



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1043 OF 2015

MANASSEH MUNIALO WANDABWA.....CLAIMANT

v

NATIONAL HOUSING CORPORATION.....RESPONDENT

JUDGMENT

1. This Cause was heard on 1 November 2019 and on 18 February 2020.
2. Manasseh Munialo Wandabwa (Claimant) and Anthony Thiongo, a Chief Human Resource Officer with the National Housing Corporation (the Respondent) testified.
3. The Claimant's submissions were not on record by the agreed timeline of 13 March 2020 (before declaration of COVID19 pandemic) nor be the extended date of 30 April 2020. The Respondent's submissions were also not on file.
4. The Court has considered the pleadings and evidence.
5. Although the parties filed an *Agreed List of Issues* setting some 8 Issues for determination, the Court has condensed them as examined hereunder.

Background

6. The Claimant was at all material times the Finance Manager of the Respondent.
7. On or around 28 June 2011, the Respondent notified the Claimant that the Board had approved and/or resolved that pursuant to Treasury Circular No. 18 of 24 November 2010 a reorganisation be carried out.
8. The notification, however, indicated that all Heads of Departments, General Manager(s) of Research Development Unit and employees over 55 years old would not be converted to permanent and pensionable terms but would remain on 3-year contracts.
9. The Claimant was therefore informed that he would enter into a new contract effective 1 July 2011.
10. As part of the re-organisation, the Respondent advertised for several positions including General Manager, Finance.
11. The Claimant executed the contract and the Respondent issued to him a copy through a letter dated 6 January 2012.
12. On 17 January 2012, the Claimant gave a resignation notice effective immediately. In the resignation letter, he indicated that he had opted not to apply for the position of General Manager, Finance.
13. The Respondent's Managing Director acknowledged the Claimant's resignation notice on 25 January 2012 and advised the Claimant that he had forwarded it to the Board and would revert.
14. The Board met on 26 January 2012, accepted the Claimant's resignation and resolved that the Human Resource Committee of Board conduct an exit interview with the Claimant.
15. On 2 February 2012, the Respondent's Managing Director invited the Claimant to attend an exit interview on 7 February 2012.
16. Despite having accepted the Claimant's resignation at its meeting on 26 January 2012, during a meeting on 12 March 2012, the Board

resolved to terminate the Claimant's employment, purportedly on allegations emanating from his role as a member of the Respondent's House Allocation Committee.

17. The Managing Director thus wrote to the Claimant on 28 June 2012 to inform him of dismissal from service, notwithstanding his resignation notice of 17 January 2012.

18. The decision prompted the Claimant to institute these legal proceedings alleging unfair termination of employment and constructive dismissal.

Unfair termination of employment

19. The Claimant gave unequivocal and unambiguous notice of resignation on 17 January 2012. The Respondent's Board discussed the resignation on 26 January 2012 and resolved that an exit interview be conducted.

20. The Respondent's Managing Directors sent a Memo dated 30 January 2012 to the Chief Human Resources Officer advising him that the Board had accepted the Claimant's resignation, and on 2 February 2012, he wrote to the Claimant to inform him of the acceptance of his resignation.

21. On the same day, the Claimant was invited to attend an exit interview which he did on 7 February 2012.

22. In the view of the Court, having accepted the Claimant's resignation with immediate effect, the employment relationship had become determined and the decision of the Respondent to dismiss the Claimant on 28 June 2012 was contractually and legally superfluous (see *Harris & Russel Ltd v Slingsby* (1973) IRLR 221 and *Brennan v C Lindley and Co Ltd* (1974) IRLR 153).

Constructive dismissal

23. *Constructive dismissal* occurs when an employee resigns claiming that there was a fundamental breach of contract on the part of the employer and that this breach caused them to resign.

24. The employer's action must constitute a breach which is significant enough to go to the very root of the contract and, typically, would involve some major change to one of the key terms of employment, introduced without the employee's agreement. The effect is that the employee feels the situation is intolerable to the extent that there is no alternative but to resign.

25. The breach of contract may be a breach of one of the express terms of the contract or a breach of an implied term. *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27).

26. The Claimant asserted that his resignation was prompted by the restructuring exercise commenced by the Respondent in November 2011 during which exercise other Heads of Departments were automatically promoted to General Managers (except himself) but did not give details of those who were automatically promoted.

27. The Respondent's witness stated that as part of the restructuring, 4 positions for General Managers were advertised and interviews were conducted and two Managers were successful while two others were recruited from outside the Respondent.

28. It is therefore not correct as contended by the Claimant that the other Heads of Departments were automatically given the positions of General Managers.

29. Restructuring often happens in the employment arena from time to time as a response to an ever dynamic work environment. Restructuring, by and of itself does not create a hostile work environment.

30. In the present case, upon restructuring, the Respondent advertised for the new positions. The Claimant was not blocked from applying for any of the positions. He opted not to apply.

31. The Court is, therefore, unable to agree with the Claimant that the Respondent was in a fundamental breach going to the root of the Claimant's contract by restructuring and calling upon him to apply for the new upgraded position(s). This was not a case of constructive dismissal.

32. The Court notes that at the time of the Claimant's resignation, he had a sword hanging over his head in respect to his role in the Housing Allocation Committee, which role had attracted investigations by the Ethics and Anti-Corruption Commission and the Claimant's arraignment before the Magistrates Court.

33. With the findings above, compensation and pay in lieu of notice are not remedies available to the Claimant.

Breach of contract

Gratuity

34. The Claimant sought Kshs 1,669,568/85 on account of gratuity.

35. The Claimant's contract at clause 12 provided for gratuity at the rate of 31% of the basic salary upon completion of the contract or pro-rated gratuity to date of separation.

36. The Claimant did not disclose the period in respect of which the gratuity related.

37. However, in terms of the contract, the Respondent should compute and pay any gratuity due up to the time of his resignation.

Leave travelling allowance

38. On account of leave travelling allowance, the Claimant made a plea for Kshs 371,428/-.

39. The Court has looked at the Respondent's Human Resource Manual, 2007. It does not provide for a leave travelling allowance. Relief is declined.

Luggage allowance

40. The Respondent's Human Resource Manual provided for transport allowance upon transfer or retirement.

41. The Claimant's separation was not on account of transfer or retirement to warrant luggage allowance. If there was any other contractual foundation to this head of the claim, it was not proved.

Conclusion and Orders

42. From the foregoing, and save for gratuity, the Court finds no merit in the Cause and it is dismissed with no order on costs.

43. Respondent to compute and pay the Claimant any outstanding gratuity.

Dated, signed and delivered through video/email in Nairobi on this 8th day of April 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mosei instructed by K. Mosei & Co. Advocates

For Respondent Mr. Wanjehia instructed by Kiarie & Kariuki & Associates Advocates

Court Assistant Fred/Judy Maina