REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COUR TOF KENYA

AT KERICHO

CAUSE NO.13 OF 2019

NAUMY JEMUTAI KIRUI.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in May, 2015 as a safety, health and environment officer until 18th June, 2018 when employment terminated.

The claim is that the respondent through the claimant's new line manager maliciously and unfairly under-evaluated the claimant's work performance creating room for unfair dismissal from her employment.

The respondent had a programme known as Performance Improvement Plan (PIP) which required that each year, every employee agree on key goals/deliverables with the respective line manager. The PIP is the process of correcting performance gaps and identifying root cause(s) of low performance and an opportunity to track mitigation plans to ensure expected performance.

During the PIP period the following is done; The employee is issued with official notification in writing from the line manager; Official sing off the goals and work plans with the employee assigned special goals for the period; Monthly couching and review sessions for feedback facilitated by the lien manager; Skip level discussions; and Communication of the outcome of the PIP process.

In this regard, in the year 2017 the claimant's targets were set together with the line manager, Shawnda Pierre but who left the respondent in May, 2017.

Under the PIP there was a mid-year review and the claimant held her first meeting with one Barbara Kenya the succeeding line manager on 22nd June, 2017. The claimant was required to share documents under reference with the new line manager, which was done. These included status of the safety health and environmental trainings, unit meetings, the units of support for Jamji operations and Kapgwen operations units.

The claim is that the relationship between the claimant and her line manager was not cordial. She was accused of being academic in her work. It was however agreed to hold another meeting on 22nd July, 2017 but this did not materialise.

The claimant submitted her self-assessment in work performance on 30th October, 2017. There was no feedback.

On 18th October, 2017 there was industrial unrest in the respondent company, Kericho and which lasted until November, 2017.

In November, 2017 the claimant received a call from Barbara Kenya requesting her to take leave as there was no on-going work due to the industrial action. The claimant took annual leave from 6th to 22nd November, 2017.

On 13th January, 2018 the claimant's line manager purported not to have seen her email of 30th October, 2017 and was directed to submit the same again. She complied.

The claim is also that as the performance reviews period was approaching, the claimant opted to remind her line manager about the same via email on 29th December, 2017 and she did self-assessment per the set policy. This was not addressed and there was no feedback.

The claimant felt unfairly treated. She filed a complaint to the human resource director, Michael Duah on 20th December, 2017.

The line manager went ahead and assessed the claimant without meeting with her and rated her at 1 “poor” out of a possible 5 “excellent” work performance. This rating was communicated on 13th January, 2018. This resulted in the claimant being placed on PIP for 3 months ending 1st May, 2018.

The claimant accepted the placement under PIP as she knew it would be a success. She signed to it and prepared for review with the line manager on 22nd February, 2018. However, the line manager did not take interests in the areas of deliverable(s). She was not keen to visit the sites to confirm work performance and set target areas.

The claimant met with the skip level manager, Nick Yiannakis on 29th March, 2018 and noted she was having relational challenges with her line manager.

The final PIP review was to be done on 11th June, 2018 when the claimant was recalled from her annual leave on 20th June, 2018.

The claim is that the placement on PIP was technically meant to result in termination of employment. While under the PIP there was no support to ensure work improvement. This led to unfair termination of employment.

The claimant lost her dues in form of compensation for breach of contract and failure to pay for 34 leave days. This has caused the claimant profession to be tainted. There was no certificate of service issued as required by law.

At the time employment terminated the claimant was earning Ksh.220,130.79.

The claim is for a declaration that the contract of employment was unprocedurally, unfairly and unlawfully terminated and payment of general damages and exemplary damages are due; payment of 34 leave days not taken; issuance of certificate of service and costs of the suit.

The claimant testified in support of her claims that she was placed under the PIP to track on her work performance after she had been rated poor. This was to be followed with discussion with the line manager to assess improvement but what followed were frustrations meant to lead to termination of employment.

The claimant also testified that on 13th January, 2018 she got the rating of 1/5 with the recommendation for placement on PIP which started on 1st February, 2018 and was to last for 3 months but technically she remained on PIP from October, 2017 as no review had been concluded for the period or a meeting held with the line manager.

The claimant got a listing of things she needed to be done from the line manager, the human resource and the business partner.

The claimant also testified that she was recalled from leave on 20th June, 2018 and served with letter terminating employment. She had prior to this complained to the managing director of unfair treatment by the line manager without any action being taken. Before taking leave in May/June, 2018 the claimant had held evaluation meetings on the PIP on 22nd February, 2018; 2nd March, 2018; 16th April, 2018 and 29th may, 2018.

There were no written notes save for the line manager to state she had not improved.

Defence

The defence is that the claimant’s employment was terminated due to poor work performance and not for any other reason as alleged. Such reason was genuine, warranted and justified. The respondent followed the due process of the law and the human resource policy. The claims made are false, misleading and all terminal dues were paid.

The defence is also that on 6th May, 2015 the claimant was employed by the respondent and issued with contract allowing for termination of employment as provided for under the contract.

In the year 2017 the respondent noted that the claimant was of poor performance as she was consistently unable to meet her key performance indicators as expected. Following discussions with the line manager on 13th January, 2018 regarding work performance and the areas that required improvement, it was agreed the claimant be placed on PIP for months starting 1st February to 1st May, 2018 in accordance with the policy.

The purpose of the PIP was to give the claimant extra support and assistance to enable her improve. The claimant accepted and signed the PIP and meetings held to note concerns of work performance by the line manager. There were follow up review meetings for guidance on 22nd February, 21st and 29th march, 16th April and 29th May in the year 2018.

An evaluation of the claimant was carried out after 3 months which assessed her overall performance against the key performance indicators issued under the PIP and the resulting recommendation was that due to lack of improvement, the respondent would carry out the following actions;

Initiate an exit process;

Demote the claimant; or

Change her role.

Despite the support accorded to the claimant she failed to improve as expected. A final performance review meeting was held on 12th June, 2018 and was found to be of poor work performance. Employment was terminated vide letter and notice dated 18th June, 2018 because of poor performance.

There was due process carried out in good faith in terminating employment. The claims made that there was unfair practice is without proof.

The claimant was paid all her terminal dues including;

Full pay for June, 2018;

Notice pay;

Pension benefits; and

Leave earned and not taken.

The defence is that the claims made should be dismissed with costs to the respondent.

Beatrice Bett testified that the respondent had the practice of carrying out yearly reviews of its employees toward the end of each year in accordance with the set policy. This was to evaluate all employees with regard to achievement of set goals and work performances referred to as 3+1 targets which would be set by the employee in conjunction with the line manager.

Ms Bett also testified that the claimant admitted to having been taken through her performance review in accordance with the work place policy and that in the year 2017 during the reviews it was discovered that there was consistent inability for performance allocated duties. The line manager Barbara was new in October, 2017 but the claimant got clarity on how to progress on her PIP from time to time and in January 2018 upon being placed on PIP there were monthly meetings for review and support but there was no improvement.

Bett also testified that the claimant was not placed on the PIP for failure. It was to help her bounce back and have a chance to address performance gaps with assistance from the line manager. The minutes for the held meeting with the line manger are not filed but the claimant confirmed these meetings took place. The skip manager also attended to give support. There were no reports that the claimant had bad/poor work relations with the line manager. There was no formal report.

At the close of the hearing, both parties filed written submissions.

In analysing the issues herein, the court has put into account the pleadings, the evidence and the written submissions and the issues which emerge for determination can be summarised as follows;

Whether there was unfair termination of employment;

Whether the remedies sought are due;

And who should pay costs.

By letter dated 18th June, 2018 the respondent terminated the employment of the claimant on the grounds that;

> *RE: PERFORMANCE IMPROVEMENT PLAN*
>
> *Reference is made to our final performance review session held on 12th June, 2018, this is to inform you that despite the support structure and measures put in place through a performance improvement plan to help you turn around your performance, your performance has not improve as required. I regret to inform you that both your performance delivery … and behavioural conduct remain below the expected standards of the organisation. …*

The core reason for termination of employment was thus *work performance has not improved as required* and that *both your performance delivery [work plan targets] and behavioural conduct remain below the expected standards of the organisation.*

For termination of employment to be fair there must be both substantive justification and procedural fairness. In the case of **Walter Ogal Anure versus Teachers Service Commission** the court held that substantial justice refers to establishment of a valid reason for termination of employment while procedural fairness refers to the procedure adopted by the employer in effecting the termination. Section 41 of the Employment Act, 2007 (the Act) requires the employer to give a hearing to the Claimant before termination or summary dismissal while Section 45 requires proof of valid reason and fair procedure. In this case, the Court held that;

> *... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.*

This was restated in the case of **Fredrick Saundu Amolo versus Principal Namanga Mixed Day Secondary School and 2 others** where the court stated that dismissal or termination of employment must meet the requirements of substantive and procedural fairness. The principle of substantive fairness is provided for in Section 43 of the Employment Act while procedural fairness is provided for in Section 41 of the Act, Section 45 prohibits unfair termination of employment.

Therefore even where the employer has a genuine and valid reason(s) existing at the time they wish to terminate employment, due process requires adherence to the mandatory provisions of section 35, 41, 43 and 45 of the Employment Act, 2007.

The respondent submitted that under section 43(2) of the Act, there were reasons that they genuinely believed to exist and which caused the termination of employment and that the court should not substitute its own views for those of the employer. With respect, such submissions are misleading and out of contest as section 43(2) provisions cannot be assessed as standalone outside the entire context of the Act particularly the provisions of section 41 of the Act with regard to the employer addressing the question of poor performance of an employee that;

Notification and hearing before termination on grounds of misconduct

> *(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*
>
> *(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.* [underline added].

The due process of the law requires the employee alleged to be of poor work performance to be issued with notice and given a hearing in the presence of another employee of choice at the shop floor. Even in a serious case which may require summary dismissal for grounds of *misconduct or poor performance,* the employee must be taken through the mandatory due process outlined under section 41 of the Act.

The Court of Appeal in the case of **National Bank of Kenya versus Samuel Nguru Mutonya [2019] eKLR** while addressing the question of keeping an employee on the PIP and using it as the basis for termination of employment held that;

> **…** *In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee*

And in National Bank of Kenya versus Anthony Njue John [2019] eKLR held that;

> *Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer*

The provisions of section 41(1) in effecting termination of employment are thus mandatory and couched as follows;

> *1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.* [Underline added].

Before the employer can be found to reply on the provisions of section 43(2) with regard to sorely relying on having *genuine reasons existing* to justify termination of employment, the due process of the law dictates that the employee must be notified of her poor performance as an issue forming the basis of reasons for which the employer *is considering termination* of employment and thus allow the employee to give her defences in the presence of another employee of choice.

Upon the end of the PIP process, the employer must invoke the law by allowing the employee an internal process to address poor performance before termination of employment as the PIP contextualised is meant to give support to the employee to ensure work improvement. The PIP as a tool is not part of the disciplinary process.

This is captured aptly in the case of **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) versus Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** the Court stated thus:

> *The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.*

Neither the documentary nor the viva voce evidence showed compliance with the law under section 41 of the Act. On this score therefore, I

find that the termination of the Claimant's employment by the Respondent on grounds of poor performance and behavioural conduct was unfair within the meaning of Section 45 of the Employment Act, 2007.

On the remedies sought, on the finding there was unfair termination of employment compensation is due under the provisions of section 49 of the Act. the claimant worked for the respondent as a specialised officer in safety health and environment with effect from 18 th may, 2015 to 18th June, 2018 and has since resulted to consultancy work following inability to secure work of equivalent role and the court finds an award of compensation equivalent to 10 months is appropriate to address the unfair conduct of the respondent.

The claimant was last earning ksh.220,130.29 gross salaries and is thus awarded ksh.2,201,and 302.90.

On the claim for general and exemplary damages, where pleaded, specific evidence should be called to support the same. The rationale is that exemplary damages should only be awarded in limited cases and where a respondent's conduct is found oppressive.

It was the claimant's case that she was discriminated against and was treated with indignity.

A claim that there is discrimination against persons should be based on evidence as Discrimination entails the unjust or prejudicial treatment of different categories of people in the same circumstances. This is expounded in the case of **Barclays Bank of Kenya LTD & Another versus Gladys Muthoni & 20 Others [2018] eKLR** that;

> **…** *Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions… whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.*

It is therefore not just sufficient to cite discrimination. A party pleading the same must delve into the matter and call evidence.

Though pleaded and generally addressed in her evidence, in her written submissions, the claimant failed to delve into the issue of why general and exemplary damages are sought with regard to alleged ill-treatment.

Having awarded in unfair termination of employment which was the core wrong committed against the claimant, such shall suffice.

With regard to claims for 34 leave days, in the letter dated 23rd October, 2018 and though issued after the fact of termination of employment, the respondent has attached the schedule of payments for;

a) Salary for the month of September at Ksh.255,923.54

b) Leave days not taken 34 Ksh.290,050.90 Less owing dues.

This is signed in approval on 1st November, 2018.

In the letter terminating employment dated 18th June, 2018 the respondent offered to pay the following;

1) Full salary up to the last working date and any other entitlement;

2) Pay in lieu of notice

3) Pension benefits where applicable as per the scheme rules; and

4) Eave earned and not taken.

With regard to the issuance of a certificate of service, such certificate is due unconditionally pursuant to the provisions of section 51 of the Act. where the failure to issue a Certificate of Service to an employee is prejudicial, it has been requested and not issued and has caused damage with regard to the employee being unable to secure new employment as a result, this is an issue which must be addressed with the court in evidence. the failure to issue the Certificate of Service and the resulting consequences should form the basis of evidence. the pleadings for the issuance of the certificate is not sufficient. The nature of loss and or damage must be gone into for the court to award as held in **Angela Wokabi versus Tribe Hotel Limited Cause No.1712 of 2014 (Nairobi).** in this case, the required certificate should issue with the letter of termination of employment for the duration of service.

According judgement is hereby entered for the claimant with an award for unfair termination of employment all being Kshs. 2,201,302.90 and costs of the suit. The paid dues shall be subject to section 49(2) of the Employment Act.

Delivered at Kericho this 30th day of January, 2020.

M. MBAR?

JUDGE

In the presence of: ....