



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 136 OF 2017

GEORGE OWUOR.....CLAIMANT

VERSUS

PLAN INTERNATIONAL INC.....RESPONDENT

JUDGMENT

1. George Owuor (the Claimant) was offered a fixed-term contract as a Community Development Facilitator through a letter dated 11 April 2011 by Plan International Kenya (the Respondent).

2. The contract was renewed through a letter dated 21 July 2015.

3. On or around 8 August 2016, the Respondent notified the Claimant of summary dismissal. The reason was:

that you violated the organization procurement practices and directly engaged the catering groups without an LPO. You also admitted receiving invoices and forwarded them directly to Faustin – PIO ECM without following the laid down procedures.

4. The dismissal letter stated that the conduct of the Claimant was in breach of chapter 11, clause 11.5.4 of the Human Resources Policies and Procedures Manual.

5. Prior to the dismissal, the Claimant had been issued with warnings on 29 February 2012, 11 September 2012 and 22 May 2015.

6. The Claimant was aggrieved with the dismissal, and on 4 April 2017, he instituted these legal proceedings against the Respondent, alleging unfair termination of employment and breach of contract.

7. The Respondent filed a Response on 27 July 2017, and the Cause was heard on 16 October 2019 and 22 February 2021.

8. The Claimant filed his submissions on 22 March 2021, while the Respondent filed its submissions on 27 April 2021.

9. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

10. The primary statutory provisions addressing the protections an employer should comply with before terminating an employment contract are set in sections 35(1) and 41 of the Employment Act, 2007.

11. The Claimant was invited to attend a disciplinary hearing through a letter dated 28 July 2016. The invitation letter set out some 3 allegations against the Claimant.

12. The Claimant was requested to make a written response which he did and also attend the hearing on 1 August 2016. He was also informed of the right to be accompanied by a colleague of his own choice.

13. The Claimant attended the hearing and made representations.

14. The Court is satisfied that the Respondent was in substantial compliance with the statutory procedural fairness requirements of the Employment Act, 2007.

Substantive fairness

15. Sections 43 and 45 of the Employment Act, 2007 place an obligation on the employer to not only prove but prove as valid and fair the reasons for the termination of an employment contract.

16. In terms of section 43(2) of the Act, the reasons to be proved are the ones that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

17. The Claimant had previous performance issues in the case at hand, but the primary reasons for termination were not *performance-based* but *misconduct* grounded.

18. In a bid to discharge the burden placed on it, the Respondent called it's the Human Resources Officer and she adopted her witness statement and also produced documents including a *Counter Fraud Unit Investigation Report*.

19. The first reason for the Claimant's dismissal was that he had directed some catering groups to offer catering services without Local Purchase Orders (LPOs).

20. The Respondent did not disclose the particulars of these groups either in the *show-cause notice* dated 28 July 2016 or in the written witness statement filed in Court.

21. However, in his written response to the *show-cause*, the Claimant did not deny knowledge of the LPOs, but he explained that he raised purchase requisitions to the front office desk for processing and that he believed that approvals had been given after receiving an email dated 5 October 2016 from the Procurement Coordinator.

22. The Court has looked at the email. It was forwarding purchase orders for review and approval.

23. The Claimant also explained that during a meeting on 6 October 2016, the Program Unit Manager (PUM) informed him that the LPOs had been generated in the system but could not be printed.

24. To corroborate the explanation, the Claimant produced an email dated 9 October 2016 from the Program Unit Manager indicating that the LPOs had been released but could not be printed as of then but would be printed the coming Monday.

25. The events for which the Claimant was alleged to have contracted caterers run from 6 October 2016.

26. The Respondent did not call the Program Unit Manager to rebut the Claimant's evidence that he had assured the Claimant of approval and/or printing.

27. The failure to call him was not explained.

28. Considering the failure to call the witness and coupled with the emails produced, the Court finds that the Respondent did not discharge the burden of proving this allegation was a valid and fair reason to dismiss the Claimant.

29. The second allegation against the Claimant was that he had received invoices directly from catering groups without following due process.

30. It was contended that the invoices should have been officially received through the front office staff, but the Claimant bypassed the front office and took the invoices for approval to the Project Implementation Officer.

31. The Claimant stated in his response to the *show-cause* that Part 4 of the Final Logistics and Administration Process Flow, 2014 was not clear on who was supposed to receive invoices and that, as a matter of practice, the front office desk had never received them. He also stated that, at times, vendors would leave the invoices and other correspondences at the gate.

32. The Claimant admitted that he picked the invoices in question from the guard at the gate and that being the requester/implementer of the related activities, he had to confirm the invoices before forwarding them to the front office desk.

33. The Claimant also admitted that he channeled the invoices directly to the Project Implementation Officer as he was the one responsible for review and confirmation.

34. The Respondent did not controvert the Claimant's evidence that some of its vendors would leave invoices and correspondences with the guards at the gate. A witness from the gate was not called. A staff member from the front office was also not called to shed light on whether there was a practice of leaving invoices and correspondences at the gate.

35. The Project Implementation Officer was not called to state whether the fact that the Claimant took the invoices directly to him adversely affected the processes of the Respondent.

36. It is not the function of the Court to substitute its view for that of the employer. The test for the Court is to establish what a reasonable employer would have done.

37. The Respondent did not produce in Court a copy of the Human Resource or Operations Manual allegedly violated by the Claimant.

38. It did not demonstrate any bias or prejudice it suffered by the practice of vendors leaving invoices at the gate.

39. There was no suggestion that that approval systems were bypassed whenever the Claimant picked invoices at the gate.

40. The Court finds that the conduct of the Claimant in picking the invoices from the gate was a minor issue that would not have led a reasonable employer to dismiss as other sanctions could have been meted.

41. The last reason given for the summary dismissal of the Claimant was that he might have been engaged in coordinating the cover-up of write-ups produced by some of the catering groups.

42. The Respondent did not produce any evidence to connect the Claimant with the catering groups in a scheme of cover-up.

43. Before leaving the question of substantive fairness, the Court notes that although the *Investigation Report* fingered the Claimant as culpable, its contents were not proved as the authors were not called.

44. In *Kenneth Nyaga Mwige v Austin Kiguta & 2 Ors* (2015) eKLR, the Court of Appeal said of documentary evidence:

How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case....

Compensation

45. The Claimant had served the Respondent on fixed-term contracts.

46. At the time of dismissal, he had served for about 1-year, and there was a balance of 2-years.

47. In consideration of the length of service and expectation to serve the contract to its logical end, the Court is of the view that the equivalent of 1-month gross salary as compensation would be appropriate (gross salary at separation was Kshs 121,654/-).

Breach of contract

48. The Claimant sought an order compelling the Respondent to pay him salaries and allowances from the date of the dismissal to the date of filing of the suit.

49. The Claimant did not lay any evidential, contractual or legal foundation to this head of the claim.

50. In any case, the Respondent had no obligation to continue paying remuneration after separation.

51. This head of the claim was not proved.

Conclusion and Orders

52. The Court finds and declares that the summary dismissal of the Claimant was unfair and awards him:

(i) Compensation **Kshs 121,654/-**

53. The Claimant had a bad disciplinary record. Each party to bear its own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 2nd day of June 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant H. Obach & Partners

For Respondent Igeria & Ngugi Advocates

Court Assistant Chrispo Aura