



**Ogolah v Postal Corporation of Kenya (Cause 1186 of 2016)
[2023] KEELRC 809 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 809 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1186 OF 2016
M MBARÚ, J
MARCH 27, 2023**

BETWEEN

SOLOMON OKOTH OGOLAH CLAIMANT

AND

POSTAL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as the acting business analysis mail service and following due to frustrations and failure by the respondent to confirm him for the said position he resigned on February 17, 2016. The respondent accepted the resignation on March 17, 2016.
2. Before the frustrations started, the claimant had worked for the respondent as the acting business analyst mail service earning Kshs 88, 490 per month which was not effected and resulted in discrimination and for the 12 months the claimant is seeking payment of Kshs 1, 061,880 for unfair frustrations of contract of employment.
3. While the claimant was serving in the acting position, he was not paid acting allowances all at Kshs 267, 826.39 in the following orders;
4. Allowances due in the first 6 months ending October, 2015 at 70% of due salary at Kshs 55,990 – 19,180 and what is due is Kshs 24,813;
5. The claimant should have been confirmed after 6 months of acting pursuant to the collective bargaining agreement (CBA) under job scale MG7 and for 64 months claims Kshs 428, 917.33 less what was paid at Kshs 161, 090.94 and total owing is Kshs 267, 826.39.
6. The claimant as a marketing professional at the time employment terminated was not issued with a certificate of service and this has led to loss of job opportunities with other employers.

The claimant is seeking the following;



7.
 - a. A declaration that resignation from employment arose out of frustrations and hence seek 12 months compensation at Kshs 1,061,880;
 - b. Unpaid salary arrears Kshs 267,826.39;
 - c. Certificate of service; and
 - d. Costs of the suit.
8. The claimant testified that he worked diligently for the respondent and was promoted and deployed to Mails Department to work in an acting capacity as Business Analyst, MG6 but the respondent failed to pay him his salary on a proper scale of Kshs 88, 490 and the acting allowance. The claimant was working as a business analyst as demonstrated by the various correspondences with the human resource office but there was no reply to his demands which action demonstrate malice and was meant to frustrate his employment. The claimant had attained the requisite academic qualifications for the position of Business Analysis he applied for transfer to marketing department as an assistant marketing manager which transfer was approved by his immediate boss but he was never issued with the letter kept by the respondent. This denied the claimant any prospects of career growth.
9. The claimant was interviewed for the position of Business analyst management Grade 6 but his salary was not reviewed or paid in time and later this was partially paid at a lower grade of MG-6 for the position of a management trainee which was an unfair labour practice.
10. The claimant testified that the response that he was not the business analyst and that he was acting on behalf of an officer on level is not true since the respondent advertised the position, the claimant applied and was interviewed coming as the finalist but his letter of appointment was withheld. The letter was supposed to be issue by Postmaster General on 27th July, 2015. In a circular issued by the respondent, all acting positions were suspended but the claimant was not affected
11. because it was special but the due allowances for the position were not paid and due to work frustrations he resigned.
12. Under the CBA, after acting for 6 months, one was supposed to be confirmed which was not the case for the claimant. The circular issued in May, 2015 did not affect the claimant hence he should be paid the salary arrears.

Response

13. In response the respondent's case is that the claimant was employed as the Postal officer and not an acting business analyst services as alleged. The claimant undertook acting duties when the said position fell vacant even though the vacancy was advertised and may interested applicants applied for a competitive recruitment for the post of business analyst. The recruitment process ended and the successful applicant was appointed to the position on October 19, 2015 and who took over the duties of the role.
14. The claimant informed the respondent that he had been acting as Business Analyst which in the Postal Corporation Scale falls in salary scale MG7 and his special acting duty allowances was calculated as from April 10, 2015 to October 19, 2015 and which was computed at Kshs 110, 671.36 and the sum of Kshs 129, 789 which was an overpayment of Kshs 29, 165.10.
15. The position of Business Analyst was filled on October 19, 2015 and the claimant claimed payment of acting allowance for the period of October 20, 2015 to March 17, 2016 but he did not qualify for



this payment but for amicable settlement, the respondent paid him Kshs 74, 854.16 out of which there was an overpayment which was recovered.

16. The response is also that the claimant resigned from his employment voluntarily and cannot claim to have been frustrated by the respondent. the claimant remained a postal officer at salary grade UN10 and when he was posted at the Mails Department he opted to perform duties of a Business Analyst in an acting position which was not a promotion to justify his claim for salary or allowances at Job Scale UN10 to MG7 which is beyond UN9 and which he could not have jumped. The substantive position remained at Postal Officer salary scale UN10. Acting allowance is only paid to an employee who remains his substantive role and is allocated
17. additional duties. Upon the appointment of the substantive role of Business Analyst, the claimant had no acting role so as to claim any allowances and he should refund the overpaid allowances by Kshs 29,139.39 and the claims made be dismissed with costs.
The respondent did not call any witness.
18. At the end of the hearing both parties agreed to file written submissions. Only the claimant complied.
19. The claimant submitted that his claims are undefended; the respondent called no witness and so should be allowed as prayed. The claimant analysed his pleadings and evidence and relied on the following cases [*Peter Kaburu Karanja v Kirinyaga Construction \(K\) Limited*](#) Cause No 81 o 2019; [*Andrew Khaemba v Afriscan Kenya Limited*](#) Cause No 479 of 2016; and [*Naomi Sao Shako v Changamka Micro Insurance Limited*](#) Cause Bo.589 of 2017.

Determination

20. Pursuant to Section 10 of the [*Employment Act, 2007*](#) (the Act), an employee who is issued with a written contract of employment is bound by its terms and conditions and unless the employer reviews the same in writing, or there is a CBA making changes to job grade or there is a policy that confers a role with benefits, the employee remains bound under the written contract issued.
21. The claimant was employed by the respondent as a Postal Officer on September 4, 2012. Through letter dated 31st March, 2015 the respondent deployed the claimant to the Mails Department. On February 17, 2016 the claimant resigned from his employment citing frustrations and that he had been the acting Business Analyst/Mail Services for long without pay or any formal appointment letter and only issued with communications on the same. He therefore resigned to seek justice. The respondent accepted the resignation through letter dated March 9, 2016.
22. In the letter of resignation, the claimant acknowledged that he had been on acting role without confirmation for the same.
23. The respondent does not deny that the claimant was appointed acting Business Analyst from October 20, 2015 to March 17, 2016 and the position was filled with
24. the appointment of the substantive holder on 19th October, 2015. The acting role for 6 months by the claimant overlapped with the appointment of the substantive holder for the position. The claimant can therefore find no justification that he held such position beyond the period allowed.
25. Without any formal appointment for the role of Business Analyst save for acting function, upon the appointment of the substantive office holder, the claimant then reverted back to his position. For the acting position, through letter dated November 5, 2015 the respondent informed the claimant that he would be paid an acting allowance for the 5 months and further that there was no vacancy for the



position of Business Analyst/Mail since the respondent had deployed someone to perform such duties and allowances for acting in such position was only possible when the position remained vacant.

Under section 5(7) (c) of the [Employment Act, 2007](#) provides that;

An employment policy or practice includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointment, and the appointment process, job classification and grading, remuneration, employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, termination of employment and disciplinary measures.

26. Upon the respondent filling the substantive position of Business Analyst, the claimant reverted back to his position of Postal Officer. The due allowances for the acting role were assessed and paid accordingly. See [Oyatsi v Judicial Service Commission](#) (Petition E111 of 2021) [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment).
27. On the reliefs sought by the claimant, having been appointed by the respondent as the Postal Officer, his acting allowances were assessed based on his then grade and paid accordingly. He cannot justify a claim for a higher grade than that he held at the time of acting as Business Analyst despite having applied for the position. The claim that he was a finalist upon being interviewed is not supported by any evidence.
28. On the claim that the claimant was frustrated in his work and therefore forced to resign, and hence he should be paid damages, where an employee is placed under
29. intolerable working conditions by the employer and forced to resign, the concept to address such matter is not to claim in frustration. A claimant seeking under such matter must outline and give the particulars of how such matter arose and was demonstrated and leading to repudiation of the employment contract which has not been demonstrated in this case.
30. On the claim for a Certificate of Service, such should issue at the end of employment pursuant to Section 51 of the [Employment Act, 2007](#).
31. Despite the respondent not calling any witness, the court finds no merit in the instant claim.
32. Accordingly, the claim is hereby dismissed. The respondent shall issue the claimant with a Certificate of Service as required under Section 51 of the [Employment Act, 2007](#). Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

