



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 589 OF 2015

BEATRICE KANANU IMATHIU.....CLAIMANT

VERSUS

BRITISH AMERICAN TOBACCO (K) LTD.....RESPONDENT

JUDGEMENT

1. The claimant alleged that she was employed by the respondent as a reward manager from 27th August, 2007 to January, 2010 when she was promoted to Area Head of Reward East and Central Africa which she held until 30th April, 2014. At the time of termination, the claimant's salary was Kshs 881,810/= per month.
2. According to the claimant the termination was unlawful and unfair for reasons among others that the respondent never gave any reason for the termination, it was not in any way related to her conduct, capacity or compatibility, the respondent attempted to make her resign but when she declined she was terminated.
3. According to the claimant, prior to the actual termination, the respondent had long made the decision to terminate her service as could be found in various communications to the claimant where at one point she was asked to resign. Further the respondent at the close of business on 29th April, 2014 sent the claimant a draft mutual separation agreement which whereas it purported to give her room to consult her legal representative did not give her time to consult and in spite of her not having agreed or signed the same, an announcement of her exit was made on 30th April, 2014.
4. On the premise the claimant contended there was no fair and or legal reason for the termination. According to the claimant, the main reason albeit not communicated to her for termination was redundancy yet redundancy procedures were never followed. The claimant further complained that during her employment the respondent discriminated against her with regard to salary review from the year 2012.
5. According to the respondent's Human Resources Policy Manual, every employee is entitled to an annual salary review. In her view she was entitled to 4.43% salary review based on the respondent's budget, performance and projections, industry salary trends and individual performance. The claimant alleged that the denial of salary review was because of the fact that she was a woman and for the period she was on maternity and pregnancy related sick leave which caused her to be away from work for some time. The claimant further alleged that she was discriminated further for the same period when 50% bonus was withheld without any lawful justification.
6. The respondent on its part stated that the claimant was employed as averred but left employment on 30th June, 2015 through a mutual separation agreement. The claimant's salary at the time of mutual separation was Kshs 881,810/=. According to the respondent, the claimant's contract was never terminated instead both parties entered into a mutual separation agreement that was to take effect on 30th April, 2014 after the claimant's role of Area Head of Reward, East & Central Africa was consolidated under centralized model and was to be provided from Reward shared services in South Africa.
7. The respondent stated that after several meetings with the claimant on 17th February, 2014 the claimant was informed that the role of Reward that was held by the claimant had been reviewed globally to become Human Resource shared service and Head of Reward in line with Global HR structures alignment.
8. The respondent further stated that the claimant's request for mutual separation had also been accepted and that it would be settled in the same terms as redundancy payment terms. The mutual separation agreement was to be forwarded to the claimant by 4th April, 2014 and that her last working day would be 30th April, 2014. The claimant was to revert to the respondent confirming the mutual separation.
9. According to the respondent as at 31st March, 2014 the claimant had accepted the mutual separation and was planning for her life as

clearly outlined in the claimant's email to the respondent dated 31st March, 2014. Further, the draft separation agreement forwarded to the claimant contained payment terms and other benefits amounting to Kshs 11,826,000/=. The claimant accepted the mutual separation agreement and the computation of the final dues by accepting the agreement and thanking the respondent. Further the claimant asked the respondent to use the words "redundancy" in the agreement instead of separation to allow the claimant benefits from her redundancy insurance cover.

10. Upon acceptance of the mutual separation agreement the respondent proceeded to announce to all staff about the claimants departure. However, while the respondent was waiting to receive the signed mutual separation agreement, it received a demand letter from the claimant's advocates concerning unfair termination and demanding payment for Kshs 27, 938,973/=.

11. According to the respondent, by demanding the payment of Kshs 11,826,000/= as contained in the mutual separation agreement meant the claimant had agreed to the mutual separation agreement. Further the sum of Kshs 11,826,000/= less PAYE was paid to the claimants' advocate and acknowledged.

12. In her oral evidence the claimant stated that she relied on her statement recorded on 2nd April, 2015 as her evidence in chief and her documents filed in support. She denied being provided with a mutual separation agreement on the date stated in the letter dated 17.2.2014. She admitted receiving the draft mutual separation agreement but wanted to seek advice first before signing the same. She received it on 29th April, 2014 and was required to respond the following day. According to her she had no adequate time to seek legal advice. She however thereafter sought legal advice and responded to the respondent and made demands in her response and reasons for the demands.

13. Regarding performance review, she stated that the respondent had appraisal policy and that she was appraised in 2012 and that for about five months in 2012 she was on maternity and sick off. Her appraisal was "requires improvement" she never appealed the appraisal as she did not want to challenge her boss.

14. The claimant further stated that she had been offered a promotion and persuaded to take it up but expressed her concern over being able to deliver effectively on her roles. According to her, she was being assigned two roles previously held by two senior managers. She declined the offer and her rating dropped. Her role was subsequently transferred to South Africa and was informed she would be declared redundant.

15. In cross-examination she stated that she was part of the management and reported to the Head of Rewards for the region. She participated in annual salary review and that she was the one who created criteria for the reward. She also came up with salary review policy. Further there was bonus policy and she was an advisor on the policy. The decision to pay bonus was with the board.

16. Concerning appraisal, it was her evidence that targets were set by her in conjunction with her line manager and that the appraisal was based on targets set. She did not appeal the appraisal because she felt she would be discriminated and lose her job.

17. The claimant denied any discussion over her separation. She never raised any written issues with the letter dated 17th February, 2014 contained at p.53 in her bundle of documents but had verbal discussions over the same with HR and according her the same was later verbally withdrawn. According to the claimant she never requested for redundancy and had no prior notice of intention to declare her redundant. She further stated that she never wrote back rejecting the draft separation agreement. It was further evidence that she was happy with numbers but not the mutual separation agreement. Further she cleared because her exit had already been announced and that she received Kshs 11,826,000/= as redundancy payment. She wanted redundancy to enable her access insurance. She also received her pension contributions.

18. The respondent's witness Ms Lucy Evara on the other hand stated that she worked for the respondent as Human Resources Business Partner for commercial functions. She relied on her witness statement filed on 15th February, 2019 as evidence in Chief together with the supporting documents filed by the respondent.

19. According to Ms Evara the claimant was responsible for analysis for annual rewards and recommending adjustments for employees' salaries. The rewards covered all staff except unionisable employees. Further, the claimant was part of management hence was bound by performance management policies of the respondent.

20. The respondent released objectives every year which were reduced to function specific objectives and later to individual specific objectives. At the end of the year each employee went through performance appraisal. The appraisal would determine salary increment and bonus. "Require improvement" score did not attract salary increment but bonus would still be paid though percentage would be reduced.

21. According to her in 2012 -2013 the claimant's rating was "requires improvement" hence she did not get salary increment she however got 50% bonus for 2013. Ms Evara further stated that the claimant's role was to be consolidated with HR shared services and was required to undergo performance improvement plan before taking up the role. The claimant declined the role. She also did not take the PIP in her area. The claimant instead requested for mutual separation through her line manager.

22. The line manager after consultation informed her that the management was agreeable to mutual separation. Her terminal dues were computed and shared with her. According to her the claimant was happy with the tabulation and the payment was wired to the claimant's bank account. A mutual separation agreement was prepared and sent to the claimant but she refused to sign the same. The claimant asked for additional payment. The claimant's package was based on redundancy however the mutual separation agreement was not a redundancy.

23. In cross-examination she stated that the claimant did not ask for mutual separation in writing and that it was as a result of discussions. She was however privy to the discussions. She further stated that the claimant was not terminated but that there was mutual separation and part of the requirements for separation was that the claimant should resign but the claimant did not.

24. It is now settled that in a claim for unfair termination the burden of proof that there has been an unfair termination is cast upon the employee, in this case the claimant. The respondent/employer has denied terminating the claimant's service and that the separation was mutual hence the issue of unfair termination should not arise.

25. The evidence in support of the respondent's contention that the separation was mutual is in the fact that the claimant accepted the computation and later received the sum of Kshs 11,826,000/= which was part and parcel of the mutual separation agreement.

26. The email dated 30th April 2014 from the claimant reads as follows:

"Thank you for the numbers and especially the discretionary bonus. I recalculated the prorated bonus and your number is higher than I was expecting. Just wanted to mention this if it was in error? I am happy to accept the number indicated...."

27. The numbers the claimant was referring to are contained at page 5 of the draft separation agreement. The claimant on the other hand contended that she was unfairly terminated because her exit announcement was made before she signed the mutual separation agreement. The complaint's informing her allegations that she was unfairly terminated were contained in her letter dated 15th May, 2014. These included the rating in her performance review which she declined to accept, the exit announcement and verbal communication meant the respondent had already made the decision that she had to leave.

Further that the draft separation agreement suggested she resigned. These among other complaints made the claimant conclude that her termination was unfair therefore she was entitled to first, monies listed in the draft mutual separation agreement, withheld bonus for the year 2012 and 2013 and 12 months' salary as compensation for unlawful termination.

28. It is a settled principle of equity that a party cannot approbate and reprobate at the same time. That is to say no one is allowed to pick and choose only the favourable aspects of a transaction and reject the rest. The claimant did not deny accepting the sum of Kshs 11,826,000/= as evidenced by the letter dated 8th July, 2014 from her advocates. This payment was a part and consequence of the mutual separation agreement. Further, when the claimant saw the figures for the first time when she received the draft mutual separation agreement she was very happy if not excited about them and for once thought the aspect on bonus was erroneous.

29. What the court can reasonably conclude from the claimants conduct as observed above was an attempt to accept the money offered by mutual separation agreement yet refuse to be bound by it. This according to the court's view was an inequitable conduct which the court cannot support.

30. In conclusion the claimant has failed to prove that there was unfair termination of her service as alleged to warrant the granting of the orders sought.

31. The claim is hereby dismissed with no order as to costs considering the years and level of service the claimant rendered to the respondent.

32. It is so ordered.

Dated at Nairobi this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

gkanyiri@fke-kenya.org

kiingati@knlawkenya.co.ke

kiingatin@gmail.com