



**Tolle v Hass Petroleum (K) Limited (Cause 530 of 2018)
[2024] KEELRC 1502 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1502 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 530 OF 2018**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

WOLFGANG TOLLE CLAIMANT

AND

HASS PETROLEUM [K] LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 11th April 2018. He subsequently amended the Claim, through the Amended Statement of Claim, filed on 18th June 2018.
2. His position is that he was employed by the Respondent as an Assistant Depot Manager, on 7th February 2012.
3. He was suspended by the Respondent on 8th December 2017. The Respondent explained that it needed time, to investigate a theft incident which had taken place on 23rd November 2017.
4. He was not interviewed during investigations.
5. On 21st December 2017 however, he received a letter from the Respondent, informing him that investigations had faulted his sense of judgment, diligence and integrity. His contract was terminated.
6. He handed over his docket, cleared, and was paid Kshs. 196,477 in terminal dues, after deductions amounting to Kshs. 162,044 were made on account of LPG float, Logbook replacement and fuel.
7. He states that the reason given in justifying termination, was not valid. He is entitled to compensation and refund of the sum that was unlawfully deducted. He states that he was denied house allowance throughout his period of service. He claims house allowance from 1st August 2012 to 31st December 2017, at Kshs. 992,243.
8. In sum, he prays for: -



- a. Declaration that termination was unfair.
 - b. 12 months' salary in compensation for unfair termination.
 - c. Kshs. 162,044 in refund of deductions made on account of LPG float, Logbook replacement and fuel.
 - d. Kshs. 992,243 in arrears of house allowance.
 - e. Costs.
 - f. Interest.
 - g. Any other suitable reliefs.
9. He went into poultry farming, after loss of employment.
 10. The Respondent filed its Statement of Response, on 10th July 2018. It is the position of the Respondent, that the Claimant's contract was fairly and lawfully.
 11. On 23rd November 2017, one of the Respondent's LPG Trucks, registration KBU 518Q, was involved in a theft incident, while in the custody of the Claimant. The Claimant was suspended on 8th December 2017. Investigations found out that there were lapses in the operation procedures authorized by the Claimant, resulting in theft. These included: loading of stocks past the stipulated time; authorizing parking inventory overnight; authorizing parking of a vehicle at a venue not designated by the Respondent; and failure to enable enhanced features of the tracker, to ensure real time notifications.
 12. The Investigations Report was shared with the Disciplinary Committee, which was constituted on 20th December 2017. The Claimant was given an opportunity to defend himself. It was concluded after the hearing that the Claimant was negligent, occasioning substantial loss to the Respondent. The Respondent further states, that it had received various complaints from its customers concerning the Claimant.
 13. The Claimant cleared with the Respondent, and was paid all his terminal dues. He confirmed receipt and is estopped from claiming additional benefits. His salary was gross, and his prayer for arrears of house allowance has no merit.
 14. The Respondent urges the Court to dismiss the Claim with costs.
 15. The Claimant filed a Reply to the Statement of Response, on 30th July 2018. He reiterates the contents of his Claim. He denies that the LPG Truck was in his custody. He denies details of negligence, pleaded by the Respondent. He was not taken through a disciplinary hearing. He concedes that he cleared with the Respondent and was paid the sum disclosed in his Statement of Claim, but that payment did not preclude his current prayers.
 16. The Claimant gave evidence and closed his case, on 16th February 2023. The Respondent's Human Resource Manager, Godfrey Imbali, gave evidence on the same date, and on 29th November 2023, when the hearing closed. The Claim was last mentioned before the Court on 16th February 2024, when Parties confirmed filing and exchange of their closing submissions.
 17. The Claimant adopted as his evidence-in-chief, his witness statement and documents, filed with the Statement of Claim. The documents are exhibited 1-14. He relied on additional documents filed on 27th July 2018, marked as exhibits 15-16.



18. Cross-examined, he stated that he worked for 5 years. He was not made aware that his salary was all-inclusive. He did not claim house allowance in the course of employment. He was not taken through a disciplinary hearing. He cleared and was paid terminal dues. He signed indemnity form. He agreed that everything due to him was paid, but that there were illegal deductions. Deductions related to repair of Trucks. He requisitioned for the amount in question. Expenditure was approved by the Finance Manager. He accounted for the amount. He did not exhibit the receipts, because he was not able to access them after dismissal. He was the Operations and Logistics Coordinator by the time of termination. He was not made aware about any disciplinary hearing.
19. Redirected, the Claimant told the Court that Finance Department kept custody of the receipts. He was not heard before deduction was made. House allowance was not indicated in his pay slip. He did not receive any charges before termination.
20. Godfrey Imbali told the Court that the Claimant was dismissed for negligence. He was entrusted Trucks by the Respondent. He did not follow procedure on loading. In November 2016, he authorized loading of LPG. It was not to be loaded past 2.00 p.m. He authorized loading beyond this hour. Secondly the LPG Truck was parked at the wrong parking. Third, the Truck was not to spend the night at its destination, while loaded.
21. The Respondent suffered losses as a result of the Claimant's negligence. The Truck was stolen at night with goods. It was intercepted by the Police. Some goods were not recovered. The Respondent incurred expenses in retrieving the Truck. The Claimant recorded a statement, and was suspended. He was aware about the allegations against him.
22. The Claimant was called before a panel made up of Managers, on 20th December 2016. He was heard in accordance with the minutes exhibited by the Respondent. Deductions made on his dues were valid. He was in charge of the Trucks. He used to requisition for advances. He would settle the accounts by production of receipts. He did not produce receipts with regard to the sum deducted. He was paid a consolidated salary and never complained about this throughout his employment. He cleared and indemnified the Respondent.
23. Cross-examined, he told the Court that loading of LPG was overseen by the Logistics Coordinator. Loading was preceded by an order. It indicated who authorized loading. The order was not availed to the Court. Witnesses confirmed that the Claimant authorized loading. Imbali did not know if the Claimant was present, when loading was done. Loading was done past 2.00 p.m. contrary to operation procedure. The Truck was released to go to Nakuru.
24. The driver arrived at the Respondent's Plaza Offices, at around 7.00 p.m. He was himself investigated and disciplined. It was not the first time a Truck was being parked at Plaza Offices. Drivers had been instructed not to park there. There were security guards at the area. They were investigated. Thieves accessed the premises, wearing uniforms similar to the Respondent's. CCTV system was not functioning.
25. The Claimant was among 4 Employees found culpable. There was no direct evidence linking the Claimant to theft. The issue was not that the Claimant should have stayed awake during loading; it was that he gave instructions for late loading, contrary to operating procedure. His instructions were not written. Attendance records show that the Claimant signed in at 13.20 hours. He was not at the depot, at the time of the incident, according to this record. There was no document showing that the Claimant authorized late loading, or parking at Hass Plaza Offices. The driver did not make a statement saying he was instructed by the Claimant. The Respondent referred to complaints made against the Claimant by customers. It did not exhibit any complaint before the Court. The minutes of the disciplinary hearing



are summarized in an e-mail. They do not show that the driver, who was also an accused person, testified against the Claimant.

26. Redirected, the witness told the Court that other Employees implicated in the incident, were also dismissed. All were heard. The e-mail is a true account of the disciplinary hearing. Dismissal was not solely on loading; there were other complaints.
27. The issues are whether termination of the Claimant's contract was based on valid reason or reasons, in accordance with Section 43 and 45 of the Employment Act; whether it was executed fairly, in accordance with Section 41 and 45 of the Employment Act; and whether he is entitled to the remedies sought.

The Court Finds: -

28. The Claimant was employed by the Respondent through a letter of appointment, dated 7th February 2012. The effective date was 10th February 2012. The starting salary was Kshs. 60,000, described in the letter as 'gross.'
29. He successfully completed a probationary period of 6 months.
30. He was suspended on 8th December 2017, to enable the Respondent investigate a theft incident, which occurred on 23rd November 2017.
31. It is common ground that the Claimant's contract was terminated by the Respondent with effect from 20th December 2017. The reasons for the decision are stated in the letter of termination.
32. At the time of termination, the Claimant's salary was Kshs. 159,750 monthly.
33. It is also common evidence, that he cleared with the Respondent upon termination, as shown in the clearance form on record. He was paid Kshs. 196,477 in terminal dues. He acknowledged payment and executed a letter of indemnity, on 22nd February 2018. He indemnified the Respondent on 'all liabilities arising from accruals of benefits and dues during my employment. '
34. Procedure. The Claimant prepared an incident report on 23rd November 2017, which he addressed to the Respondent, following theft of the Respondent's Truck, on the night of 22nd / 23rd November 2017.
35. He received a letter of suspension effective 8th December 2017. The reasons related to what the Respondent considered as lapses, which enabled thieves, dressed like staff of the Respondent, to steal the Respondent's LPG Truck. The reasons for suspension, were adequately known to the Claimant, from the time he prepared and issued his incident report.
36. The Respondent has a Disciplinary and Procedure Manual, 2012. The Manual states that the Respondent's disciplinary procedures are administered in accordance with the relevant Country's Labour Laws, and that the Respondent takes into consideration the provisions of related Labour Acts, and Decisions of the Industrial Court on unfair dismissal and unfair employment policies.
37. The procedure entails letter to show cause, citing the offence and requiring the Employee to show cause why disciplinary action should not be instituted.
38. The Manual refers to a pre-termination interview. It is not clear if this interview comes after the disciplinary hearing, or is intended to serve as the disciplinary hearing. There is a thin line, between disciplinary hearing and pre-termination interview. The Manual falls far short, in regulation of disciplinary hearing, dedicating a lot of space, to what has been characterized a pre-termination interview.



39. But the basics of a fair hearing are captured. The Manual states that the Employee must know the exact nature of the accusations against him; he must be given an opportunity to state his case; the disciplinary authority must act in good faith; and there should be a right of appeal to a higher authority.
40. Pre-termination interview as noted above, occupies most of the space in the Respondent's Manual on discipline.
41. The Manager recommending termination, must discuss the recommendation with the Head of Human Resource and Administration. Upon approval, the Manager should hold pre-termination interview with the Employee. The Manual states that the Manager conducting pre-termination interview, must have authority to recommend or decide what, if any corrective action should be taken.
42. The Manual emphasizes that before termination, the Head of Department must schedule and conduct pre-termination interview. He / She must give a written notice of the meeting to the Employee, the location, time and the facts; and inform the Employee about the acts or failures that are the reasons for termination to the Human Resource Department.
43. The Manual furthers states that the Head of Department, the Employee and Head of Human Resource, shall be present during the pre-termination interview.
44. It is restated in the Manual that the Employee will be given a written notice of the meeting; and allowed an opportunity to respond to the recommendation for termination.
45. Lastly, the Manual states that following the pre-termination interview, the Head of Human Resources will review and consider response by the Employee; if the Respondent decides to terminate, a letter of termination will be issued; the letter must include reasons; the Employee will be contacted by all reasonable means to communicate the decision; and if a decision has been made not to terminate, the Employee will be notified to return to duty.
46. This procedure, in the view of the Court is not clear at all, and does not disclose compliance to the minimum statutory standards of a fair disciplinary hearing, contemplated by Section 41 and 45 of the *Employment Act*. It is not clear where the disciplinary hearing begins and ends, and where pre-termination interview, begins and ends.
47. There is no evidence that the Respondent was alive to its disciplinary hearing and pre-termination requirements, in the process leading to termination of the Claimant's contract.
48. There is no evidence of a disciplinary hearing, as contemplated by Section 41 and 45 of the *Employment Act*. There is no evidence of pre-termination interview, a procedure that is self-imposed by the Respondent. There was no letter to show cause, issued to the Claimant.
49. The Respondent alleged that an email sent on 20th December 2017 by one Justin Nyaga Njiru, to one Abdirizak Sheikh, constituted minutes of the hearing. The e-mail simply states that a disciplinary hearing meeting was held. It then goes on to make reference to committee's findings and resolutions. It is stated that the committee recommended the immediate termination of the Claimant's contract on account of negligence and questionable integrity.
50. The email can hardly pass for minutes of a disciplinary hearing. There is no record of specific charges read out to the Claimant. There is no record of who composed the disciplinary committee, what evidence was received, whether there were witnesses and documents in the proceedings. The Claimant is not shown to have said anything. Indeed, no one is shown to have said anything. There is no record of any invitation to a disciplinary hearing communicated to the Claimant. He was not advised about



his right to be accompanied by a colleague, or trade union representative, at the hearing. This appears to have been an e-mail generated merely to fill a gap, on the lack of a disciplinary hearing.

51. The Manual refers to a right of appeal, which the Respondent does not seem to have extended to the Claimant.
52. While the Respondent started fairly, with its request for incident report and subsequent letter of suspension, to the Claimant, the procedure adopted at the end of the given suspension period, to the time of termination, was shambolic. It did not conform to the minimum statutory standards of fair termination procedure, under Section 41 and 45 of the *Employment Act*. It was in stark departure from the Respondent's own internal disciplinary procedure.
53. Validity of reason. The reasons as stated in the e-mail authored by Justin Nyaga Njiru, were, that the Claimant was negligent; and that he was of questionable integrity.
54. The two reasons revolved around the allegation that the Claimant, authorized loading of an LPG Truck outside the authorized hours; the Truck was parked at Hass Plaza contrary to policy on parking of LPG Trucks; and that there were other allegations against the Claimant from the past, including some made by the Respondent's customers. The Human Resource Manager, testifying for the Respondent, told the Court that the Respondent was not informed in its decision against the Claimant, solely on the loading of LPG; there were other factors, casting long shadows, from the Claimant's past.
55. On cross-examination, he appears to have faltered tremendously, in justifying the reasons. He stated that there was an order, preceding LPG loading, which would show who authorized loading. He did not have the order. He did not know if the Claimant was at the workplace, when loading was done. Loading was done past 2.00 p.m. when the records indicate, the Claimant was not at the workplace. It was not the first time LPG Trucks were parked at Hass Plaza. CCTV cameras were not working. The Claimant in his incident report, referred to footage taken from CCTIV cameras, showing thieves dressed as Respondent's Employees, driving away the Respondent's Truck.
56. Further, the Human Resource Manager stated that the driver of the stricken Truck, did not record any statement, saying he was instructed by the Claimant, to park the Truck at Hass Plaza. There were no complaints from the Respondent's customers, against the Claimant, exhibited by the Respondent.
57. This evidence by the Human Resource Manager, strongly discounts the Respondent's reasons, given in justifying termination. Dismissal was not shown to have been founded on valid reasons relating to loading of LPG, or other undisclosed complaints from the Claimant's past. Lack of integrity and negligence were generic terms, adopted by the Respondent for lack of valid reasons, to justify its termination decision against the Claimant.
58. Termination was not founded on valid reason or reasons, under Section 43 and 45 of the *Employment Act*.
59. Remedies. The Claimant's contract dated 7th February 2012, described his salary as gross. Gross salary includes basic salary and all allowances. He earned a gross salary from the inception, and did not complain about house allowance, throughout his period of employment. He is not entitled to house allowance in arrears.
60. There was no specific proof, on his claim for refund of deductions made, on payment of terminal benefits. He did not complain about those deductions, when he indemnified the Respondent on 22nd February 2018, on "all liabilities arising from accruals of benefits and dues during my employment." He cleared with the Respondent, received his terminal dues with the deductions, and indemnified the Respondent. His prayer for refund of deductions is declined.



61. The indemnity however, was confined to payment of terminal benefits. It was a limited discharge. It did not free the Respondent from its obligation to take the Claimant through a fair disciplinary process, and the consequence of failure to honour such obligation. In other words, indemnity did not foreclose remedies for unfair termination.
62. The Claimant worked for 5 years. He was not shown to have caused or contributed, to the circumstances leading to termination. He mitigated his loss of employment, by delving into gainful poultry farming. His contract was open-ended. Termination was flawed on all fronts. He is granted equivalent of 9 ½ months' gross salary in compensation for unfair termination, at Kshs. 159,750 x 9 ½ = Kshs. 1,517, 625.
63. Costs to the Claimant.
64. Interest granted at court rate from the date of Judgment, till payment in full.
In sum, it is ordered: -
 - a. It is declared that termination of the Claimant's contract by the Respondent was unfair.
 - b. The Respondent shall pay to the Claimant, equivalent of 9 ½ months' gross salary in compensation for unfair termination, at Kshs. 1,517,625.
 - c. Costs to the Claimant.
 - d. Interest granted at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES 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

