



SMW v DHL Kenya (Cause 698 of 2019) [2023] KEELRC 1468 (KLR) (15 June 2023) (Judgment)

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

CAUSE 698 OF 2019

BOM MANANI, J

JUNE 15, 2023

BETWEEN

SMW CLAIMANT

AND

DHL KENYA RESPONDENT

JUDGMENT

1. The dispute before me relates to alleged unfair termination of a contract of employment. It is the Claimant's case that the Respondent, who was his employer, terminated his employment without lawful cause and in breach of the applicable procedure. Consequently, and by this action, the Claimant seeks various reliefs as more particularly set out in the amended Statement of Claim.
2. The Respondent does not admit liability for the claim. According to the Respondent, the Claimant engaged in misconduct during the currency of his contract necessitating that the contract be terminated. The Respondent contends that following the Claimant's misconduct, he was subjected to appropriate disciplinary action before he was summarily dismissed from employment.

Claimant's Case

3. The Claimant states that by a letter dated 15th February 2011, the Respondent offered him employment as a Field Sales Executive. It is the Claimant's case that he rose through the ranks until he was seconded to DHL Swaziland sometime in April 2018.
4. The Claimant avers that the secondment was subject to the Respondent procuring a work permit for him. Further, he contends that the Respondent promised to evaluate his performance within three (3) months of the secondment in order to increase his salary. It is the Claimant's case that the Respondent was to also provide him with other benefits including medical cover, a motor vehicle, airtime allowance and bonus pay. In addition, the Claimant states that the Respondent was to facilitate the relocation of his family from Kenya to Swaziland in accordance with the company's practice and tradition.



5. In alleged breach of the terms of the secondment, the Claimant accuses the Respondent of renegeing on all these promises. The Claimant states that he was forced to dig deep into his pockets to finance his upkeep and housing in Swaziland. The Claimant also states that because of the Respondent's failure to procure the work permit, the Claimant had to contend with continuous harassment from law enforcement agencies.
6. The Claimant further states that his house was broken into in continuation of the targeted harassment against him. As a matter of fact, he states that at some point, there was an attempt at his life.
7. It is the Claimant's case that the Respondent exposed him to unnecessary discriminatory treatment during the currency of his secondment to Swaziland. He accuses the Respondent of refusing to pay him annual bonus and refusing to review his performance and increase his salary when other employees of the company had been reviewed for purposes of salary increments and had been paid their annual bonuses.
8. The Claimant also states that whilst in Swaziland, he was falsely accused of sexually harassing a female colleague. The Claimant believes that the accusation was an attempt by the employee to divert attention from the issue of her poor performance which the Claimant was handling.
9. The Claimant accuses the Respondent of failing to handle the aforesaid allegation against him in a fair and just manner. He asserts that he was suspended from duty without the matter being properly investigated. Further and following the allegation, the Claimant accuses the Respondent of allowing DHL Swaziland to undertake illegal disciplinary proceedings against him.
10. It is also the Claimant's case that the Respondent subjected him to inhumane working conditions. The Claimant accuses the Respondent of denying him the opportunity to visit his family in Kenya notwithstanding that he had accrued leave days. In the Claimant's view, the Respondent's actions of refusing to procure a work permit for him whilst at the same time refusing to allow him to travel to Kenya to be with his family indirectly subjected him to house arrest since he could not move freely within Swaziland.
11. It is the Claimant's case that because of the emotional anguish that he suffered due to the attempt at his life, he was granted sick off to seek medication in Kenya. He confirms that after he travelled to Kenya, he did not return to Swaziland.
12. The Claimant accuses the Respondent of failing to settle his salary for May 2018 and part June 2018. It is the Claimant's case that as a result of the Respondent's decision to cancel his medical cover, he was forced to spent huge sums of money to cover medical expenses for his family. Besides, he states that the decision to cancel his medical cover exposed him to emotional anguish out of fear of the exposure his family was subjected to.
13. After cancellation of his secondment to DHL Swaziland, the Claimant states that the Respondent took over and continued with a flawed disciplinary process commenced by the DHL Swaziland against him. The Claimant asserts that the Respondent once again irregularly suspended him from duty before subjecting him to a biased disciplinary process presided over by his juniors. As a result, the Claimant asserts that he was forced to tender his resignation from employment.
14. It is the Claimant's case that the resignation was the culmination of the hostile treatment that he had been subjected to at the workplace. In his view, the resignation in effect resulted in the constructive termination of his contract of employment. And hence the current claim.



The Respondent's Case

15. On its part, the Respondent acknowledges that the Claimant was its employee. However, it is alleged that his work ethic was not good. It is the Respondent's case that whilst serving in its Mombasa branch, the Claimant was accused of sexually molesting a female co-employee at the branch. This allegedly forced the Respondent to re-deploy him back to Nairobi.
16. The Respondent states that the Claimant was subsequently seconded to DHL Swaziland from mid April 2018. The Respondent further states that whilst on the aforesaid secondment, the Claimant remained its employee even though DHL Swaziland became responsible for all of his employment benefits for the duration.
17. The Respondent states that whilst on secondment, the Claimant was once again accused of sexually molesting an employee of DHL Swaziland. Following this accusation, the Respondent avers that DHL Swaziland commenced disciplinary proceedings against the Claimant. However, the process allegedly aborted after the Claimant left Swaziland for Kenya and failed to return. As a result of his alleged failure to return to Swaziland, DHL Swaziland terminated the Claimant's secondment on account of his unauthorized absence from duty.
18. It is the Respondent's case that as the inquiry into the sexual harassment accusations against the Claimant whilst in Swaziland had not been finalized at the time he left the country for Kenya, the Respondent took up the matter in order to bring it to closure. According to the Respondent, as the Claimant's primary employer, it had power to inquire into the aborted disciplinary process.
19. The Respondent states that in line with its policies, it suspended the Claimant from duty before taking him through the disciplinary process. However, before the matter was finalized, the Claimant resigned. Nevertheless, the Respondent went ahead to summarily dismiss him from employment.

Analysis

20. This case raises two critical matters in employment law. The first one relates to the concept secondment of an employee by a principal employer to a secondary employer and the attendant consequences. The second one relates to the concept of resignation from employment and its import on the employment relation. It is important to reflect on the two issues generally before I consider them in the context of the case before me.
21. The concept of secondment in employment law is not novel. It arises when an employer temporarily releases an employee to work for another employer with the understanding that the employee will resume his services with the original employer upon the lapse of the term of the temporary transfer. In effect, the contract of employment between the original employer and employee is not terminated by reason of the temporary assignment of the employee to the new employer (see *David Barasa v British Peace Support Team & Another* [2016] eKLR).
22. In a sense, this arrangement results in a scenario where we have a tripartite arrangement between the original employer, the employee and the subsequent employer. On the one hand, the original employer stands in the position of the legal employer. On the other hand, the secondary employer stands in the position of the host or economic employer.
23. Whilst the economic employer enjoys the actual services of the employee during the currency of secondment, the primary employer remains the legal employer of the employee with the consequence that the employment relation between the employee and the primary employer remains alive. It is not



extinguished. It is because of this reality that the employee is able to resume his services with the original employer upon the lapse of the period of secondment.

24. In his publication entitled 'Employment Law Guide for Employers, Revised Edition, LawAfrica Publishing Ltd, George Ogembo states that secondment usually results in a principal-agent relation between the primary employer and the host employer with respect to the seconded employee. In this sense, the primary employer remains principally responsible for the rights of the employee except to the extent that is expressly excluded by the secondment agreement. Similarly, the primary employer will be liable for any breaches of contract by the host employer against the employee except to the extent that is excluded by the secondment agreement (see also *Nahashon Cheruiyot Ngeno v Strengthening of Mathematics & Science Education Project & another* [2015] eKLR). It is thus important that the primary and host employers draw a comprehensive and clear agreement specifying who between them will be responsible for which of the employee's various rights under the arrangement.
25. Since the primary employer remains the legal employer of the seconded employee, only this employer has the legal mandate to terminate the primary employment relation. The host employer has no power to terminate this relation. However, the host employer reserves the right to terminate the secondment arrangement by releasing the employee back to the primary employer before the lapse of the secondment period.
26. Whilst the host employer retains some say in determining whether the employee's secondment should be terminated before term, whether the employee's contract of employment should ultimately be terminated for any infractions at work including during the duration of his secondment lies with the primary employer. In this sense, the ultimate disciplinary control over an employee on secondment lies with the primary employer [see *Secondment Agreement (Employers Guide)* <https://www.davidsonmorris.com/secondment-agreement/>].
27. During the currency of the secondment agreement, the economic employer retains the power to assign the employee the duties to be executed and determine where this is to be undertaken. Similarly, the economic employer is usually responsible for directly paying the employee's emoluments to the employee unless the secondment agreement provides for settlement of these dues through the primary employer.
28. In Kenya, the law is silent on secondment of employees in the private sector. However, there is legislation that regulates the process in the public sector. For instance, section 42 of the *Public Service Commission Act* empowers the Public Service Commission to second employees from one public agency to another. Similarly, the national government has power to second its employees to a county government under section 73 of the *County Governments Act*. (See also *Tonny Oira Bironga & 5 others v County Government of Nyamira & another* [2022] eKLR).
29. Due to the absence of legislation on the subject in the private sector in Kenya, secondment of employees in this sector is regulated by the terms of the secondment contracts. Consequently, the intention of the parties with regard to their obligations under the arrangement is discernible either from the express terms of their contract or their conduct.
30. The second issue of general importance to the dispute relates to resignation of an employee from employment and implications of such decision. Resignation is a tool that is available to an employee to close an employment relation. When he tenders his unequivocal and unconditional resignation from employment, the employee effectively terminates the relation.



31. In Kenya, an employee may terminate employment by tendering a resignation under section 35 of the [Employment Act](#). Unlike the employer, an employee does not require to give reasons for his decision to close the employment relation.
32. Except when it is expressed to take effect at some future date, resignation from employment takes effect immediately. An employee's decision to resign from employment does not require the employer's concurrence. Therefore, the employer cannot reject or postpone the taking effect of an employee's decision to resign (Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR).
33. The consequence is that once an employee resigns from employment, the employer loses jurisdiction over him, the employer-employee relation having closed. If there were pending disciplinary proceedings against such employee, they automatically abate. The employer has no power to postpone the resignation in order to finalize the disciplinary process (Kennedy Obala Oaga v Kenya Ports Authority (supra)).
34. In the case before me, it is clear from the record that the Claimant was employed by the Respondent as from 1st March 2011. The contract of service was reduced into writing through a letter of appointment dated 15th February 2011.
35. It is also clear to me that on 19th April 2018 the Claimant was seconded to DHL Swaziland. The letter of secondment was signed by the Claimant and the Vice President Human Resources, SSA Regional Services (Pty) Ltd. The parties do not contest that the purpose of this letter was to offer the Claimant the position of Country Manager at DHL Swaziland on secondment basis.
36. The Claimant admits that he took up the assignment with DHL Swaziland and in fact reported to work. From the several pay slips that were produced in evidence by the Respondent, the effective date of the secondment of the Claimant to DHL Swaziland was 1st May 2018.
37. From the exposition of the general principles on secondment of employees in the initial parts of this decision, it is clear to me that once the Claimant reported to work at DHL Swaziland, a tripartite relation between DHL Kenya, DHL Swaziland and the Claimant fell in place. In this context, whilst DHL Swaziland took up the position of the economic or host employer of the Claimant, DHL Kenya remained the Claimant's legal and or primary employer.
38. It is apparent from the secondment instrument dated 19th April 2018 that the host employer took up the responsibility of settling a number of the Claimant's employment benefits during the duration of the secondment arrangement. These included the Claimant's medical cover, motor vehicle allowance, insurance cover and salary. Indeed, the various pay slips produced in evidence show that the Claimant's salary, PAYE, pension fund medical aid, rent among others were settled by DHL Swaziland. That the Claimant's employment benefits and liabilities were to henceforth be managed in accordance with Swaziland's employment law is self evident from clause 2 of the addendum contract which states as follows:-

“Please note that this offer is subject to the conclusion of a contract of employment on our standard terms and conditions of employment for Swaziland.”
39. As mentioned earlier, once the Claimant accepted the offer by SSA Regional Services (Pty) Ltd on behalf of DHL Swaziland and DHL Kenya, a tripartite arrangement was established between the primary employer, host employer and the Claimant. Further and as earlier indicated, whilst DHL Swaziland had no power to terminate the contract of employment between the Claimant and DHL Kenya, it enjoyed the power to terminate the secondment contract. This position is expounded by George Ogembo in his publication referred to earlier in this judgment when he states as follows:-



“...the economic employer, even though it has no right to terminate the employment of an employee, reserves the rights to terminate the secondment agreement.”

40. In my view, while processing termination of a secondment arrangement before term, the host employer is bound to observe the universally accepted principles of natural justice. Even if there are no express rules imposing this obligation on him, the host employer cannot proceed to terminate the arrangement in an arbitrary manner. He must, at the very least, notify the affected employee of the accusations against him and provide him with an opportunity to react to them before the secondment is terminated. I am thus convinced that by inviting the Claimant to a disciplinary session before determining the fate of his secondment to it, DHL Swaziland was simply observing the principles of natural justice.
41. The Claimant has questioned the host employer’s right to subject him to a disciplinary process in respect of the accusations of sexual harassment against him whilst serving in Swaziland. I have looked at the internal policy regulations under which DHL Swaziland proceeded to institute its inquiry into the accusations. Of significance is the Sexual Harassment Policy dated 31st May 2007 and produced in evidence by the defense.
42. The Claimant’s counsel has attempted to discredit the policy on the ground that it is not signed. However, it is noteworthy that the owners of the document have not disowned it on account of want of signature on it. On the contrary, they rely on it as their document. In view of this, it is doubtful that it is open to the Claimant to discredit the instrument on this account. In any event, unless the issuer of a policy instrument has expressly disowned it, the validity of the document is, in my view, not necessarily measured by whether it has been signed or not.
43. Importantly, the Claimant did not challenge the authenticity of the aforesaid policy in his pleadings. On the contrary and as the defense has pointed out, the Claimant cites and seeks to rely on the instrument at paragraphs 60 and 61 of his amended Statement of Claim. To say the least, the attempt by the Claimant at discrediting the policy whilst at the same time relying on it to advance his case is an act in reprobation and approbation which the law frowns upon.
44. The policy prohibits all forms of sexual harassment at the host employer’s workplace. These include unwelcome sexual advances.
45. The evidence on record shows that the Claimant’s host employer received a complaint of sexual harassment against him from a co-employee on 19th July 2018. According to the Claimant, the accusation was false and meant to cover up the accuser’s unsatisfactory performance at work.
46. From the email by the Claimant dated 30th August 2018 and which he produced in evidence, it would appear that following the accusations of sexual harassment against him, the host employer commenced disciplinary action against him with a view to determining the fate of his secondment to the institution. As can be discerned from the email, the disciplinary session was adjourned to 20th and 21st September 2018 for reasons that are explained in the said email.
47. Through the email, the Claimant requested to be released to travel to Kenya pending resumption of the disciplinary session on 20th September 2018. Although the host employer’s email of 3rd September 2018 indicates that this request was initially declined on account of the need to expeditiously finalize the disciplinary process, it appears that the Claimant was subsequently allowed to travel before the matter was concluded. Evidence of this is contained in the subsequent email exchanges between the parties including those dated 29th March 2019, 30th March 2019 and 1st April 2019.



48. From the record, the Claimant did not go back to Swaziland to enable the host employer finalize the pending disciplinary case against him. Although he attributed his absence from duty on his poor health, the host employer questioned the authenticity of the Claimant's assertions. This can be discerned from the host employer's letter to the Claimant dated 27th June 2019 which was tendered in evidence by the Claimant.
49. As a result of the Claimant's continued absence from Swaziland, the host employer terminated his secondment contract through a letter dated 13th November 2019. In the letter, the host employer refers to the Claimant's affidavit in which he allegedly confirmed his unwillingness to resume duty with the host employer.
50. In my view, the steps taken by the host employer to inquire into the allegations of sexual harassment against the Claimant were in line with both the rules of natural justice and the host employer's policy against sexual harassment. The disciplinary hearing was meant to provide the Claimant an opportunity to clear his name before a decision on his secondment was taken. This was to ensure that the host employer's decision on the matter was not arbitrary.
51. Despite this attempt, the record shows that the Claimant avoided the disciplinary process that had been commenced by the host employer. After he came back to Kenya, the Claimant did not, for whatever reason, go back to Swaziland to finalize the disciplinary process against him. As a consequence, the host employer terminated his secondment to it.
52. Through this case, the Claimant now seeks to challenge the disciplinary process by the host employer against him, a process that he frustrated through evasion. He seeks to challenge the propriety of his suspension by the host employer before he was summoned for the disciplinary session. He also seeks to challenge the legitimacy of the accusations of sexual harassment against him.
53. In my view, these are issues that the Claimant ought to have challenged before the host employer's aborted disciplinary process as they lay at the heart of whether his secondment to the host employer was to be sustained or terminated. However, this was not to be since the Claimant avoided the process.
54. As the Claimant failed to raise these matters before the host employer's disciplinary panel, a decision was taken to close his secondment to the host employer. The current attempt by him to raise the matters through this case is tantamount to pleading a defense after the fact. With respect, I doubt that this is permissible.
55. The Claimant has raised several other grievances relating to the period he was serving DHL Swaziland under the secondment agreement. First, he states that his emoluments were not reviewed to be commensurate with the cost of living in Swaziland. He also raises the issue of not being granted a work permit thus exposing him to unnecessary harassment by the law enforcement agencies in Swaziland. The Claimant has also taken issue with the Respondent's alleged failure to provide him with transport whilst in Swaziland.
56. The Claimant blames the Respondent for failing to ensure that all these grievances were fairly and promptly addressed. In the Claimant's view, the Respondent's inaction over the various grievances amounted to violation of his right to fair labour practice.
57. As observed earlier, the responsibility of ensuring the Claimant's employment rights were upheld fell on the primary employer save as the parties had agreed otherwise. I have looked at the secondment agreement. In respect of processing of the Claimant's work permit, the agreement provides as follows:-
"This offer is contingent upon you obtaining the necessary work visa/work permit."



58. In the email correspondence by the Claimant dated 30th August 2018, he took issue with the lack of a work permit. However, he acknowledged the fact that the permit had been applied for and was being processed. There is also the letter by the Claimant's host employer addressed to the Chief Immigration Officer, Swaziland dated 18th July 2018 applying for a temporary permit for the Claimant. In reaction to the Claimant's concerns about his delayed work permit as raised through his email of 30th August 2018, the host employer's representative wrote an email dated 3rd September 2018 indicating that a scrutiny of the Claimant's documentations showed that he had documents that protected his stay in Swaziland. It is noteworthy that all this evidence was placed before the court by the Claimant.
59. Further, at paragraph 21 of his amended Statement of Claim, the Claimant alludes to the host employer having shared with him a copy of the work permit via an email sent to him in June 2019. Indeed, the letter by the host employer to the Claimant dated 27th June 2019 appears to have enclosed a copy of his work permit whose validity was run up to 20th September 2020.
60. In the face of this evidence, it is doubtful that the Respondent and or the host employer "failed and or refused to acquire" a work permit for the Claimant as he asserts. The record shows that contrary to the Claimant's assertions about his employer's refusal and or failure to apply for the work permit, the host employer had in fact applied for it. The fact that there was delay in issuing the permit by the issuing authority is not evidence of refusal by the host or primary employer to apply for it.
61. Importantly, the available evidence suggests that the obligation to procure a work permit for the Claimant lay either with the Claimant directly or his host employer. In terms of the secondment instrument, this responsibility did not fall on the Respondent.
62. At paragraph 15 of the amended Statement of Claim, the Claimant accuses the Respondent of not facilitating his performance evaluation within three months of his posting to Swaziland to enable him get an immediate salary increment to cushion him against the high cost of living in the country. It is the Claimant's case that the offer to increase his salary within the first three months of reporting to Swaziland was made to him through an email dated 19th April 2018.
63. I have scrutinized the email in question. The offer was made by a Mr. Nolwazi Tshikala, HR Business Partner, Sub Saharan Africa, DHL Express, SSA Regional Services, Johannesburg South Africa. This was certainly not an offer by or from the Respondent. Therefore, it is doubtful that the Respondent can be held responsible for its fulfillment. This is particularly in view of the fact that the host employer, DHL Swaziland had by virtue of clause 3 of the secondment (addendum) agreement expressly taken up the obligation of settling the Claimant's salary.
64. Further, the alleged offer for salary increment appearing in the email under reference is not captured in the signed addendum (secondment) agreement between the Claimant and the agent for the primary and or host employer(s) dated 18th April 2018. Noteworthy, clause three (3) of the addendum contract shows that the Claimant was to receive a fixed annual base salary of SZL 390,813 payable over one year from the date of commencement of the secondment.
65. Not being part of the written secondment agreement between the parties, it is doubtful that the email communication constitutes an enforceable arrangement between them. It is doubtful that the Claimant is entitled to rely on the email correspondence to vary clause three (3) of the secondment agreement which fixed his salary to a specific sum for the first twelve (12) months of the engagement. As a general rule, a party to a written agreement is not entitled to rely on extrinsic evidence to vary an express and unambiguous term in the written agreement (see *John Onyancha Zurwe v Oreti Atinda* [2009] eKLR).



66. The Claimant has also accused the Respondent of not allowing him to relocate to Swaziland with his family contrary to the company's custom and practice. Yet, he did not cite any company policy instrument providing for this practice. Neither did he demonstrate that this obligation was included in the secondment agreement.
67. The Claimant also accused the Respondent of not having paid his bonus pay for 2018. Yet, during cross examination, he conceded that the Respondent had paid his bonus dues up to April 2018. He also confirmed that the bonus dues that were not paid were from May 2018 and that this was payable by DHL Swaziland. Under clause four (4) of the secondment agreement dated 18th April 2018, it is clear to me that the host employer specifically assumed the responsibility for paying the Claimant's bonus pay for the duration of the secondment. Therefore, responsibility for this benefit during the secondment period did not lie with the Respondent.
68. The Claimant has also accused the Respondent of not providing him with a vehicle whilst he was in Swaziland. Yet, clause three (3) of the secondment agreement indicates that the responsibility to provide the Claimant with transport lay with the host employer. Further, this benefit was to be facilitated through payment of a car allowance as opposed to provision of a physical car. Importantly, a look at the various pay slips produced in evidence shows that the host employer did, as a matter of fact, pay the Claimant car allowance as sanctioned in the secondment agreement.
69. In respect of the May and June 2018 salary, this entitlement arose during the term of the Claimant's secondment to DHL Swaziland, the host employer. Under clause three (3) of the secondment contract, the host employer had assumed the responsibility for paying the Claimant's salary. As a matter of fact, the evidence on record in the form of pay slips issued to the Claimant during the duration of his secondment shows that it is the host and not primary employer who was paying the Claimant's salary. Therefore, the suggestion by the Claimant that the Respondent failed to settle his salary for this period in breach of the employment contract is misplaced.
70. In any event, if the Claimant was subjected to intolerable working conditions during the period that he was serving DHL Swaziland, he ought to have resigned during the currency of the secondment in order to plead constructive termination of the secondment arrangement. As the record shows, he did not. Instead, he left his work station for Kenya and failed to report back to Swaziland until the secondment was terminated by the host employer on 13th November 2019.
71. When the Claimant eventually resigned from employment on 23rd December 2019, the secondment arrangement between the parties had already come to a close by reason of the host employer's letter of 13th November 2019. Thus, the only subsisting contract that could be closed through the resignation was the primary employment contract with the primary employer. In my view, the secondment having closed before the Claimant resigned, he was thereby foreclosed from relying on the events that occurred during the secondment to plead constructive termination of the primary contract.
72. As was mentioned earlier in the decision, once the host employer terminates the secondment arrangement, the employee reverts to the primary contract of service. He resumes his position with the primary employer.
73. Although the host employer enjoys a secondary mandate to inquire into an employee's infractions with a view to terminating his secondment, the residual disciplinary mandate over the employee vests in the primary employer. The primary employer has the residuary power to discipline the employee for infractions committed whilst serving on secondment (see Local Government Association, 'A Guide to the Law on Secondments'^{pg3}<https://www.local.gov.uk/sites/default/file/documents/workforce>).



74. In the dispute before me, upon the host employer terminating the secondment arrangement, the Claimant resumed his employment with the Respondent. Contrary to the Claimant's assertion that his position with the primary employer was no longer available when he resumed duty, the Respondent's letter to the Claimant dated 18th November 2019 shows that he was reinstated to DHL Kenya (the Respondent) in the role that he had occupied immediately before his secondment to DHL Swaziland.
75. The evidence on record shows that upon his resumption of duty, the Claimant was issued with a notice for a pre-suspension hearing dated 18th November 2019. This was followed with a suspension notice dated 27th November 2019. The notice lists the accusations leveled against the Claimant to include: sexual harassment of an employee of the host employer on 22nd June 2018; victimization through performance management of an employee of the host employer; and urinating in public outside the DHL office.
76. All these charges related to the Claimant's conduct whilst serving the host employer on secondment. The Claimant has questioned the right of the Respondent to undertake the disciplinary process against him without the request of the host employer. However, and as has been pointed out, the residuary disciplinary power over the Claimant including for infractions committed whilst on secondment rests with the Respondent. In this respect, the Respondent's election to pursue resolution of the pending disciplinary cases against the Claimant arising from his tenure during his term with the host employer was legitimate.
77. However, the evidence on record shows that before the Respondent concluded the disciplinary case against the Claimant, the Claimant tendered his letter of resignation from employment. The letter is dated 23rd December 2019 and was expressed to take effect on the same day.
78. In reaction, the Respondent wrote to the Claimant on 7th January 2020 asking him to comply with the terms and conditions of his contract of employment as far as termination of employment was concerned. According to the Respondent's witness, the aim of the Respondent's response was to reject the Claimant's resignation unless he complied with the requirements as to notice.
79. The record shows that the Respondent went ahead to issue the Claimant with a letter of termination of employment dated 17th February 2020. The purported termination came approximately two months after the Claimant's letter of resignation.
80. As indicated earlier, once an employee resigns from employment, the contract of employment terminates. Consequently, the employer loses disciplinary control over the employee since the substratum of this power is the employment relation. It does not matter that the resignation was without notice. The resignation crystallizes all the same. The employer cannot defer the resignation for whatever reason including pending disciplinary proceedings or the need by the employee to comply with the requirements of notice.
81. Thus, the decision by the Respondent to reject the Claimant's letter of resignation dated 23rd December 2019 was of no legal consequence. Similarly, the purported decision to terminate the Claimant's employment as from 17th February 2020 coming some months after the Claimant had terminated the contract through resignation was of no legal effect.
82. The above being the position, it must then be determined whether the Claimant's resignation of 23rd December 2019 was occasioned by the Respondent subjecting him to intolerable working conditions forcing him to resign. If this be the case, the Claimant can legitimately plead constructive termination of his contract of employment.



83. As indicated earlier, the Claimant cannot found his plea for constructive dismissal of the primary contract on the conditions of employment that he was subjected to during the tenure of the secondment arrangement. If he wished to do so, the Claimant should have resigned before closure of the secondment arrangement once he perceived the working conditions under the arrangement as intolerable. The fact that he failed to do so until after the secondment was terminated on 13th November 2019 deprived the Claimant of the opportunity to rely on the events that are attributable to the secondment to plead constructive termination of the primary contract.
84. In any event, it has been observed that an employee opting to resign in reaction to an employer's intolerable actions must do so promptly. Unexplained and elongated delay in taking the decision to resign is deemed to waive the right to do so and may defeat a claim for constructive dismissal (see *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR).
85. That being the position, the question whether the Respondent rendered the Claimant's work environment too intolerable as to force the Claimant to resign from employment can only be considered in the context of the events that occurred after closure of the secondment arrangement. Put differently, was the Respondent's conduct in respect of the contract of employment after the Claimant resumed duty so grave as to amount to a fundamental breach of the terms of the contract with the consequence that the Claimant had to resign? Was the Respondent's conduct in this respect so grave as to leave no doubt that the Respondent was no longer desirous of being bound by the contract? In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the court, quoting an English decision, indicates as follows on constructive termination:-
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.
- He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.”
86. I have evaluated the Claimant's claim for constructive dismissal against the foregoing parameters. In support of his claim in this regard, the Claimant states that after termination of the secondment arrangement, the Respondent took up from the host employer and continued with the allegedly flawed disciplinary case against him. The Claimant has poured cold water on the Respondent's decision to suspend him after he resumed duty under the primary contract. It is the Claimant's case that the process of investigations into the alleged infractions against him was flawed. The Claimant further accuses the Respondent of setting up a panel of junior employees to hear the disciplinary case against him.
87. The Claimant accuses the Respondent of acting maliciously by attempting to rely on unsigned witness statements during the disciplinary session. In court, the Claimant stated that the Respondent denied him the opportunity to call witnesses in support of his case. In the Claimant's view, the disciplinary process mounted against him was biased with a predetermined outcome to terminate his employment. Consequently, he was forced to resign.
88. A careful examination of the Claimant's complaint shows that he was uncomfortable with the Respondent's decision to undertake the disciplinary process against him. He accuses the Respondent of all manner of breaches in respect of the process.



89. In my humble view, an employee cannot argue that an employer who opens up a disciplinary process against him is acting in breach of the contract of employment between the parties. An employee cannot, except with cogent evidence, accuse the employer of creating a hostile work environment merely by reason of the employer commencing a disciplinary process against him, however flawed the process may be. If this were to be the case, then no employer will ever be able to open an inquiry into alleged misconduct by an employee.
90. In the case before me, the Respondent had received complaints about the Claimant's sexual misconduct among others. The complaints, which relate to events that allegedly occurred during the Claimant's secondment engagement, are documented.
91. With this information, the Respondent was entitled to open an inquiry into the matter. I do not agree that the mere fact of the Respondent legitimately invoking its powers to institute disciplinary action against the Claimant was intended to create an intolerable work environment for the Claimant. I do not agree that the Respondent's decision in this respect demonstrated its resolve to repudiate the contract of service between the parties.
92. Simply put, I do not agree that the Claimant has established a case for constructive dismissal against the Respondent. The Claimant's decision to resign from employment was not in response to any intolerable work atmosphere at the behest of the Respondent. As such, the resignation must be deemed as a normal termination of the employment relation by the Claimant.

Determination

93. The upshot is that I find the Claimant's case against the Respondent to be without merit.
94. Accordingly, I dismiss the claim with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

