



**Oanda v Kenya Airways (Cause 2517 of 2017)
[2024] KEELRC 520 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 520 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2517 OF 2017
L NDOLO, J
MARCH 7, 2024**

BETWEEN

CHRIS OANDA CLAIMANT

AND

KENYA AIRWAYS RESPONDENT

JUDGMENT

Introduction

1. Chris Oanda, the Claimant in this case worked for the National Carrier, Kenya Airways, in the position of Head of Supply Chain. He brought this claim following the termination of his employment on 16th October 2017.
2. The claim is documented by a Statement of Claim dated and filed in court on 28th December 2017. The Respondent filed a Statement of Response dated 21st May 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called two witnesses; Grace Wamiti, the Head of Employee Relations & Staff Welfare and Hellen Mwariri Mathuka, the Chief Finance Officer.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 15th January 2009, in the position of Head of Supply Chain, earning a monthly consolidated salary of Kshs. 950,000. He adds that as per the terms of his employment, his employment was terminable by three (3) months' notice or payment in lieu of notice.
5. The Claimant claims to have performed his duties diligently, as a top performer who made significant savings for the Respondent as its Head of Supply Chain. To support this assertion, the Claimant filed copies of his performance appraisals.



6. The Respondent contends that during his tenure with the Respondent he supervised procurement of goods, works and services worth over Usd 5,000,000,000 and made cost reductions in excess of Usd 300,000,000. He adds that he had directly co-ordinated the sale and disposal of assets which brought over Usd 80,000,000 in cash as savings for the Respondent. The claimant maintains that during his employment stretching close to eight (8) years, he made significant improvement to processes and procedures.
7. The events leading to the termination of the Claimant's employment began with a notice to show cause on allegations of lapses and weaknesses in various aspects of procurement. The Claimant was required to respond within 48 hours. Upon receipt of the notice to show cause, the Claimant made a request for the final Forensic Audit Report, which formed the basis of the allegations, and time to put in his response.
8. The Claimant presented a detailed response on 13th March 2017. He states that there was no further communication from the Respondent until 2nd October 2017, which he claims was in gross violation to Clause 17.10 of the Human Resource Manual that provides that disciplinary cases be concluded within a maximum period of 30 days.
9. The Claimant faults the disciplinary hearing conducted on 12th October 2017 stating that no reference was made to the Forensic Audit Report, which led to the termination of his employment on 16th October 2017. The Claimant adds that the reasons given for the termination being; poor management, poor decision making with respect to pricing and weaknesses in jet fuel tendering process lacked detailed particulars sufficient to constitute fair reasons for termination. He points out that the alleged loss incurred by the Company was not quantified.
10. The Claimant states that that he appealed the termination on 23rd October, 2017 through the Respondent's Group Managing Director who delegated the appeal hearing to the Chief Legal Officer and Acting Chief Finance Officer who had previously taken part in the initial hearing. This the Claimant maintains was in violation of the provisions of Clause 17.13 (b) of the Human Resource Manual. The outcome of the appeal hearing was that the termination was upheld.
11. The Claimant maintains that the termination of his employment was unlawful and unfair. He therefore seeks the following remedies:
 - a. A declaration that the termination of his employment was unlawful and unfair;
 - b. An order of reinstatement to the position of Head of Supply Chain;
 - c. Payment of Salary until retirement;
 - d. 12 months' salary in compensation for unfair termination;
 - e. 3 months' salary in lieu of notice;
 - f. Costs of the suit.

The Respondent's Case

12. In its Statement of Response dated 21st May 2028 and filed in court on 22nd May 2018, the Respondent confirms having employed the Claimant as pleaded in the Statement of Claim. The Respondent gives the Claimant's monthly salary as Kshs. 850,000 plus a taxable car allowance of Kshs. 100,000.
13. The Respondent maintains that as the Head of Supply Chain, the Claimant had responsibility for the overall purchasing function, including ensuring compliance with the Purchasing Procedures



- Manual. The Respondent accuses the Claimant of improper performance of his duties as evidenced by numerous lapses identified in internal audit reports, which included nil stock for critical in-flight items, non-conformity with procurement procedures, loss and/or pilferage of stock in the warehouse.
14. The Respondent states that procurement was not always fully compliant with the Purchasing Procedures Manual; for instance, procurement documentation was not maintained, open tendering for jet fuel was not done, some contracts were not available, there was lack of proper minutes of meetings in support of fuel negotiations and there was failure in compliance with the tendering process when extending fuel suppliers' contracts for the period 2014 to 2016.
 15. The Respondent avers that it considered the Forensic Audit Report by Deloitte Consulting Limited, the lapses and weaknesses identified therein and commenced a formal disciplinary process against the Claimant, under Clause 17.2 of the Human Resources Policy Manual by issuing him with a notice to show cause dated 24th February 2017. According to the Respondent, the charges levelled against the Claimant were clearly stated in the notice to show cause and he was given ample time given to respond.
 16. The Respondent's case is that the termination of the Claimant's employment was for justifiable reasons and in compliance with fair procedure.
 17. The Respondent confirms having received the Claimant's appeal, whose hearing was delegated in line with the provisions of Clause 17.14 the Human Resources Policy Manual.

Findings and Determination

18. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

19. The Claimant's employment was terminated by letter dated 16th October 2017 stating as follows:

“Dear Sir,

Re: Termination of Employment

We refer to the Notice to Show Cause dated 24th February, 2017 your response thereto dated 13th March 2017 and the disciplinary hearing held on 12th October 2017. We advise that the Panel has given consideration to your detailed response and to the explanations offered during the hearing and has found them to be largely unacceptable, deficient and unsatisfactory.

As Head of Supply Chain, the overall purchasing function including the responsibility for compliance with the Purchasing Procedures Manual lies with you. The Panel was concerned that the process of procurement does not appear to have been conducted in accordance with the Purchasing Procedures Manual and there are numerous instances of poor management, poor decision making with respect to pricing and weaknesses in the jet fuel tendering process. The net result is that the Company has lost a significant amount of money. The Panel was also concerned at your apparent abdication of responsibility arising from your constant request that an 'expert' be consulted. So far as the Company is concerned, you are supposed to be its expert in the area of procurement.



We regret therefore that the Company has decided to terminate your employment with immediate effect in accordance with Section 44(4)(c) of the *Employment Act* on the basis that you have carelessly and improperly performed work which from its nature it was your duty to have performed carefully and properly.

Upon termination, all benefits associated with your position will no longer be available.

Please bear in mind that you continue to be bound by the Company's code of Business Conduct and Ethics and any information that you have received in the course of your work regarding the Company's processes as well as its customers, suppliers and partners must not be disclosed to any external party. Such information must also be deleted from all your personal devices.

Accordingly, upon compliance to all the clearing procedures and process of the Company and returning any Kenya Airways property that may be in your possession, you will be paid the following:

- a. Salary and all applicable allowances up to 16th October 2017.
- b. Accrued leave days earned as at 16th October 2017.
- c. Provident Fund contributions in accordance with the Rules and Regulations governing the Fund (if applicable).

Yours Faithfully

Kenya Airways PLC,

(signed)

Sammy Chepkwony

Group Human Resources Director”

20. This letter accuses the Claimant of a myriad of infractions, ranging from failure to adhere to the Respondent's Purchasing Procedures Manual, poor management, poor decision making to abdication of responsibility. The Respondent claims to have suffered financial loss as a result of the alleged infractions.
21. The termination letter was preceded by a show cause notice dated 24th February 2017 addressing the Claimant as follows:

“Dear Chris,

Ref: Notice to Show Cause

The Deloitte Forensic Investigations highlighted lapses and weaknesses in various aspects of procurement:

The lapses and weaknesses included:

- a. The procurement is not always fully compliant with the Purchasing Procedures Manual (PPM). For instance:
 - i. Procurement documentation were not always maintained- Section 1.1 of the PPM
 - ii. Open tendering is not done for Jet Fuel-Section 5.5.2 of the PPM



- iii. Some contracts are not available-Section 1.1 of the PPM
- iv. Failure to follow the procurement process e.g. Purchase orders and PDIs approved after delivery of services for 2014/15 Safari Sevens events
- b. KQ jet fuel procurement process:
 - i. There was lack of minutes of meetings in support of all fuel negotiations
 - ii. Open tender system is not done thus denying other possible suppliers who might have a better offer an opportunity to quote for jet fuel supply to KQ
 - iii. Failure to comply with the tendering process when extending fuel suppliers contracts for the period of year 2014 to 2016

Overall, the lapses and weaknesses led to financial losses by the Company in some cases and raise question on your management of the Company's procurement processes which in turn necessarily impacts on your performance. As you are well aware, it was your overall responsibility to ensure that the procurement process was fully complied with as provided in the PPM.

In view of the above, you are required to show cause why disciplinary action should not be taken against you.

Your written and signed response setting out a full and proper explanation should reach the undersigned within 48 hours upon receipt of this letter but in any case not later than close of business on Monday 27th February 2017.

Yours faithfully,

(signed)

Dick Murianki

Ag. Group Finance Director”

- 22. From the show cause notice, it is clear that all the charges levelled against the Claimant came from the Deloitte report. This report was therefore crucial in enabling the Claimant to prepare an adequate defence. Moreover, the report was not availed to the Court and its full import was therefore kept under wraps. No credible reason was given as to why the Respondent chose first, to deny the Claimant the benefit of the full report and second, to keep this evidence away from the Court.
- 23. The Claimant testified that he had no mandate to make decisions on purchase of jet fuel single-handedly. He told the Court that the Jet Fuel Tender Committee, of which he was a member, was ordinarily chaired by the Finance Manager. The Claimant further testified that management of records fell within the role of the Secretary to the Tender Committee. The Respondent's first witness, Grace Wamiti confirmed that the role of keeping records was assigned to the Purchasing Manager and not to the Claimant.



24. Regarding the charge of extending suppliers' contracts, the Claimant stated that the sourcing report dated 18th June 2015 recommended for a longer contract period with best performing suppliers, a recommendation that was duly approved by the Chief Finance Officer, Alex Mbugua and the Group Managing Director, Titus Naikuni.
25. The Respondent's second witness, Hellen Mwariri Mathuka testified that at the time the decision to extend the contracts was made, the Respondent was experiencing financial difficulties. Mathuka confirmed that the jet fuel sourcing report for the year 2014/2015, which recommended extension of the contracts, was prepared by the Jet Fuel Committee, made up of five officers, including the Claimant.
26. With regard to the charge of failure to use open tender for jet fuel, the Claimant stated that there were various options of tendering provided for under the Purchasing Procedures Manual and that open tender was not the only available option. The Claimant further stated that use of previous suppliers was classified as competitive bidding as per the express provisions of the Purchasing Procedures Manual. The Claimant submitted that use of previous suppliers was a business decision which was fully approved by resolution of the Jet Fuel Tender Committee.
27. The Claimant added that no evidence was adduced to support the proposition that only open tender could be utilised to procure jet fuel to the exclusion of other competitive bidding options. The Claimant denied any wrongdoing maintaining that no particular breach of the provisions of the Purchasing Procedure Manual was assignable to him. He stressed that he did not at any time initiate or approve procurement of jet fuel or any service as an individual.
28. From the testimony of the Respondent's own witnesses, which strikingly corroborated the Claimant's account, it is apparent that the Claimant was blamed for institutional actions and lapses involving many people acting in concert. Indeed, the show cause notice issued to the Claimant reads more like a management letter arising from an audit.
29. With this in mind, the question to ask is whether the Respondent has established a valid reason for terminating the Claimant's employment as required under Section 43 of the *Employment Act*. This Court is fully aware of the 'range of reasonable responses test' to be applied in answering this question, by which the Court is cautioned against replacing the employer's decision with its own.
30. In its final submissions dated 5th February 2024, the Respondent referred to the following rendition of this test by Lord Denning in *British Leyland UK Ltd v Swift* [1989] IRLR:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”
31. In light of the foregoing findings regarding the veracity of the charges levelled against the Claimant, the only conclusion to make is that the Respondent failed the test established by Section 43 of the *Employment Act*.



32. I now turn to the disciplinary procedure adopted by the Respondent. In his witness statement dated, 14th February 2020, the Claimant faults the manner in which his disciplinary hearing was conducted; he states:

“The Respondent resorted to general questions and answer session during the disciplinary hearing, no witnesses were called by the Respondent and no reference was ever made to the Deloitte Report anywhere as forming the basis of the questions that were posed to me and which formed my eventual dismissal. Similarly, I was never referred to any document or report by the Respondent during the entire disciplinary hearing process.”

33. In his final submissions dated 19th December 2023, the Claimant referred to the decision in *Andrew K. Tanui v Postal Corporation of Kenya* [2014] eKLR where the Court faulted the employer for failure to avail to the employee a copy of an audit report relied upon to discipline the employee.

34. The Claimant further relied on the decision in *Lawrence Lien Shoona v East Africa Portland Cement Company Limited* [2018] eKLR where the Court stated as follows:

“As is evident from the notice to show cause, the charges are framed in a general manner and the claimant required the report to ascertain what the exact complaints and recommendations against him were and therefore effectively respond to the same...I find that the respondent’s refusal to supply copy of the audit report and other particulars sought by the claimant to enable him respond to the notice to show cause was prejudicial to him and made it extremely difficult for him to respond to the charges raised in the notice to show cause. It is not lost to the court that the report has not been produced in court to enable the court confirm if the extract by the respondent is correct or if the respondent’s interpretation leading to the charges against the claimant is accurate. The only interpretation the court makes is that the respondent had information it wished to keep away from the claimant and the court.”

35. The case now before me is on all fours with the *Lawrence Lien Shoona case* (*supra*) by which I am fully persuaded.

36. The Respondent admits that it did not furnish the Claimant with the full audit report, despite his request. A copy of the show cause notice produced by the Claimant exhibits his handwritten comments by which he asked for a copy of the official final report by Deloitte, to enable him respond to the allegations levelled against him. He also asked for extension of time within which he would respond to the allegations.

37. From the evidence on record, the request for extension of time was granted but the full report by Deloitte was not availed. The Respondent’s Head of Employee Relations, Grace Wamiti told the Court that the Claimant was issued with excerpts of the report.

38. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court held as follows:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”



39. In the present case, the Claimant was denied access to the report upon which the Respondent relied to charge him with multiple allegations. Without this report, the allegations remained unsubstantiated and unexplained. The procedural fairness requirements of Section 41 of the Employment Act were therefore compromised.
40. Ultimately, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair.

Remedies

41. The Claimant claims reinstatement as a primary remedy. However, in light of the time lapse after separation, this would not be an appropriate remedy. Instead, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the finding that he did not contribute to the termination. Further, having been dismissed from a senior position by a high profile employer, such as the Respondent, he is unlikely to procure alternative employment of equivalent stature. At the time he testified before the Court, he was jobless.
42. In addition, I award the Claimant three (3) months' salary in lieu of notice, as provided in Clause 22(a) of his appointment letter dated 15th January 2009.
43. No basis was established for the claim for salary until retirement which therefore fails and is disallowed.
44. Finally, I enter judgment in favour of the Claimant as follows:
- | | | |
|----|---|-------------------|
| a. | 10 months' salary in compensation..... | Kshs.9,500,000 |
| b. | 3 months' salary in lieu of notice..... | <u>2,850,000</u> |
| | Total..... | <u>12,350,000</u> |
45. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
46. The Claimant will have the costs of the case.
47. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF MARCH 2024

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JUDGE

Appearance:

Messrs Ogutu and Ogembo for the Claimant

Mr. Kiche h/b Mr. Ohaga, SC for the Respondent

