



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1821 OF 2017

PETER MBITHI MUTIA.....CLAIMANT

v

JUBILEE INSURANCE CO. OF KENYA LTD.....RESPONDENT

JUDGMENT

1. Peter Mbithi Mutia (Claimant) was offered employment by Jubilee Insurance Company of Kenya Ltd (Respondent) as an Accounts Assistant on or around 9 October 2007.
2. On 12 January 2012, the Respondent sent the Claimant on *compulsory leave* to enable investigations into allegations of fraud. The leave was to last up to 13 February 2012 but was extended up to 20 February 2012 to enable conclusion of investigations.
3. On 22 February 2012, the Respondent issued a show-cause notice to the Claimant to respond to allegations of being involved in *manipulation of the system with an intent to defraud*.
4. The notice instructed the Claimant to make a written response before 23 February 2012 and also invited him to attend a disciplinary hearing on 27 February 2012.
5. The Claimant responded on 23 February 2012 and on 27 February 2012. He also attended the disciplinary hearing.
6. On 25 May 2017, the Respondent notified the Claimant of the termination of his employment, and this prompted the Claimant to institute these legal proceedings alleging unfair termination of employment.
7. The Respondent filed a *Response* on 18 June 2018 and the Claimant filed a *Reply to Response* on 5 July 2018.
8. The Cause was heard on 16 September 2019 and on 21 November 2019.
9. The Claimant, the Respondent's Human Resource Business Partner and Senior Forensic Fraud Investigator testified.
10. The Claimant filed submissions on 23 January 2020 (should have been filed/served by 20 December 2019) while the Respondent filed its submissions on 10 February 2020.
11. The Court has considered the pleadings, evidence and submissions and adopted the Issues as proposed by the Claimant on 26 October 2018.

Unfair termination of employment

Procedural fairness

12. The Claimant was issued with a show-cause notice setting out the allegations to confront. He was requested to make a written explanation and was also invited to a disciplinary hearing. The Claimant made two written representations and participated in the hearing.
13. Despite the above, the Claimant contended that he was not afforded an opportunity to be heard because he was not supplied with a copy of any audit/investigations report.
14. The only question in regard to the process is whether the failure to furnish the Claimant with an audit/investigation report rendered the process unfair.

15. The Claimant did not suggest in Court that he sought for a copy of the audit/investigation report after receiving the show-cause or before the oral hearing.

16. In the circumstances, the Court is of the view that the Claimant was not prejudiced or handicapped at all in making his responses to the allegation(s), and finds that the Respondent was in substantial compliance with the statutory requirements on procedural fairness as contemplated by sections 35(1)(c) and 41 of the Employment Act, 2007.

Substantive fairness

17. The Respondent had the burden, pursuant to sections 43 and 45 of the Employment Act, 2007 to prove the reason(s), and that the reason(s) were valid and fair to warrant the termination of the Claimant's employment.

18. The Claimant's duties included receipt of hard copies of member premium schedules and then transferring the information to an electronic system known as ISF system, after verifying the schedules.

19. The Respondent's second witness, the Forensic Investigator stated that the investigations revealed 59 cases of alteration and/or misallocation of premiums amounting to Kshs 9,199,205/- and he attributed the same to tampering by the Claimant, and other employees in the Life Department.

20. The witness also stated that the Claimant was unable to produce during the investigations, hard copies of the schedules he had relied on to make entries into the ISF system, and that copies of schedules obtained from one of the Schemes (Teachers Service Commission) did not tally with the data entered into the ISF system by the Claimant. An example of policy account number 201469 was given.

21. The witness further testified that the investigations established that the individual in favour of whom the premiums were allegedly received from July to December 2013 was not an employee of the Teachers Service Commission.

22. The Respondent's second witness, an expert in computer forensics admitted in his filed witness statement that there was tampering with the system by the Claimant and other employees. He admitted that the system had access rights/sign in credentials.

23. It is within general knowledge to those with rudimentary interest in information technology that computer software(s) and/or systems such as the one in contention here would leave behind electronic footprints of log-ins.

24. Therefore, it is not unheard of to state that any log-ins and log-outs from the system would be easily traceable especially where no physical damage has been caused to the computer/system.

25. In this case, the forensic witness did not disclose or explain why there was no attempt to establish the credentials of the particular employee (whether Claimant or any other employee) who made the specific altered/misallocated entries into the ISF system.

26. The Court, regrettably finds, based on the evidence on record that it was possible that any other colleague of the Claimant with access rights to the ISF system could have entered/manipulated the data in the ISF system, and therefore the Respondent failed to discharge the burden placed on it by sections 43 and 45 of the Employment Act, 2007.

27. The termination of the Claimant's employment, was unfair.

Compensation and pay in lieu of notice

28. The Claimant sought two primary remedies, compensation and pay in lieu of notice.

29. Considering that the Claimant served the Respondent for about 10 years, the Court is of the view that the equivalent of 10 months gross salary would be appropriate and fair compensation (gross salary at separation was Kshs 81,400/-).

30. The Court, after considering that no notice was given and the conclusion that the termination of employment of the Claimant was unfair, awards the Claimant the equivalent of 1-month salary in lieu of notice.

Conclusion and Orders

31. From the foregoing, the Court finds and declares that although the Respondent was in substantial compliance with statutory requirements on procedural fairness, it failed to prove as valid and fair the reason(s) for terminating the Claimant's employment.

32. The Claimant is awarded

(a) Compensation Kshs 814,000/-

(b) Salary in lieu of notice Kshs 81,400/-

TOTAL Kshs 895,400/-

33. The Claimant did not file/serve submissions within the agreed timelines. He did not offer any explanation. He is denied costs.

Delivered, dated and signed in Nairobi on this 14th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mwinzi instructed by Mwendwa Mwinzi & Co. Advocates

For Respondent Mr. Mbaluto instructed by Oraro & Co. Advocates

Court Assistants Lindsey/Judy Maina