



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1038 OF 2016

STEPHEN OSWEKHA AMWAYI.....CLAIMANT

V

TECHPAK INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 12 February 2019 and on 18 December 2019.
2. Stephen Oswekha Amwayi (Claimant) and the Human Resources Manager with Techpak Industries Ltd (Respondent) testified.
3. The Claimant filed his submissions on 15 January 2020 (but only served upon the Respondent on 2 March 2020) while the Respondent filed its submissions on 3 March 2020
4. The Court has considered the pleadings, evidence and the submissions and identified the Issues for determination, as examined hereunder.

Nature of employment

5. The Respondent contended that the contractual relationship with the Claimant commenced in July 2015 when a formal contract was issued.
6. The Claimant had on his part asserted that he was employed by the Respondent in 2003 and to demonstrate the employment date, he produced a copy of a Certificate of Service issued by the Respondent showing the period of employment as 2003 to 2015.
7. Considering that a Certificate of Service is a statutory document and that the Respondent did not deny the genuineness of the Certificate, the Court finds that the Respondent employed the Claimant from 2003 to 2015.

Unfair termination of employment

Procedural fairness

8. The Claimant was employed as a Foaming Operator by the Respondent in 2003 and served until 30 November 2015 (according to the certificate of service).
9. The Claimant testified that on 13 November 2015 he reported to work and found that a colleague had made alterations to the mould of the machine he was operating but the Factory Manager insisted that he operate the machine and that after 2 hours, pressure had built up in the machine causing him to report to the Factory Manager who changed the mould settings after which he operated the machine until evening.
10. According to the Claimant, on 21 November 2015, the Factory Manager instructed him to report to the Respondent's head office to meet the Personnel Manager.
11. The Claimant stated that the Personnel Manager directed him to go home and return on 30 November 2015 and that when he reported, the Manager told him that his services were no longer required.
12. The Claimant contended that there was no disciplinary hearing or notice of termination and therefore his dismissal was unfair.

13. The Respondent's witness, however, asserted that the dismissal of the Claimant was fair because the Claimant was asked to explain the problem with the machine which he did on 17 November 2015 and that on 21 November 2015 the Claimant was invited to attend a disciplinary hearing, but the letter could not be delivered as the Claimant could not be reached as he had switched off his phone.

14. The Claimant did not attend the oral disciplinary hearing as he could not be contacted, but before the invitation to the hearing, the Respondent had called upon him to give written explanations which he did.

15. The Court is satisfied that the Respondent was in substantial compliance with the statutory requirements of procedural fairness as envisaged under section 41 of the Employment Act, 2007.

Substantive fairness

16. The reason given by the Respondent for terminating the Claimant's employment was changing 1000cc cavities to 500 cc cavities on the forming machine, an activity said to be outside the scope of his duties.

17. In terms of sections 43 and 45 of the Employment Act, 2007, this was the reason the Respondent was expected to not only prove, but prove as valid and fair reason warranting the termination of the Claimant's employment.

18. Although testifying that it was not within the province of the Claimant to change the machine, the Court has looked at minutes of the disciplinary hearing held on 25 November 2015 (related to Claimant's colleague).

19. The minutes show that the Claimant's named colleague changed the order from 1000cc to 500cc at about 5.00 am before handing over the machine to the Claimant who was on day shift. The said colleague admitted changing the mould.

20. The Claimant stopped the machine at about 10.40 am after noting something was wrong.

21. The minutes further show that there was no experienced supervisor at the plant to be entrusted with the maintenance of the machine.

22. The Respondent's disciplinary proceedings placed the change of the machine settings/mould at the doorstep of the Claimant's colleague, and, surprisingly, he was also sanctioned without establishing any deliberate fault on his part.

23. In the view of the Court, the Claimant was sanctioned as part of a group without taking into account any deliberate omission or commission on his part.

24. The termination of the Claimant's employment, the Court finds, was not for valid and fair reasons, and was also not in accord with justice and equity as demanded by section 45(4) of the Employment Act, 2007.

Compensation

25. The Claimant served the Respondent cumulatively for about 12 years, albeit on different contracts.

26. Considering the length of service, the Court is of the view that maximum compensation would be fair.

27. Compensation is computed using gross as opposed to basic salary (October 2015 gross salary was Kshs 29,064/-).

Salary in lieu of notice

28. The Claimant was offered a 1-month salary in lieu of notice, and nothing turns on the relief.

Service gratuity

29. The Claimant was a contributor towards the National Social Security Fund and by dint of section 35(5) & (6) of the Employment Act, 2007 is not eligible for *service pay*.

30. If there was a contractual provision for service gratuity as opposed to *service pay*, the Claimant did not prove the same.

31. If there were any unremitted contributions to the Fund, the Claimant should make a formal report to the Fund to invoke the recovery power it has been granted under the relevant Statute. The statute even provides for penalties against employers.

Conclusion and Orders

32. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(a) Compensation **Kshs 348,768/-**

33. The Claimant is denied costs for failing to serve submissions upon the Respondent within the agreed timelines.

Delivered, dated and signed in Nairobi on this 13th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kamau instructed by Mwaura Kamau & Co. Advocates

For Respondent Ms. Gathimbo/Mrs. Kahura instructed by Wekesa & Partners Advocates

Court Assistant Lindsey/Muturi