Degener v German School Society (Cause E017 of 2021) [2024] KEELRC 1438 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1438 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E017 OF 2021

J RIKA, J

JUNE 14, 2024

BETWEEN

DINAH DEGENER .... CLAIMANT

AND

THE GERMAN SCHOOL SOCIETY .... RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 11th January 2021.
2. She states that she was employed as a Kindergarten School Teacher by the Respondent, in August 2016. She was confirmed and issued a written contract on 20th February 2020.
3. She was diligent, and the Respondent had full confidence in her, sending her to Cairo, Egypt on 3rd April 2019 for training, and allowed the Claimant to conduct private lessons.
4. She was, on 23rd October 2020 contacted by a parent, to organize playgroups for children during the school's autumn break. She informed the Respondent about the request, and there was no objection.
5. She proceeded to organize the playgroups, with other Teachers.
6. On 2nd November 2020, she was surprised to receive a letter to show cause from the Respondent, alleging that she had solicited for provision of hedgehog play dates. The letter to show cause exhibited the Claimant's e-mail to parents, which she sent on organization of playgroups.
7. She responded, explaining in detail, her involvement with the playgroups. She was summoned for disciplinary hearing, which took place on 12th November 2020. She was not fairly heard.
8. She was not allowed to take minutes. Some children were taken away from her class, and assigned to other Teachers contrary to school policy.

9. On 19th November 2020, she was summarily dismissed for engaging in other work, during scheduled working hours, while employed by the Respondent, without the Respondent's consent.

10. She states that summary dismissal was malicious, in bad faith, and discriminatory. Her colleagues had engaged in provision of similar private services. They were not taken through disciplinary processes.

11. The Respondent did not conduct proper investigations. It was wrong for the Respondent to purport to control what the Claimant wished to do, with her free time.

12. She prays for: -

    a. Declaration that dismissal was unfair and unconstitutional.

    b. 12 months' salary at Kshs. 4,803, 313, in general damages for breach of contract and unfair termination.

    c. 6 months' salary at Kshs. 2,401,656 in compensatory damages for bad faith dismissal and breach of the Claimant's constitutional right to fair labour practices.

    d. 6 months' salary at Kshs. 2,401,656 in aggravated damages for anxiety caused to the Claimant, and loss of income.

    e. Costs.

    f. Interest.

    g. Any other suitable order.

13. The Respondent filed a Statement of Response, dated 26th February 2021. It is conceded that the Claimant was employed by the Respondent as a Kindergarten Teacher, on 16th August 2016. Her employment was regulated by her contract and the Respondent's employment handbook. The Respondent is a school of international repute, governed by strict rules and regulations. It is part of the policy that Teachers should not engage in other employment activities, during work hours, or during other time they may be required to work. Clause 11 of the Claimant's contract prohibited her from engaging directly or indirectly, in any consultancy, work, job or any business, profession or occupation, other than that of her employment with the Respondent. She could only engage elsewhere, with written, prior consent of the Respondent.

14. The Claimant was summarily dismissed, for engaging in other employment activities, contrary to clause 11 of her contract.

15. Towards the end of October 2020, the Respondent learnt that the Claimant, and her assistant, were arranging private lessons for the Respondent's students. The lessons were to be given at a private residence. There was no consent sought from the Respondent. The Claimant was charging a fee for the lessons. The lessons were to be held during working hours, or when the Claimant was expected to be teaching. The issue had been discussed with Teachers on various occasions, prior to October 2020. Communication through e-mail had been made to the Teachers by Management. The Claimant ignored these meetings, her contract and the handbook, and organized her own private activities with the Respondent's students.

16. Private lessons were only organized by the Respondent during school holidays, and took place within the school premises. All payments by parents would be channelled through the school account, for accountability. In her e-mail to the parents, the Claimant states that she decided to come up with the idea. Her private lessons were entirely her own idea, organized contrary to her contract.

17. She was issued a letter to show cause. She responded. She was furnished with the damning e-mail she sent out to parents organizing her lessons. She was invited to disciplinary hearing. She was advised of her right to be accompanied by a representative of her choice. She attended hearing alone, on 12th November 2020. She was heard fairly.

18. The Respondent urges the Court to find that termination was fair and lawful, carried out in accordance with the *Employment Act* and *the Constitution*. The Respondent urges the Court to dismiss the Claim with costs.

19. The Claimant gave evidence, and closed her case, on 1st July 2022. Human Resource Manager, Mary Makau, gave evidence for the Respondent on 2nd November 2023, closing the hearing. The Claim was last mentioned on 1st March 2023, when the Parties confirmed filing and exchange of their closing submissions.

20. The Claimant adopted her witness statement and documents, in her evidence-in-chief. She restated the contents of her Statement of Claim, as summarized above.

21. She highlighted that she was allowed to have private lessons. Parents were aware. She did so for 1 hour, before regular afternoon lessons. It was not a secretive undertaking. She was not the only Teacher involved. When Covid-19 hit, a parent contacted the Claimant asking for private lessons. The Claimant consulted her boss, and was advised that the Respondent's Board had consented. In consultation with the parents, it was agreed that the lessons take place at a central area, within Runda Estate, in the vicinity of the school.

22. The Claimant told the Court that she cancelled the lessons, because the exercise had become confusing. Her boss was angry. Parents were angry. The Claimant told the Court that she was subsequently issued a letter to show cause, and taken through the disciplinary hearing. The disciplinary hearing was like a courtroom. The Respondent's Advocate was there. She continued reporting until about a week after the hearing when she was handed the letter of summary dismissal by the Respondent's Advocate. Her assistant was also dismissed. There was racial discrimination.

23. Cross-examined, the Claimant told the Court that she understood clause 11 of her contract. There was no written consent for her to engage in private lessons. Parents contacted the Claimant. Their contact was tantamount to consent.

24. The Claimant was familiar with the employment handbook. It had similar policy on private lessons. The Respondent had always spoken to the Teachers about private lessons.

25. The Claimant conceded that in her e-mail dated 26th October 2020, she states that she had decided to come up with the playgroup idea. She gave the timeframe. It was between 8.30 a.m. and 12.30 p.m. She was still in employment. It would be for 4 hours, at a cost of Kshs. 2,000 per child.

26. The Claimant agreed that she did not copy her e-mail to her boss and Management. She wrote to parents through her official e-mail address. The lessons were to take place at a private home in Runda. The insurance taken out by the Respondent covering students, did not extend to private homes. She cancelled the lessons because there was confusion. She admitted that she was issued letter to show cause and heard.

27. Redirected, she told the Court that her boss was aware about her private lessons. She was not in competition with the Respondent. Colleagues offered the same service. Private teaching was not expressly prohibited. She secured alternative work after dismissal.

28. Mary Makau, the Human Resource Manager relied on her witness statement and documents filed by the Respondent, in her evidence-in-chief.

29. She reiterated that the Respondent does not allow Teachers to conduct private lessons. The Claimant executed the contract, which barred her from engaging in private lessons. She was familiar with the handbook, which had similar prohibition. The Respondent had communicated severally to the Teachers, on this prohibition. Teachers were employed full-time, on full salary, to avoid deviation into private teaching.

30. In October 2020, the Respondent found out that the Claimant had sent out e-mail to parents, offering private lessons. She was charging Kshs. 2,000 per child. Lessons would take place outside the school. The Respondent had not authorized this. Extra tuition was only allowed with the permission of the Respondent, within the Respondent, and in relation to weak students. Teachers could not charge privately. She proposed to teach for 4 hours. This was within the normal working hours. Schools were not closed. They offered online learning during the pandemic. Her conduct was in contravention of her contract and the handbook.

31. Cross-examined, Makau told the Court that the Claimant did not have the consent to conduct private lessons. She worked on Mondays and Fridays during Covid-19. She offered private lessons on other days. There was express prohibition against private lessons. She charged Kshs. 2,000 per child for 4 hours. Redirected, Makau reiterated that the Claimant was employed full time. She was governed by the contract and the handbook. There was security risk to students, when lessons were offered privately at private residences.

32. The issues are whether the Claimant's contract was terminated fairly, under Sections 41, 43 and 45 of the *Employment Act*; and whether she merits the prayers sought.

The Court Finds: -

33. The Claimant was employed by the Respondent as a Kindergarten Teacher, on 16th August 2016.

34. She states that she was confirmed, and employed for unlimited period, with effect from 1st August 2020.

35. Clause 11 of her contract states: -

> ''The Employee shall not, without the previous written consent of the Society, directly or indirectly, carry out or be engaged in any consultancy work, job, or any business, profession or occupation, other than that of their employment with the Society hereunder.''

36. This clause, together with the employees' handbook which applied to the Claimant, clearly prohibited engagement in teaching or related activities, outside the Respondent's scheduled lessons, unless okayed by the Respondent in writing.

37. The Claimant wrote an e-mail to parents on 26th October 2020, stating that she had decided to come up with a playgroup, that might be helpful to everyone involved. She writes that the schools would not re-open in January, and she proposed the ill-fated private lessons.

38. She proposed that she would offer the lessons from 8.30 a.m. to 12.30 p.m. it was a whole 4 hours. She would charge Kshs. 2,000 per child, per session. She proposed to offer the private lessons, with her assistant, at a private residence around Runda Estate.

39. This e-mail and arrangement did not have the blessing of the Respondent. There was no prior written consent from the Respondent sought or obtained by the Claimant. Her explanation that she thought

contact by parents, was equivalent to consent, is absurd in the extreme. Her contract states the prior written consent of the Respondent, not of the parents, was needed.

40. There is a series of WhatsApp messages exchanged between the Claimant and a group of the Respondent's parents, which suggest that the idea of private lessons was discussed between the Claimant and the parents. The parents encouraged the idea, and were enthusiastic about their children being engaged by the Claimant, at a period when normal school learning, had been interrupted by Covid-19 pandemic. The Court has not found anything sinister in the arrangement crafted by the Claimant and the parents. Their intention was good, and even noble.

41. A parent named Mama Ottilia [Turtle], wrote to the Claimant informing her that they had in the past, organized playgroups for their kids during holidays. She asked the Claimant if she was interested in organizing such a group, which appears to have led to the Claimant's e-mail to parents, dated 26th October 2020, offering such private services.

42. The idea may have been good and even noble, conceptualized and implemented in consultation with a group of well -meaning parents.

43. The fault was in that the Claimant did not see the need to consult the Respondent, and seek the concurrence of the Respondent, in accordance with her contract and the employees' handbook.

44. Although schools were not physically opening, there were online lessons going on. The Claimant was still in employment, and bound by the terms of her contract and the employees' handbook. The Respondent remained responsible for the kids, and did not permit the kids to be taken to private residences for private learning. The Respondent was concerned about the safety and security of its kids. Its insurance cover, extended to occurrences happening within the school.

45. There could also be another unspoken reason why the Claimant's private lessons, would be against the interest of the Respondent. Private schools are business entities. They make money by offering learning to students. They would be utterly foolish, if they allowed their Employees to render the same services they render to their customers- the parents and their children - without control. Even when private lessons were offered at the Respondent, it would be within the school and payments would be made through the school bank account, to ensure that there was, what the Respondent, called accountability. The Claimant was proposing to make some money on the side, while still earning a salary from the Respondent. She was charging Kshs. 2,000, which was payable to her, not through the school. She set this rate herself, with the concurrence of the parents. The Respondent was not involved. She was entering the risky field of a business rival, and the Respondent dealt with her, as it would deal with any other business rival- promptly and ruthlessly.

46. Ultimately, the Respondent had valid reason, under Section 43 of the *Employment Act*, to justify termination. The Claimant was clearly in breach of clause 11 of her contract, however noble her intentions, and notwithstanding her partnership with the parents.

47. The Claimant realized she had made an error, by not seeking the consent of the Respondent, and called off the exercise. This is what the Court understood her to be saying, when she testified that there was confusion, leading to cancellation of the private lessons. The parents appeared to have been determined in keeping their children mentally engaged during the Covid-19 slowdown, and Mama Ottilia even suggested a Plan B, which does not seem to have come to fruition. Why did not the parents aid the Claimant, by engaging the Respondent, and clarifying that the arrangement was not solely a money-making venture conceptualized by the Claimant? Plan B ought perhaps to have involved the concerned parents and the Claimant, explaining their respective positions to the Respondent, and seeking the consent of the Respondent.

48. Procedure cannot be faulted. The Claimant was issued a letter to show cause. The allegations against her were clearly spelt out. The damning e-mail she dispersed to parents, was availed to her from the inception. She responded to the letter to show cause. She was advised to attend the disciplinary hearing in the company of a colleague of her choice. She attended the disciplinary hearing alone. She states the atmosphere was like that prevailing in a courtroom, but did not establish that this atmosphere prevented her or limited her, in stating her case. The presence of the Respondent's Advocate at the hearing was not in material departure from Section 41 of the *Employment Act*. It was open to the Claimant to engage her own Advocate and insist that she is accompanied by her Advocate, if she felt that this would counterbalance the influence the Respondent's Advocate had, on the disciplinary hearing. She was fairly heard, in accordance with the Sections 41 and 45 of the *Employment Act*.

49. The Court has not found any instance when the Claimant's Article 41 rights were violated by the Respondent.

50. Termination was fair and lawful.

IT IS ORDERED: -

a. The Claim is declined.

b. No order on the costs.

Dated, signed and delivered electronically at Nairobi, under Practice Direction 6[2] of the Electronic Case Management Practice Directions, 2020, this 14th day of June 2024.

James Rika

Judge

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