



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2154 OF 2014

JULIUS MARK BWIBO

CLAIMANT

v

BRITISH AMERICAN TOBACCO KENYA LTD

RESPONDENT

JUDGMENT

1. Julius Mark Bwibo (the Claimant) was offered employment as a Computer Programmer through a letter dated 29 December 1989 by the British American Tobacco Kenya Ltd (the Respondent).
2. The Claimant briefly left the Respondent's employment in 1995, but on or around 28 March 1996, he was offered the position of Business Analyst, and he later rose to the position of Senior Business Analyst.
3. On 3 May 2013, the Respondent notified the Claimant of the termination of his employment and being aggrieved, the Claimant lodged the instant legal proceedings alleging that the termination of his employment was unfair. The Claimant also alleged breach of contract.
4. The Respondent filed a Memorandum of Response on 17 April 2015, in which it was contended that the reason for terminating the Claimant's contract was *under-performance* in the years 2011 and 2012.
5. The Cause was heard on 16 April 2018, 29 January 2019, 3 April 2019, 10 July 2019, 9 November 2019, 27 January 2020 and 27 January 2021.
6. The Claimant and the Respondent's Human Resource Business Partner testified.
7. The Claimant filed his submissions on 15 April 2021 (should have been filed and served on or before 27 February 2021 (explanation for the delay was tendered), while the Respondent filed its submissions dated 31 March 2021.
8. The Claimant identified 6 Issues for the Court's determination in his submissions:
 - (i) What was the Claimant's role in his employment?
 - (ii) Was the Claimant's appointment as Project Manager within the scope of his employment or an additional role?
 - (iii) Was the performance rating that led to the Claimant's dismissal done fairly and procedurally?
 - (iv) Was the Claimant wrongfully and/or unfairly terminated?
 - (v) Is the Claimant entitled to damages for unfair termination of his employment?
 - (vi) Who bears the costs of this suit, inclusive of interest?
9. The Respondent's brief submissions concentrated on procedural fairness.

Brief background

10. From 25 January 2012 to 8 March 2012, the Claimant held several meetings with his supervisors to discuss his performance for the year 2011.

11. The Claimant was rated *nearly there* in respect of the performance objectives and appraisal for 2011.
12. As a result, on 26 March 2012, the Respondent put the Claimant on a performance improvement plan to run for 4-months.
13. The plan was to end on 18 July 2012. During the plan, the Claimant was expected to provide monthly progress updates to his Line Manager.
14. The Claimant consented to be put on the plan but at the same time made a formal response raising certain concerns through a letter dated 29 March 2012.
15. The Claimant also asked to be furnished with the Respondent's policies and procedures on performance management.
16. On or around 31 July 2012, the Respondent re-evaluated the Claimant's performance for the 4-months ending on 18 July 2012.
17. The Claimant's Line Manager recommendation was that he should continue focussing on the 3 core areas of *planning and execution, consistency and level of details in presentation* (financial management) and *stakeholder management* in virtual environments.
18. On or around 5 February 2013, the Respondent reviewed the Claimant's performance for 2012 (a mid-year review had also been conducted).
19. The Claimant was rated as *requires improvement*.
20. The Respondent was not satisfied with the Claimant's performance, and on 13 February 2013, it issued a show-cause asking him to explain why disciplinary action including termination of employment should not be taken. The Claimant was instructed to respond by the close of 15 February 2013.
21. The Claimant received the show-cause on 14 February 2013, and his response was received by the Respondent on 21 February 2013. The next day, the Claimant appealed against his performance rating for the year 2012.
22. On 13 March 2013, the Respondent informed the Claimant that his response was unsatisfactory and invited him to attend a disciplinary hearing on 21 March 2013.
23. The Claimant was informed of the right to be accompanied and also to call witnesses.
24. Upon receiving the invitation, the Claimant replied the same day, registering his concerns that the Respondent had jumped the performance evaluation processes by moving to a disciplinary process.
25. The Claimant attended the hearing accompanied by an advocate and, after making representations, requested another session.
26. The second session was held on 11 April 2013, and it was followed by the termination letter on 3 May 2013.
27. The Court has considered the pleadings, evidence and submissions.

Claimant's role and project mWEWE

28. The Claimant was appointed as a Senior Business Analyst in 2010, and he was issued with a role profile.
29. Under the purpose statement, the Claimant was to ensure the implementation and deployment of IT solutions in the region and end market, with one of the accountabilities being helping the business in checking end-product against the initial requirements as articulated in the business requirement development.
30. In terms of leadership, the Claimant was to guide senior and middle management with the core responsibility of providing IT consultancy to other business units. Skills and experience in project management were required.
31. The Claimant's job profile envisaged that he could be assigned other responsibilities. Indeed, he was assigned additional responsibilities as a Project Manager.
32. The project was time-bound.
33. In the Court's view, considering the above, the Claimant was not holding distinct or separate positions with the Respondent to warrant the payment of additional remuneration as of right.

Bonus

34. The Claimant made a claim for a bonus of Kshs 1,000,000/- for the year 2012.

35. The Claimant demonstrated that the Respondent had a practice of paying bonuses founded upon the employee's and Respondent's performance.

36. However, apart from stating that other colleagues were paid a bonus for 2012, the Claimant did not place before the Court any evidence on the Respondent's performance for the year in question.

37. Without such an evidential foundation, the Court is not ready to allow this head of the claim.

Unfair termination of employment

Procedural fairness

38. The Claimant challenged the fairness of the process on the grounds that the Respondent did not follow the steps outlined in the *Underperformance Policy*, which required the holding of a formal disciplinary hearing, issuance of a formal warning with timelines for corrective action, assessment of the employee's response and the making of a final decision and the option of redeployment.

39. The Claimant also asserted that he was never afforded an opportunity to appeal the performance evaluation before the Respondent embarked on the disciplinary process, his evidence was not reviewed and that he was not allowed to defend himself.

40. The Claimant further contended that he was not served with the written notice of termination as contemplated by section 35(1) of the Employment Act, 2007.

41. The Claimant was placed under a *performance improvement plan* through a letter dated 26 March 2012. Prior to the *performance improvement plan*, the Claimant had met with his superiors severally to discuss (his) performance.

42. The Respondent was not satisfied with the outcome of the *performance improvement plan*, and on 13 February 2013, it issued a notice to show-cause to the Claimant.

43. The notice set out the allegations against the Claimant and called upon him to make a written response before 15 February 2013. The Claimant was informed in the notice of contemplated disciplinary action.

44. The Claimant responded through a letter dated 21 February 2013, and after that, invited through a letter dated 13 March 2013 to attend an oral hearing.

45. The Claimant was informed of the right to attend the hearing accompanied by a colleague of his own choosing and also to call witnesses.

46. The Claimant responded to the invitation notice in a lengthy letter dated 14 March 2013, and the disciplinary hearing took place on 21 March 2013. The Claimant opted to attend the hearing accompanied by an advocate.

47. During the hearing, the Claimant asked for another opportunity to present further evidence, and the further hearing was held on 11 April 2013, followed by the termination.

48. Was a formal disciplinary hearing conducted? The answer is yes. Had the Claimant been given a plan and time to improve on alleged poor performance?

49. Again the answer is yes.

50. Did the Respondent consider the responses from the Claimant during the performance improvement phase and during the disciplinary hearing? Yes.

51. In the Court's view, the Respondent was in substantial compliance with the statutory tenets of procedural fairness as contemplated by sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

52. By dint of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving the reasons for terminating the Claimant's contract and that the reasons were valid and fair.

53. The reason given for terminating the Claimant's contract was *underperformance*. This is the reason the Respondent was expected to prove as valid and fair.

54. The Claimant was initially offered employment as a Computer Programmer in 1989. The Claimant then separated with the Respondent but was again offered a contract in 1996 as a Business Analyst, and he served as Area Marketing IT Manager and later rose to the position of Senior Business Analyst with effect from 1 August 2010.

55. Sometime in 2010, the Respondent put in place project mWEWE.

56. In an email dated 6 October 2010 to the Area Office, Kenya, the Respondent's Head of IT recommended the appointment of a Project Manager from the marketing function (he gave 2 names). He also recommended that the Claimant be appointed as Project Delivery Manager.
57. On 28 October 2010, the Head of Trade Marketing & Development, East and Central Africa area, recommended that the Claimant be appointed the Project Manager.
58. The Claimant was given the responsibility of Project Manager. The responsibilities of the Claimant as Project Manager were set out in appendix C of the project document.
59. The Claimant's woes arose out of the performance of the project responsibilities.
60. According to the Respondent, the Claimant's poor performance was in relation to financial management, stakeholder management and planning v execution as Project Manager for project mWEWE.
61. The Respondent's witness testified that the Claimant's performance was evaluated twice, and he did not meet the targets and thus was taken through a performance improvement plan with the required assistance, but he did not improve.
62. In challenging the validity and fairness of the reasons given for termination, the Claimant asserted that his substantive function at the material time was that of a business analyst in the marketing department and that in that role, his performance had been satisfactory until he was asked to be Project Manager, mWEWE project, an added function.
63. According to the Claimant's testimony, the financial management aspects of the project was the responsibility of Area Marketing and not his, and that, in any case, he was not accorded the support he needed in that respect.
64. It is not in dispute that the Claimant's substantive role was that of a business analyst. The role had a finance portfolio of up to Kshs 100,000/- in respect of small-medium sized project spend.
65. The Claimant was given additional function to be the Project Manager, project mWEWE, whose financial portfolio was much higher. Other persons had been recommended for the position, but it was not disclosed why they were not given the role.
66. The project was time-bound.
67. The Claimant's performance evaluations for his substantive role had been satisfactory. The Respondent only found fault with the Claimant's performance in relation to the time-bound mWEWE project.
68. The question, therefore, arises whether it was fair to terminate the Claimant's contract on the basis of performance on a specific time-bound project and not on his substantive role.
69. In this Court's view, the decision by the Respondent was not fair.
70. A reasonable employer would have reverted the Claimant to his substantive role of a business analyst if he was not up to the task in the added function, considering that his ratings on the substantive role had been satisfactory all along.
71. The Court finds that the reason(s) for the termination of the Claimant's employment was not proved as valid or fair.

Salary in lieu of notice

72. The Respondent offered the Claimant the equivalent of a 1-month salary in lieu of notice, and nothing turns on this head of the claim.

Compensation

73. The Claimant served the Respondent for over 20 years, and in light of the length of service, the Court is of the view that the equivalent of 10-months gross salary as compensation would be appropriate (copy of payslip for September 2012 indicated a gross monthly salary of Kshs 505,826/-).

Salary for May 2013

74. The Claimant was offered the salary for days worked in May 2013, and it would amount to double payment if the Court were to award this relief.

Severance pay

75. The Claimant did not separate with the Respondent on account of redundancy and is therefore not entitled to severance pay as contemplated under the Employment Act, 2007.

76. Before concluding, the Court regrets that the Cause could not be heard and determined any sooner because of my transfer which occurred before all the evidence from the witnesses had been taken, and the late filing of submissions.

Conclusion and Orders

77. From the foregoing, the Court finds and declares:

- (i) The termination of the Claimant's employment was unfair.
- (ii) The Claimant did not have separate or distinct roles warranting distinct remuneration.
- (iii) The Claimant did not prove entitlement to a bonus.

78. The Claimant is awarded:

- (i) Compensation Kshs 5,058,260/-

79. Interest at court rates on the compensation if not paid within 30 days.

80. The Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Ms Koech instructed by Nyiha, Mukoma & Co. Advocates

For Respondent Ms Kanyiri/Mr Masese instructed by the Federation of Kenya Employers

Court Assistant Lindsey/Judy Maina/Chrispo Aura