - iv. Year 4.....30%
 - v. Year 5.....100% [Accumulated].
10. The gross salary for a Farm Manager was graduated based on the production levels. Thus;
 - i. Group A-Current period..... USD 5, 750.
 - ii. Group B-4,000 Metric Tonnes..... USD 6,750.
 - iii. Group C- 6000 Metric Tonnes.....USD 7,750



- iv. Group D-10,000 Metric Tonnes..... USD 9,250
11. It was his further case that at the time of termination of his employment, he had reached Group C with a monthly salary of USD 7,750. His promotion and ascend to this level were a result of the fact that he had enabled the Respondent to achieve fish production of over 6,000 metric tonnes.
 12. Sometimes in July 2021, he engaged the Respondent's Chief Aquaculture Officer, Steve Morgan, and Chief Finance Officer, Lenka Afeador via email, on then the status of his package in the Management incentive program. In an email dated 17th July 2021, Steve Morgan advised Mr Lenka and the Claimant, that he had 450, shares with an estimated value of USD 315,000 upon reaching 10,000 metric tonnes of production.
 13. As at the time of termination of his employment he had served the Respondent for four years and five months. Therefore, he was entitled to 70% of the accumulated Management Incentive, totalling USD 154,350 as of 25th October 2021. On or about 25th October 2021, the Respondent informed him that the value of his 70% Management Incentive was USD 154, 350. The value was arrived at the Respondent's discretion.
 14. The representation by the Respondent through various communications at the beginning of his employment created a legitimate expectation on his part that incentive amounts earned would be paid out either upon exit from the Respondent Company or upon the company hitting the target of 10,000 metric tonnes fish production.
 15. Additionally, he legitimately expected that denial of the incentive sum would only be where one was a bad leaver. He wasn't declared a bad leaver. Therefore, he was entitled to the earned incentive amount that was due and payable to him. The Respondent's discretion in payment of the incentive was only limited to determining the share value. This it did when it pronounced that he was entitled to USD 154,350.
 16. The Respondent didn't have a lawful basis to deny him a prompt payment of his entitlement under the program.
 17. The Claimant stated that in August 2021, the Respondent offered him the position of Director of Aquaculture. He subsequently, first orally, and eventually via an email on 21st October 2021, engaged the Respondent on the terms of the offer. The email didn't elicit any response.
 18. On or around 24th October 2021, the Respondent's CEO, Joseph Rehmann, and Chief Aquaculture Officer, Steve Moran, summoned the Claimant from his workstation in Homabay to attend an urgent meeting in Nairobi on 25th October 2021. They declined to disclose the meeting's agenda in advance.
 19. During the meeting on 25th October 2021, the CEO and CAO instructed the Claimant to tender a resignation. They were clear, however, that the instructions were not a result of any infraction or unsatisfactory performance on his part. The CEO further informed the Claimant that his vested Management Incentive would only be paid if he resigned immediately, but he would forfeit the incentive if he waited for the Respondent to terminate his employment.
 20. Out of an abundance of caution, he asked for a formal commitment by the Respondent, as regards payment of the entitled to incentive sum and the exact date for payment of the same. The Respondent failed to offer the commitment but instead resorted to acts that amounted to unfair labour practices, that were aimed at influencing and coercing him to exit employment.
 21. The actions included; placing him on indefinite suspension without a letter specifying reasons and duration for the same; evicting him from company housing without alternative arrangements or



- relocation allowance; denying him access to personal belongings locked in the farmhouse; unjustifiably delaying payment of his November 2021 salary; and attempting to force him to resign from employment with a sole aim of putting him in a situation to lose the vested Management Incentive of USD 154,350.
22. When its attempts to cause him to resign flopped, the Respondent threatened to terminate his employment. True to the threat, on 21st December 2021 it issued him with a redundancy notice, and subsequently terminated his employment on 25th January 2022.
 23. The termination was unfair, unlawful, wrongful and in complete disregard to fair labour practices.
 24. Cross-examined by Counsel for the Respondent Mr. Deya, the Claimant testified that the Management incentive was part of his remuneration. It was embodied in the letter of offer and as such, it was a contractual pay. The benefit accrued annually. It vested from the 1st to 5th year. It was also subject to production milestones, whichever came first. At the time of termination, the Respondent hadn't attained the production milestone of 10,000 metric tonnes.
 25. He further testified that the document dated 25th October 2021, by the CEO, captioned 'Good Leaver Package Discussion' was an exit offer by the Respondent. Under the incentive program, the determination of the value of an employee's vested and accrued shares was at the discretion of the Respondent.
 26. At some point, the Respondent attempted to suggest that the incentive sum could not be paid until VF was hit.
 27. At the time the Respondent made an offer for employment regarding the position of Director Aquaculture, the position wasn't in existence in its Organizational structure. He was interested in the offer, and that is why he sent an email to the Respondent seeking that they have a conversation over the same.
 28. There was also a proposal for him to become the Chief of Farming in Rwanda, as the Respondent Company was extending its footprint to other countries. From this, he formed the impression that structural changes were on the way.
 29. The separation occurred before he could take up the role that was being offered.
 30. Following the many discussions between the Respondent and him, the former prepared a mutual separation agreement and executed the same. However, he [the Claimant] declined to execute the same as he was not agreeable to its terms.
 31. After the discussions collapsed, the Respondent issued him with a notice of intended redundancy dated 21st December 2021. On 25th January 2022, the Respondent issued him with a termination letter. The termination was expressed to be on account of redundancy. After terminating his employment, the Respondent computed his terminal dues and paid the same partially.
 32. In his evidence under re-examination, the Claimant stated that, per the letter of offer, the incentive was to be contractual. Besides in the letter, the incentive was not enshrined in any policy document or handbook.
 33. The incentive became active after one year of service. The calculation of incentive assessment was anchored on the time factor and value growth of the Respondent.



34. When an employee was existing, the Respondent could only exercise discretion to determine the amount payable to him or her not whether or not the incentive was payable. The benefit could have accrued.
35. Had stayed on until the lapse of five years or until the Respondent attained 10,000 metric tonnes of production, he would have been entitled to 450 shares with a value of USD 3, 145, 000. The CEO's email dated 17th July 2021, expressed such much.
36. According to the Respondent's letter dated 17th November 2020, if one exited as a 'Good Leaver', he could be entitled to payment of Management Incentive, computed by the Respondent discretionarily. The determined amount shall then be paid within six months. The Respondent determined what he was supposed to be paid, USD, 154,350. He didn't have any objection to the computed value.

Respondent's case

37. The Respondent presented one witness, Joseph Rehman, its Chief Executive Officer, to testify on its behalf. The witness stated that the Respondent is a sustainable aquaculture farm for tilapia fish comprising hatcheries, nursery ponds, and deep-water cages for farming.
38. The witness stated that the Respondent terminated the Claimant's employment on account of redundancy on 25th January 2022. The process leading to the termination was wholly carried out in conformity with the law.
39. In June 2021, the Respondent decided to undertake a staff restructuring to streamline and optimize its existing functions and align its staff structure to essential requirements. The restructuring was informed by the need to improve the Respondent's performance, business efficiency and competitive advantage.
40. Following the review, the Respondent concluded that there was an urgent need to reorganize various aspects of its operations to achieve the desired results. The Respondent concluded that the operational functions and fish management should both not be under the role of the Farm Manager. In light of this, the Respondent determined that the role of the Farm Manager was no longer required within its structure. Consequently, the Respondent proposed to split the role into two new roles, Director of Farming Operations, and Director of Aquaculture.
41. Considering that the Respondent decided to eliminate the position of the Farm Manager from its structure, the Respondent was compelled to engage the Claimant in discussions with the aim of encouraging him to accept one of the new roles created on comparable terms. However, the discussions didn't succeed as the Claimant declined to take any of the two roles.
42. Consequently, the Claimant's position became superfluous. The Respondent was compelled to engage the Claimant in a mutual separation discussion.
43. The witness stated that on 25th October 2021, he had a one-on-one meeting with the Claimant where he tried to encourage him to take up one of the proposed new roles in the Respondent's structure, however, the Claimant expressed his intention to resign and exit the Respondent's employment.
44. As a pre-condition for resignation, the Claimant insisted on payment of a management incentive and a written acknowledgement that the incentive could be paid to him upon his resignation.
45. Following separation discussions, the Respondent proposed to the Claimant terms of separation which were reduced into an agreement dated 5th November 2021. The agreement proposed the following terminal dues one month's pay in lieu of notice, two months' pay, repatriation pay out of



- USD 1,500; and payment of management incentive when the company's production triggered 10,000 metric tonnes.
46. Payment of the management incentive became a sticky issue. The Claimant insisted on an accelerated payment or a staggered payment approach. However, the Respondent stuck to its position. In addition to it being a discretionary bonus, the incentive had not crystalized as the Respondent had not attained a production milestone of 10000 metric tonnes over the applicable performance period. Therefore, the Claimant had no right to demand an immediate payment of the same.
 47. Considering the protracted nature of the negotiations between the parties and given the Respondent's intention to move on and implement the proposed restructure, compounded with the Claimant's rejection of its settlement proposal, the Respondent deemed the discussions unfruitful.
 48. On 20th December 2021, the Respondent's Human Resource Manager issued the Claimant with a notification of intended redundancy. The letter informed him of the Respondent's intention, reasons for it, and the projected extent thereof. Further, the Respondent caused the notification of intended redundancy to be served on the Nairobi County Labour Officer.
 49. On 25th January 2022, the Respondent declared the Claimant redundant and issued him with a termination letter. By the termination letter, the Respondent gave the Claimant his final dues thus, salary for the days worked up to and including the date of the termination, one month's salary in lieu of notice and severance pay of 15 days' pay for each completed year of service. The terminal dues were duly paid to him.
 50. The Claimant was not entitled to service pay, as he was enrolled in both the NSSF and NHIF schemes. Additionally, there was no contractual or statutory provision supporting the payment of a housing allowance or relocation allowance as alleged.
 51. Cross-examined by Mr. Njuguna, Counsel for the Claimant, the witness stated that Clause 4.6.2 of the Respondent's Employee Handbook provided for service pay. The Respondent didn't place before the Court a document from which it can be discerned that the Claimant was excluded from enjoying the benefit.
 52. As a Farm Manager, the Claimant was supposed to be housed at the farm by the Respondent. The letter of offer spoke to this. From 25th October 2021, till he exited the Respondent's employment, he was not living in the farmhouse. The Respondent didn't pay him house allowance for the three months after this date.
 53. In his email dated 1st November 2021 addressed to Mr. Lenka, the Claimant alluded to the fact that he was entitled to relocation allowance. Mr Lenka didn't protest the assertion.
 54. The Respondent didn't place before the court any policy document from which one can deduce guidelines on the management incentive.
 55. The letter of offer of employment mentioned the incentive program. According to the letter of offer, the period of service that was required of him for the Management Incentive program to take effect was of year. Details of the program were to be provided later.
 56. He testified further that payment of the incentive amounts could be paid at the departure of an employee from the Respondent's employment notwithstanding that the production scale of 10,000 metric tonnes had not been hit. Vesting of the incentive in an employee was based on both time and value growth of the Respondent company. The sum could be paid after six months of the departure.



57. He reiterated that since his employment was terminated on an alleged redundancy, he didn't fall in the category of those who under the program, could be forfeit their earned incentive sums. At his departure, if an employee was declared a "Good Leaver" he could be entitled to a portion of the vested incentive. How much, depended on the good discretion of the Respondent.
58. He further testified that the mechanism that the Respondent's management was to use in determining the amount payable was to be determined by the Chief Executive Officer.
59. The witness further stated that the management incentive was contractual. It was payable upon the company attaining the 10,000 tonnes production scale or at the lapse of 5 years whichever came earlier. The Chief Executive Officer and the Chief Administrator fixed the value of the incentive at USD 154,350. Through his email dated 5th November 2021, the Claimant agreed to be paid the value. Only the date of payment was not agreed on.
60. The witness testified further that he was the one who invited the Claimant to Nairobi for the meeting on 25th October 2021, through WhatsApp. The message sent to him didn't have the agenda for the meeting. Up to the day of the meeting, the Claimant was not informed of the agenda. It was in the meeting that he offered to resign.
61. Per Steve's email dated 29th October 2021, he had the option of agreeing to take the "Good Leaver Offer" or the Respondent could terminate his employment and consider him a Bad Leaver'.
62. Through his letter dated 23rd December 2021, the Claimant responded to the Respondent's intention to declare him redundant, he protested that all through he was kept in the dark on the alleged structure and how it could affect his position.
63. The witness testified that he couldn't tell how many of the employees in the Claimant's Department were affected by the redundancy.
64. There were no minutes taken in the meeting of 25th October 2021.
65. In his evidence in re-examination, the witness stated that the Claimant's payslip reflected that the Respondent was remitting NSSF dues to the relevant Authority. As such, the Claimant isn't entitled to service pay.
66. The figure 154,350 USD was based on the categorization of the Claimant as a 'Good Leaver'. It was offered in good faith to enable an amicable separation. The Claimant refused the offer.

Analysis and Determination

67. I have carefully considered the pleadings by the parties, their evidence and submissions, and three principal issues emerge for determination;
 - i. Was the termination of the Claimant's employment fair?
 - ii. Was the Claimant entitled to payment of the management incentive at the time he exited the employment of the Respondent or thereafter?
 - iii. Whether the Claimant is entitled to the reliefs sought.

Was the termination of the Claimant's employment fair?

68. It was common cause that the Claimant's employment was terminated under the letter dated 25th January 2022. Further, the termination was due to redundancy. The Claimant strongly disputed its substantive justification and propriety in the procedure leading up to the termination.



69. Section 45 of the *Employment Act*, 2007, provides for three grounds for termination of an employee's employment, misconduct, incapacity, and the employer's operational requirements. In terms of the section, a dismissal that is not automatically unfair will be unfair if the employer cannot demonstrate that the termination is related to one of the three recognised grounds and if a fair procedure was not followed before the termination. These grounds, together with the requirement that a fair procedure must be followed prior to termination, were drawn from the ILO Convention on Termination of Employment, 158 of 1982.
70. Although the three grounds of dismissal are distinct from one another, sometimes, employers have deliberately or not deliberately incorrectly classified employee dismissals. There are instances where a dismissal that could easily have been dealt with based on either misconduct or incapacity is instead dealt with as a case of operational requirements because the employer thinks that operational requirements is an easy-to-use ground. Detecting this, the Court should find the ground camouflaged and unfair.
71. The defining characteristic of termination of an employee's employment on account of redundancy is the lack of fault on the part of the employee. It is a species of "no-fault" termination. One cannot be off the mark to assert that, for this reason, the *Employment Act* 2007, places particular obligations on the employer, most of which are directed towards ensuring that those employees who are to be affected are treated fairly.
72. In the case of *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR the Court of Appeal stated;
- "Redundancy is a legitimate ground for terminating a contract of employment provided that there is a valid and fair reason based on the operational requirement of the employer and the termination is in accordance with fair procedure. As Section 43[2] provides, the test of what is fair is subjective. The phrase "operational requirement of the employer must be construed in the context of the definition of redundancy." What the phrase means in my view is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy-that is that the services of the employee have been rendered superfluous or that the redundancy has resulted in the abolition of office, job or loss of employment."
73. I have agonized over the facts of this matter. A pivotal question springs up, was the Claimant's employment rendered superfluous at any time, to justify a termination on the grounds of redundancy? I will answer this question assuming for a moment the Respondent's version of the events preceding the termination were true, and without prejudice to this Court's findings shortly here hereinafter.
74. Superfluous means unnecessary, obsolete, or exceeding what is needed. The Respondent's witness alleged that the Respondent "split", the Claimant's role into two, to enhance operational efficiency. His evidence is clear, the Claimant could fit in any of those new roles created, at terms comparable to those that he was enjoying under his contract in the role of Farm Manager, but he refused to take up any of them. There was no evidence that any of those duties that he was discharging under his role as a Farm Manager were completely discarded and not fitted into any of the two roles. However, the impression I get, is that they were spread across the two departments created. In reality, therefore, his services were not rendered redundant [superfluous]. Assuming the Respondent's version of events is true, the Claimant is an employee who resisted a redeployment. He misconducted himself. He could have been dealt with on the grounds of misconduct.
75. I have no doubt in my mind, that an organizational restructure of whatever magnitude, and more especially in a large entity like Respondent, must be conceived as an idea, the idea deliberated on,



its scope and import ascertained, and its implementation map drawn. It [restructuring] doesn't just happen. The Respondent who was bound to prove that there was an organizational restructure that led to a redundancy situation, did not tender any documentary evidence, or reasonable and sufficient details, to prove the pivotal point, the existence of a restructuring activity. This Court isn't surprised that it didn't. Considering the material placed before it, the restructure and alleged redundancy situation were non-existent.

76. The Claimant contended, and the Respondent didn't discount it, that all through the proposal to him to take up a new role was presented as promotional. It was never presented to him as flowing from an intention to restructure its department or to mitigate the impact of a redundancy situation. The Claimant's protest letter to the redundancy notice, speaks to this.
77. Further, I note that despite the numerous correspondences between the Respondent and the Claimant, none of them mentions the alleged restructure and its likely effect, redundancy situation. If indeed a restructuring and a likely redundancy were in the mind of the Respondent, definitely one or more of the emails could have mentioned it. This conclusion is informed by the fact that apparently the regular mode of communication between the Respondent and the Claimant was via email.
78. In sum, I am not persuaded that there was a redundancy situation following which the Respondent could have terminated the Claimant's employment. It didn't prove any reasonable operational requirement that necessitated the termination on account of redundancy. As such, the termination lacked substantive justification.
79. Undoubtedly, a redundancy notice was issued to the Claimant. It is trite the notice gives rise to consultations between the employer and the employee. The process of consultations, though not codified in Kenyan statutes, has been held by our Courts to be a vital process and a default on the part of the employer to initiate and engage the employee in consultations renders the termination procedurally unfair. Elaborating on this, the Court of Appeal in the case of *The German School Society & Another -vs Ohany & Another* (Civil Appeal 325 & 342 of 2018(consolidated) [2023] KECA 894 (KLR) held;

“A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in *Kenya Airways Limited -vs- Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR held:

- a. Consultation is implicit in the *Employment Act* under the principle of fair play;
- b. Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;
- c. Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;
- d. Consultations have to be a reality not a charade;
- e. Opportunity must be given for the stakeholders to consider;
- f. Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and
- g. Consultation must not be cosmetic.

57. In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as



fair as possible and that all mitigating factors are taken into consideration. A reading of the record shows that the respondent was served with a redundancy notice and asked to proceed for a one month's leave. The trial court found that the redundancy was unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance."

80. The consultations must be shown to be about the intended redundancy, its impact and how it can be avoided or the impact mitigated. I have carefully considered the back-and-forth correspondences, between the Respondent and the Claimant. They do not appear to have flowed from the notice of intended redundancy, they were not on the alleged redundancy and how it could be avoided. They originated from the meeting of 25th October 2021, which apparently wasn't about the redundancy.
81. It would be remiss of this Court if I didn't point out that I am persuaded by the Claimant's evidence that on the 25th of October 2021, the Respondent attempted to force him to resign, an attempt he didn't succumb to. It was the Claimant's evidence that in the meeting, the Respondent's CEO and CAO asked him to hand in a resignation letter and stay away from the farm, effectively putting him on an indefinite suspension. The Respondent's witness in his evidence under cross-examination admitted the Claimant never stayed in the farmhouse after the meeting until he was his employment was terminated. Why the Respondent could do that to an employee it was "so caring" to redeploy to another role, an employee whom they wanted to stay on, he didn't explain. Reasonably, it should be concluded that a hard feeling was developed against him due to his adamant stand.
82. The termination was destitute of procedural fairness for want of consultations.

Was the Claimant entitled to payment of the management incentive at the time he exited his employment?

83. It was common cause that at all material times, the Respondent ran a Management Incentive Program for its managers. However, it is clear that the Respondent didn't have a detailed policy document providing guidelines on how the program was to be administered. If there was, then the Respondent inexplicably didn't place it forth to help this Court determine the question[s] in controversy as regards the program in this matter.
84. However, the various documents placed before this Court and the evidence of the Respondent's witness more especially that under cross-examination are sufficient to enable this Court to justly answer the question in issue. By a document dated 11th December 2017, the Respondent in a summary form brought to the attention of the Claimant, the Incentive program and what it entailed.
85. On a letter dated 17th November 2020 addressed to one Brandon, the Respondent's CEO, Joseph Rehmann. From the letter, it is clear that: -
- i. The incentive was contractual.
 - ii. The incentive was to vest over a period of 5 years or would trigger as and when the Respondent could achieve 10,000 metric tonnes of production.
 - iii. The Management incentives required 2 years of service before the incentive became active. If after vesting for at least this length of time, the employee exited the company, the employee will be classified as either "a Good Leaver" or a Bad Leaver".
 - iv. Good Leavers Would be provided a portion of their earned MI based on the best discretion of the management.



86. The Respondent's witness in his evidence under cross-examination largely admitted the foregoing as what the Management Program entailed. He testified that in the circumstances of his exit, the Claimant couldn't be categorized as a "Bad Leaver". He was therefore entitled to a portion of the earned incentive. He stated further that the amount payable when an employee exited his employment either before the five years or attainment of the production scale mentioned above by the Respondent, was discretionarily computed by the CEO, and his decision wasn't appealable.
87. The witness admitted that for the Claimant, whose exit had come before the occurrence of the two events mentioned above, the CEO computed his value Phantom shares at KShs. 154, 350, and the CEO's document dated 25th October 2021, expressly stated this. The witness further testified that, in such a situation, the Claimant could be entitled to payment of the amount within six months.
88. I have carefully considered the material placed before me, and I am convinced that the Management Incentive was contractual. The only matter that the CEO had discretion over was fixing the value of the shares at a particular time and circumstance[s]. He had no such discretion as the Respondent submitted, to enter into the space of deciding that a certain employee couldn't earn the value of shares already accrued in his or her favour.
89. By reason of the foregoing premises, I am not convinced that there is a justifiable and reasonable reason that has been advanced by the Respondent that can be a basis for this Court to hold that the Claimant wasn't entitled to the Management Incentive dues, to the extent that the Respondent's CEO, computed.

Whether the Claimant is entitled to the reliefs sought.

90. The Claimant asserted that he worked for the Respondent for 4 years and 6 months. The Respondent paid him severance pay for 4 years only and left out six months. The Respondent submitted that this prayer has no basis in law. The computation of severance pay is based on each completed year as the operative word under Section 40 of the Act is "completed year". To support this submission, the Respondent relied on the decision in ELRC Cause No. 947 of 2015- George K Kangethe vs Ziwa Garments and Apparel Limited [2020]. I must state that the point as Counsel for the Respondent wants the Court to believe wasn't discussed in this cited case, by the Learned Judge.
91. The Claimant on his part cited the case of Ann Njambi Ngugi v Medimax Network Limited [2020]eKLR where Radido J held;

"Section 40[1][g] of the [Employment Act](#),2007 has set formula for calculating severance pay.

The Respondent did not pay the Claimant any severance pay, even on a pro-rata basis because she had not completed a year in employment. That was a misapprehension of the law, and the Claimant was entitled to severance pay on a pro-rata basis for 8 months served."

I entirely agree with the reasoning by Radido J, save to add that where a statute confers a right on an employee that has been presented for interpretation by the Court, such a right shall be interpreted in a manner that is most favourable to the employee, considering that the rights and conditions of work for employees, normally stipulated in the statutes are the minimum rights and conditions that an employee is supposed to enjoy.

92. The Claimant asserted that the Respondent without any reasonable justification excluded him from the farmhouse with effect 25th October 2021 till his employment was terminated on 25th January 2022. As such, he was forced to secure, and expend on, accommodation, elsewhere. In his evidence under cross-examination, the Respondent's witness admitted that indeed, the Respondent didn't provide



accommodation for the Claimant during the three months. Under section 31 of the Employment Act, the employee is entitled to be accommodated by the employer or be paid an allowance that can enable him to secure reasonable accommodation. Having decided to arbitrarily deprive the Claimant of the accommodation, the Respondent was enjoined to pay him an allowance that could enable him to get alternative accommodation, until he exited employment. It should pay him, a house allowance for the three months.

93. The Claimant further sought the compensatory relief contemplated under section 49[1][c] of the Employment Act. It is pertinent to point out that the relief is discretionarily granted, depending on the circumstances of each case. I have carefully considered the circumstances of how the Claimant was dismissed from his employment, including that he was on account of a camouflaged redundancy situation, the finding hereinabove that this happened when the Respondent failed in its attempt to cause him to resign, thus exhibiting bad faith on its part, the unreasonable and unjustified manner in which he was directed to leave the farmhouse, the length of service, and the fact that he didn't contribute to the termination of his employment in any proven manner, and hold that he is entitled to the relief, to the extent of ten [10] months' gross salary.
94. The Respondent's witness in his evidence under cross-examination admitted that the Claimant was entitled to a relocation allowance. Further, in his email dated 6th November 2021, the CEO informed him that he was entitled to the allowance. In light of the admission, the submission by Counsel that the allowance was not provided for in the contract stands on quicksand. I hold that he is entitled to the relief.
95. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
 - i. A declaration that the termination of his employment was unfair.
 - ii. Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act..... USD. 77,500.
 - iii. Pro-rated severance pay USD. 1,614.58.
 - iv. House Allowance for the period 24th October 2021- 25th January 2022.....USD.3, 387.50.
 - v. 70% vested Management IncentiveUSD. 154, 350.
 - vi. Relocation allowance USD.1,500.
 - vii. Interested on the awarded sums above at court rates from the date of this judgment till full payment.
 - viii. Costs of suit.

READ SIGNED AND DELIVERED THIS 31ST DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE.

In the presence of: -

Mr Ngugi holding brief for Mr Njuguna for the Claimant.

Ms. Wangila holding brief for Mr. Deya for the Respondent.

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