



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 273 OF 2019

EDAH CHERONO MAIYWA.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI ENTERPRISES

AND SERVICES LIMITED....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this claim on 25.4.2019 as a result of the Respondent's actions, seeking the following remedies–

- i. The Respondent be ordered to stop/ revoke the Claimant's re-deployment and re-assignment of duties outside her area of professional competence with immediate effect.*
- ii. The Respondent be ordered to confirm the Claimant to the position of Senior Human Resource Officer which should be backdated to when the other officers were confirmed with immediate effect.*
- iii. The Respondent be ordered to stop the recruitment process of the position of Senior Human Resource Officer as advertised in January 2019.*
- iv. The Claimant be paid arrears for the basic salary and house allowance of Senior Human Resource Officer from 1/12/2015 the effective date of confirmation amounting to KShs. 1,194,975.00.*
- v. The Claimant be paid arrears of service gratuity and annual leave for the position of Senior Human Resource Officer since 1st December 2015 amounting to KShs. 347,159.00.*
- vi. General damages for discrimination, unfair labour practices, distress, frustration and witch hunt by the Respondent at the work place equivalent to 12 months salary of Senior Human Resource and Administrative Officer amounting to KShs. 1,648,728.00.*
- vii. Interest on (ii), (iii) and (iv) above at commercial interest of 14%.*
- viii. Costs of the claim.*
- ix. Any other relief that the Honourable Court may deem fit.*

2. The brief factual background of the case is that Respondent employed the Claimant as a human resource officer on a 3-year renewable contract, effective 8.10.2012. The contract was renewed on 7.10.2015 for a further 3 years and again on 7.10.2018, for a further 3 years until 8.10.2021. Her basic salary under this contract was KShs. 70,549.00 with a house allowance of KShs. 14,109.00, office allowance of KShs. 13,000.00 and a service gratuity of 31% of her basic salary, at the end of her contract.

3. On 1.6.2015, the claimant was appointed to act in the position of Senior Human Resource Administration Officer (SHRAO) following organizational restructuring of the respondent which led to ten vacant positions. The claimant was to earn an acting allowance of KShs. 14,109.00 per month and she was to act until a substantive SHRAO was appointed. All the officers who had filled the other 9 positions in

acting capacity were confirmed following competitive interviews, save for the Claimant contrary to the Respondent's Board's timeline and program on acting appointments and confirmations.

4. In February 2016, the position of Senior Human Resource Officer (SHRO) was advertised, the Claimant applied and was shortlisted together with three other candidates but nothing came out of the interview. The position was re-advertised on 5.1.2018 and in January 2019, forcing her to write a letter to the Respondent's MD complaining about the recruitment process which she considered discriminative. The complaint letter was responded to vide the letter dated 5.2.2019 but she was not satisfied because in her view the extension of acting capacity must be for reasonable timelines and for a valid reason. Thereafter she was accused of misconduct and redeployed to her substantive position followed by a further re-deployment to the position of Administration Officer which in her view amounted to a demotion, discrimination and unfair labour practices.

5. The Respondent filed defence to the claim on 10.5.2019, admitting that all the senior management positions were initially filled in acting capacity, but were later subjected to competitive recruitment processes before the substantive appointments were done, save for 4 positions that are still vacant. She averred that the position of SHRAO was not filled as envisioned because she was undergoing an organizational structure review, job evaluation and internal restructuring. She further averred that the processing of the post after the second re-advertisement was incomplete due to the deferral of the implementation of the approved structure by the State Corporations Advisory Committee's (SCAC).

6. The respondent contended that the processing of the position on account of the January 2019 advertisement is still ongoing and was subject to implementation of the SCAC's approved structure scheduled for July 2019. She contended further that the Claimant's concerns regarding the recruitment process of that position were substantially responded to. She averred that the Claimant was paid an acting allowance during the period she served in acting capacity and clarified that acting appointments can be extended by the Board or the MD, if the post remains vacant. She urged this Court to dismiss or strike out the suit with costs and interests thereon.

7. The suit went for full hearing whereby both parties gave evidence and thereafter filed written submissions.

The Claimant's Case

8. The Claimant testified as CW1 and adopted her witness statement filed on 25.4.2019, as her evidence in chief which was basically a reiteration of the facts summarized hereinabove. In addition, she contended that she had no performance issues and none was raised when she was appraised before the renewal of her contract in October 2018. As regards the allegation that she threatened her supervisor, she denied the same contending that if it was true, she would have been subjected to disciplinary action because the offence amounts to gross misconduct.

9. She further testified that her acting capacity was terminated and on 4.4.2019 and she was redeployed to the position of Administration Officer without any prior discussion. According to her, she was not consulted before the change in her job description which also amounted to a demotion from her substantive position in grade 7 to the new position in grade 8. She further contended that her substantive appointment was only for the HR function and not administration.

10. On cross examination, she conceded that the procedure for filling vacancies in the respondent is through a competitive process and that her colleagues' positions had been advertised. She maintained that she complained about the recruitment process to her supervisor and the response received was unsatisfactory but she never appealed to the Board in line with the company's procedure for handling grievances. She contended that the SRC and SCAC never barred any recruitment or her confirmation. She further contended that after the lapse of the 6 months acting period, the management had the option of terminating or confirming her appointment. She maintained that all her colleagues who had served in acting positions were confirmed to those positions. Finally, she maintained that acting appointments were supposed to be short term.

11. The claimant called Mr. Geoffrey Aori Momanyi who testified as CW2. He adopted his written statement dated 25.6.2019 and the Further List of Documents filed on 28.6.2019, as his evidence. However, the Respondent objected to the production of the documents at pages 9-34 and 70-89 for being illegally obtained and the same were expunged from the Court's record. His evidence majorly consisted of a reiteration of the Claimant's testimony.

12. He told this Court that the Claimant was his former colleague at the Respondent's company and that he had worked for the Respondent from 15.2.2009 until May 2019 when he resigned. He testified that the Respondent company underwent a strategic re-organization in 2014 and 2015 and a new organization was created which led to the creation of his position as well as ten other positions. He stated that immediately the new organogram was approved by the Board, the older positions became obsolete and officers were appointed in acting capacity in the corresponding positions. He explained that his previous position had been Business Advisory Officer Grade 6 and that he was appointed the acting Manager Strategy Delivery and Coordination.

13. He contended that he drafted a Roll Out Program under which, those serving in acting capacity were to be appointed to the new positions while the positions with no one in acting capacity would be competitively filled, depending on the performance of the organization. He confirmed that the program provided for competitive filling of all the vacancies created, depending on the set time and the sensitivity of the position, and it was approved by the CEO. He contended that according to the program, the position of SHRAO was to be filled by the third quarter of 2015/2016 financial year but no interviews were conducted for the first advertisement and the management was not briefed as to why they were never conducted.

14. He further told the court that the position of Chief Manager Finance and Administration was not advertised but Jennifer Mburu was the sole candidate recruited internally for the position even without first serving in acting capacity like the others. He stated that subjecting the Claimant to serve in an acting position for 3 years was discriminatory as the HR Manual only allowed an individual to serve in that capacity for only 6 months. He confirmed that the Claimant's remuneration remained the same save for the acting allowance she was receiving. He contended that during his tenure as the chairman of the performance management committee, no complaint was received concerning the Claimant's performance and there was no inefficiency in the HR department.

15. As regards the position of Administrative Officer to which the Claimant was redeployed, Cw2 contended that its role consisted of reception duties, which was technically a demotion, and it was not based on any management resolution this had been done in bad faith.

16. On cross examination, he admitted that the letter dated 27.7.2015 appointed the claimant in acting capacity until the position was substantially filled and that the board could extend that appointment as long as the position remained vacant. However, he contended that the HR was a very crucial position and should not have been delayed. He further contended that in his capacity as the person in charge of quality management procedures, he advised the CEO that a delay in filling the SHRAO position was not right. He maintained that the SHRAO position was supposed to be filled immediately among the first positions to be advertised.

17. He admitted that all the employees who were holding acting positions were subjected to competitive recruitment before their substantive appointment. He further admitted that the MD acted in that position for 2 years before his appointment. He also admitted that he was paid 15% of his basic salary as his acting allowance during the period he was acting. He maintained that the position of Chief Manager Finance and Administration was filled by Jennifer Mburu without going through a competitive recruitment process. He explained that the recruitment of the MD's position was delayed because the qualifications had to be scaled down before recruitment.

The Respondent's Case

18. Mr. John Kiplagat Kenduiwo and the Respondent's MD, testified as RW1. He adopted as his evidence his Witness Statement dated 9.5.2019, List of Documents No. 1 – 5, Replying Affidavit dated 9.5.2019, Further Affidavit dated 22.5.2019, Further Witness Statement dated 2.7.2019 and Further List of Documents dated 17.10.2019. However, the Claimant's advocate objected to the production of the documents dated 17.10.2019 as they were filed after the Claimant had testified, and the same were withdrawn and expunged from the record.

19. He told this Court that the positions that were left vacant because of the restructuring, were supposed to be filled competitively. He testified that initially the said positions were filled by officers in acting capacity pending substantive appointments. He contended that he served as an MD in an acting position for 23 months before his substantive appointment and contended that, up to date there are employees still serving in acting capacities because of financial constraints. He denied ever discriminating against the Claimant in any manner and explained that no recruitment was done after the advertisement dated 22.2.2016 due to factors beyond the Respondent's control.

20. He stated that prayer 2 is untenable because the position did not exist and the HR Policy does not allow direct appointment but only competitive recruitment. Further, he contended that the prayer for salary arrears and allowance totaling to KShs. 1,194,975 is also untenable because all that was payable to the Claimant was an acting allowance of 15% of her basic salary. As regards the claim for service gratuity, he contended that the same was only payable on the substantive position, and not for an acting position. Likewise, he contended that the Claimant was not entitled to general damages for discrimination because there was no discrimination or unfair labour practice.

21. On cross examination, Rw1 stated that the Claimant was informed by her supervisor that interviews on account of the first advertisement would not be carried out. He contended that the interviews on account of the second advertisement were stalled after the SCAC advised that the position of SHRAO be reviewed and elevated to director level. He further contended that the Claimant was fully aware of the foregoing matters since she was working with the SCAC on the process.

22. He told the court that the position of SHRAO was not a priority position due to the reduced number of staff in the organization. He admitted that the Chief Manager Finance and Administration was recruited as Deputy Manager Finance and Operations and then became Chief Manager Finance and Administration after the restructuring. He admitted that he had no evidence to prove that there were other officers who were still serving in acting capacity like the Claimant.

23. He maintained that the due process was followed in redeploying the Claimant to the position of Administration Officer as clause 2.9 of the HR Policy provided that re-designation may require redeployment. He admitted that the claimant was a HR professional and that he had never issued the Claimant with any warning letter in respect of her performance nor did she have any disciplinary issue. He contended that the administration officer position was a senior position and did not affect the Claimant's terms of service as the HR Officer. He confirmed that there was a person appointed as the HR officer in acting capacity after the Claimant's redeployment to the position of Administrative Officer. He maintained that all the employees were treated the same.

24. Ms. Jennifer Muthoni Mburu, testified as RW2. She also adopted her witness statement filed on 5.6.2019 as her evidence. She testified that she was appointed by the respondent to the position of Chief Manager Finance and Administration, in 2015. She testified further that the recruitment process of SHRAO was not completed because the first advertisement referred to position of SHRO, which did not exist in the organization and the Claimant was aware of that fact. She further testified that the second advertisement also did not yield any appointment because the job evaluation by the SRC graded the SHRAO position lower than what was advertised and thereafter the SCAC recommended a different organizational structure.

25. Rw2 denied that the Claimant was discriminated against and averred that all the positions in the organization were filled competitively. She further contended that the claimant was not the only applicant for the position of SHRAO who was affected by the said developments. She also contended that the claimant is still working for the Respondent and earning full salary for substantive position. She blamed the claimant for delaying the recruitment of the SHRAO because she rushed to get an injunction order from the court. She urged this Court to dismiss the claim as the prayers sought were untenable since recruitment of SHRAO must be done competitively.

26. On cross examination, Rw2 contended that the Claimant was the one who made the error in the job title of the first advertisement which was then approved by the MD. She admitted that she had no copy of the Reports by SRC and SCAC which found the SHRAO position to be of a lower grade than what had been advertised. She also did not produce as exhibit her appointment letter before this Court.

27. She admitted that the Claimant performed her duties as expected hence was never served with any warning letter. However she contended that the Claimant threatened her on 29.3.2019 and she reported the same to the MD. She admitted that she never reported the matter to the police because it was work related, as such it was handled through grievance handling process under the HR policy. She

however, did not file any minutes to prove that assertion.

28. She denied the allegation that the Claimant had been redeployed because she had threatened her, but confirmed that the Claimant was redeployed on 4.4.2019 after she had reported the alleged threat on 1.4.2019. She reiterated that the Claimant was not entitled to the full salary and benefits, for serving in an acting position. She concluded by stating that the Claimant had agreed to serve in the acting position having accepted the letter to act.

The Claimant's Submissions

29. The claimant filed written submission on 18.2.2020 contending that after the restructuring of the respondent, she was appointed as the SHRAO in acting capacity which extended for over 3 years from 1.6.2015 as a result of which, she lost the benefit of full salary and benefits that come with the substantive position. She contended that she was only paid an acting allowance of 15% of her basic salary yet she was discharging all the substantive duties of the SHRAO position, to the Respondent's benefit and to her detriment in terms of career progression and financial growth.

30. She further submitted that she was discriminated against by being treated differently from the other officers who were appointed in acting capacity with her after the restructuring of the respondent when all of them were given substantive appointments to their respective positions through competitive recruitment and also direct appointment. She contended that her appointment on acting capacity for over three years while her colleagues were given substantive appointment was unreasonable and amounted to discrimination and unfair labour practices on the part of the respondent, contrary to section 5 (2) of the Employment Act and Articles 27 (1) and 236 (b) of the Constitution. She relies on the case of *Silas Kaumbuthu Mbutura vs. Central Dairy Cooperative Union Limited [2015] eKLR* where the Court held that subjecting an employee to serve in an acting capacity amounted to an unfair labour practice and a gross violation of article 41 of the Constitution.

31. As regards the redeployment to the position of Administrative Officer, the Claimant submitted that it amounted to demotion and also the job description went outside her competence and skill. She contended that the duties of the administration officer as set out in the advert dated 22.1.2019, was proof that the position was inferior to her position of HR officer. Further, in her view, there was no justification for redeploying her to a position she was not skilled in yet she had performed her tasks as SHRAO satisfactorily and effectively. She contended the Respondent's actions were actuated by malice only because she complained about her appointment in an acting capacity for an inordinately long period, yet her colleagues who had been appointed in an acting capacity with her were confirmed in their respective positions.

32. She further submitted that RW1 and RW2's failure to follow the procedure set out in clause 2.9 of the HR manual were driven by other extraneous factors which were not legal. She maintained that her redeployment amounted to fundamentally changing the terms of her contract hence a violation of section 10 (5) of the Employment Act. She relied on the case of *Elizabeth Kwamboka Khaemba vs. BOG Cardinal Otunga High School Mosocho & 2 Others [2014] eKLR* where the Court held that an employer could not alter an employee's employment contract without consulting them. She further relied on *Maxwell Miyawa & 7 Others vs. Judicial Service Commission [2017] eKLR*, *Dorothy Nchabira Bernard vs. Solution Sacco Society [2015] eKLR* and *Lt. Col (Rtd) Richard Nchapi Leiyagu vs. Chief of Kenya Defence Forces & 2 Others [2015] eKLR* to fortify the foregoing submission.

33. It is the Claimant's submissions that the SCAC and SRC did not stop the Respondent from filling the position, as admitted by RW1. She contended that the Respondent did not avail the recommendations of the two bodies.

The Respondent's Submissions

34. The respondent filed her written submissions on 10.7.2020 contending that conducting a competitive recruitment process instead of confirming the Claimant to the SHRAO position did not amount to discrimination or unfair labour practice because it is provided for under article 10 and 232 of the Constitution. She reiterated that filling the position of SHRAO was not a priority, as there was reduced workload since the number of employees had reduced from 42 to 22. She argued that the Claimant ought to have resigned from her acting position after 6 months, if she was uncomfortable serving as such.

35. The Respondent further submitted that no discrimination or unfair labour practices were evidenced and that the same could not have taken place when the open recruitment process was incomplete or still ongoing. The Respondent relies on the case of *Willis vs. United Kingdom 36042/97, ECHR 2002 – IV* where it was observed that discrimination and unfair labour practice means treating differently, without any objective and reasonable justification, persons in similar situations.

36. Further, she contended that the Claimant waived her right to claim that she had been discriminated against when she subjected herself to the recruitment process and continued serving in acting capacity. The Respondent relied on the case of *Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR*, where the Court observed that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by that person's previous action or statement.

37. The Respondent further submitted that the prayers sought are untenable as there is no position known as SHRO within her establishment. However, she contended that the Claimant stands a fair chance to be appointed to the position of SHRAO. She argued the claim for service gratuity for the prolonged acting appointment as the SHRAO is untenable because there was no contract between her and the Claimant for the substantive position of SHRAO. She relied on the case of *New KCCC vs. OAA; Civil Appeal 163 of 2017* where the Court held that gratuity is only payable if it is provided for under the contract service.

38. The Respondent further submitted that the HR and Administration Unit is made up of HR section and Administration section and posited that the position of administrative officer is not junior to the claimant's substantive position of HR officer. She contended that the two positions are equal and both reporting to the SHRAO who oversees the two sections. Further, she contended that what changed after the redeployment, was only duties and roles assigned to the claimant which were within the duties she has been carrying out as acting SHRAO. She further argued that the claimant was competent to serve in the position of Administrative officer because she applied thrice for the

position of SHRAO whose role includes administration.

39. Finally, the Respondent submitted that the cases relied on by the Claimant are distinguishable from the case herein since there was no contract between the Claimant and Respondent to have the position substantively held rather than in an acting capacity. Further, in her view, the cases cited by the Claimant are inconsistent and not related to the claim before this Court.

Issues for determination and analysis

40. I have carefully considered the pleadings, evidence and the written submissions presented to the court by the parties and found no contention in the fact that the Claimant was substantively appointment in the position of HR Officer for a term of three years. It is also a fact that on 1.6.2015, she was appointed to serve as SHRAO in acting capacity pending the appointment of the substantive office holder. It is also a fact that the claimant was given a third term in her substantive position running from 7.10.2018 to 6.10.2021 and continued to serve as SHRAO in acting capacity till 4.4.2019 when the appointment was withdrawn. Finally, it is common ground that the Claimant was redeployed to the position of Administration Officer from her position of HR officer on 4.4.2019 and another person was appointed HR Officer in acting capacity. The main issues for determination are –

a. Whether retaining the claimant as the SHRAO in acting capacity for over 3 years without giving her substantive appointment was inordinate and amounted to discrimination and unfair labour practice on the part of the Respondent.

b. Whether the redeployment of the claimant from HR Officer to Administrative Officer amounted to a demotion and unfair labour practice.

c. Whether the Claimant is entitled to the reliefs sought.

Whether prolonging acting appointment and the failure to Confirm the Claimant to the SHRAO Position was discriminatory and unfair labour practice

41. Clause 4.5 (v) of the Respondent's Human Resource Policy and Procedures Manual provides as follows–

Appointment on acting basis is a temporary measure pending the substantive filling of the vacant post by either recruitment or resumption of duty by the substantive holder of the post. The appointment shall normally be limited to a continuous period of 6 months or until the vacant post is filled whichever is earlier, but may be extended by Board/MD if the post remains vacant.

42. The letter appointing the Claimant to the acting appointment SHRAO was dated 27.7.2015 but the effective date was 1.6.2015. The appointment was to last until the position was substantively filled. Under the said Clause 4.5 of the HR Policy Manual, the acting appointment was to last for only 6 months unless it was extended by the respondent's Board or the MD. No formal extension was done after the lapse of the initial 6 months of the acting appointment and the recruitment of SHRAO was not concluded within that time. The claimant was not pleased by the delay in recruiting SHRAO for no valid reason or not appointing her to that position like her other colleagues and wrote a protest letter to the MD on 17.5.2017 and 18.1.2019.

43. Although it is common knowledge that the first advertisement published on 22.1.2016 had an error on the Job Title, the second advert dated 5.1.2018 was proper and there was no valid reason for not concluding the recruitment process. Before advertising the vacancy for the second time, the respondent had put in place its organizational structure and HR policy and Procedures all of which had received approval from her Board and the SCAC in accordance with public service requirements. Again by the letter dated 20.11.2017, the SRC advised the respondent that: -

“The Commission in the 42nd Job Evaluation meeting held on 9th November,2017 observed that the current structure for your institution is above the recommended salary structure for job evaluation within the framework of affordability and fiscal sustainability. Consequently, the commission advises as follows:

(i) Retain the current salary structure (with annual increments) until the next review cycle;

(ii) Implement job evaluation grading structure by appropriately mapping the jobs evaluated; and

(iii) Align the current salary structure of your institution to a scale of between eight (8) and twelve (12) salary points.

The purpose of this letter therefore, is to convey the Commission's advice for your further necessary action.

The Commission appreciates your continued support on the job evaluation process.

Yours

...”

44. In view of the foregoing letter, I dismiss as unmeritorious the respondent's contention that she was prevented from recruiting the substantive SHRAO by the advice received from SRC and SCAC. No written evidence from the said Agencies was produced by the respondent to prove said allegation. In fact, it is on the basis of the said above quoted letter by SRC that the second advertisement for the post

of SHRAO was published on 5.1.2018. In any event, a careful consideration of the documents produced, clearly reveals that the evaluation and advice conveyed by the said Agencies referred to the respondent's entire establishment and not just the post of SHRAO.

45. It follows that the reason for not recruiting substantive SHRAO in 2018 and prolonging claimant's acting appointment was not advice from SCAC or SRC but a decision by the respondent that the post of SHRAO was no longer a priority after staff reduction as stated by the RW1 in his testimony. Consequently, I find and hold that failing to fill the position of SHRAO pursuant to the advert dated 5.1.2018 and instead prolonging the claimant's acting appointment, amounted to discrimination and unfair labour practices as the claimant was treated differently from her colleagues whose acting positions were filled promptly.

46. Section 5 (2) and (3) (b) of the Employment Act provide as follows–

“(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

47. I agree with the meaning of the word discrimination adopted by the European Court of Human Rights in the case of ***Willis vs. United Kingdom 36042/97, ECHR 2002 – IV*** cited by the respondent, where the court observed that discrimination and unfair labour practice means treating differently, without any objective and reasonable justification, persons in similar situations. In the instant case, I find that the claimant has proved on a balance of probability that she was treated differently from the other colleagues who were appointed on acting capacity and thereafter were given substantive appointment in their respective positions without any delay, based on the same HR instruments approved by the respondent's Board, SCAC and SRC in 2017 and before.

48. In addition, I agree with the claimant that she was not treated the same way with her Supervisor, Rw2, who was given a direct appointment as the substantive Chief Manager, Finance and Administration after the restructuring process. Rw1 admitted that RW2 was competitively appointed Deputy Manager Finance and Operations before the restructuring process and later became Chief Manager, Finance and Administration after the restructuring process. He further admitted that there was no evidence that the said position of Chief Manager, Finance and Administration was advertised and recruitment done competitively. It is therefore my considered view that the Claimant has proved on balance of probability that the Respondent's failure to confirm the Claimant to the position she had served in acting capacity for over 3 years, amounted to discrimination.

49. The foregoing view is fortified by Clause 2.6 of the HR Policy and Procedures Manual filed in court as annexure JKK1 to the Replying Affidavit sworn by Rw1 on 9,5.2019 which provides that: -

“(i) ...

(ii) ...

(iii) The Board will competitively advertise all positions within UNES when they fall vacant.

(iv) The Board may also consider filling vacant positions internally to attract applications from any staff members within UNES.

(v) Where internal recruitment process is exhausted and no suitable internal candidate exists, applicants will be sourced through open advertisements...”

50. The above provision of the HR Policy and Procedures manual cannot be wished away as it is founded on the law and it is incorporated into the contract of service of every employee of the respondent. Cw2, RW1 and Rw2 confirmed in their testimonies that the claimant was an efficient HR professional who had no performance issues in the HR docket. She had acted for fairly long period as the SHRAO and as such, nothing prevented the employer from conducting internal recruitment under Clause 2.6 (iv) of the HR Policy and Procedures Manual as she did to RW2.

51. In view of the observations and finding herein above, I am satisfied that the claimant has proved on a balance of probability that her prolonged appointment as the SHRAO in acting capacity for over 3 years, without being given the substantive appointment was inordinate and amounted to discrimination and unfair labour practices on the part of the Respondent.

Whether redeployment to an Administration Officer was a demotion and unfair labour practice.

52. The Claimant was redeployed to serve in the position of Administration Officer on 4.4.2019 the same day her acting appointment as SHRAO was terminated. From the job description annexed at page 45 of the Claimant's bundle of documents, she was to report to the office manager and her duties were as follows–

a. Customer care and attending to clients at the front office.

- b. Coordinating of transport logistics within the UNES units.*
- c. Allocating duties to the pool drivers, motor cyclist, office assistants and records assistant.*
- d. Ensure prompt maintenance of vehicles and motorcycle.*
- e. Issuance of and authorization on work tickets and vehicle fuel management.*
- f. Management of Head office store (stocking and issuance of goods)*
- g. Preparation of administration related reports.*
- h. Ensuring general cleanliness of the work environment.*
- i. Supervision and performance appraisal of staff in the section.*
- j. Any other duties that may be assigned to her.*

53. There is no doubt that the said duties were materially different from the Job Description (JD) for a HR officer. Similarly, the qualifications required for the new position going by the advertisements dated 22.1.2019 are quite different. Again, considering the said JD, the place where she was to perform the new duties was different and manifested a demotion. According to the Oxford Learner's Dictionary, demotion is defined as a move to a lower position or rank. In the case of Silvanus Lukoko Were v Ministry of Lands & Physical Planning & Another [2020] eKLR the court expressed itself as follows–

32. The ordinary English meaning of the word ‘demotion’ is “reduction in rank or status”. The meaning of the word ‘rank’ on the other hand is “place within a grading system”. Furthermore, the ordinary meaning of the word ‘status’ is “person’s social standing.”

54. The Respondent contended that the position of administrative officer was in equal rank with the Claimant's substantive position of HR officer and denied that the redeployment amounted to a demotion. She further argued that the two positions report to the SHRAO. However, she never produced her organogram and going by the said JD the claimant was supposed to report to the Office Manager and not SHRAO. She was also to perform duties at the front office and stores as opposed to her corner office. Applying the meaning of demotion hereinabove, I would agree that the Claimant's redeployment from HR Officer to an Administrative Officer as per the said JD reduced not only her rank but her social standing and therefore, it amounted to a demotion.

55. On the other hand, it is clear from the letter dated 4.4.2019 that, the reason the claimant was redeployed to the post of Administration Officer, was due to alleged performance issues and her personal conduct towards Rw2. It was a punishment inflicted on her without following the due process of the law, and it amounted to unilateral change of the terms of her contract of service contrary to section 10(5) of the Employment Act which requires that prior consultation be made with the employee.

56. It also amounted to removal from office or demotion contrary to Article 236 of the Constitution which provides that: -

“236 A public officer shall not be –

(a)...

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

57. In view of the foregoing violations and demotion, I find that the claimant has proved on a balance of probability that the Respondent violated her right to fair labour practices as envisaged under Article 41 (1) of the Constitution by demoting her and changing the terms of her contract of employment without following due process of law.

Remedies

58. The Claimant sought for an order to stop/revoke her re-deployment and re-assignment of duties outside her area of professional competence with immediate effect. There was no justification to redeploy the Claimant on account of her performance as CW1, CW2, RW1 and RW2 testified that the Claimant's performance had been commendable. Having found that the Claimant's redeployment amounted to a demotion, unilateral change of the terms of the contract of service and unfair labour practice, I hereby revoke the said deployment of the claimant to the post of Administrative officer and reinstate her to the position of Human Resource Officer.

59. However, I decline to confirm the claimant to the position of Senior Human Resource officer as prayed because she admitted in her protested letter dated 18.1.2019 that the said position was not in the Organogram that was approved by the respondent's Board and that is why the advertisement made in February 2016 was cancelled.

60. I further decline to stop the recruitment process of the SHRAO as advertised in January 2019 because it does not affect the claimant's position of HR Officer, nor has the respondent barred her from participating in the process. However, the parties are reminded that the court will not hesitate to intervene in the process if shown that the process is proceeding unfairly.

61. The claim for payment of basic salary arrears, house allowance and gratuity for the position of the SHRAO effective 1.12.2015 is not grounded in the claimant's contract of service. Contrarily, the letter appointing her as SHRAO in acting capacity and the Respondent's HR Policy and Procedures Manual entitled her to an acting allowance only. She has not disputed the fact that she was paid all her acting allowance upto the date when the appointment was terminated.

62. The Claimant sought general damages for discrimination and unfair labour practices, distress, frustration and witch hunt by the Respondent at the work place equivalent to 12 months' salary as SHRAO amounting to KShs. 1,648,728. Having found that the Claimant has established that she was discriminated against and her right to fair labour practices violated by the respondent, an award of general damages would be justified. However, since I have revoked the redeployment and reinstated her to her post of Human Resource Officer, I decline to award of general damages as a way of promoting good working relationship between the parties.

Conclusion and disposition.

63. I have found that the claimant's prolonged appointment as the SHRAO in acting capacity for over 3 years without being given the substantive appointment was inordinate and amounted to discrimination and unfair labour practices on the part of the Respondent. I have further found that her redeployment to the post of Administration Officer amounted to a demotion and unilateral change of the terms of her contract of service by the respondent without following due process of law and therefore a violation of the claimant's right to fair labour practices under Article 41 of the Constitution. Consequently, I enter judgment in favour of the claimant in the following terms: -

(a) The redeployment and re-assignment of duties outside her area of competence, namely the Post of Administrative Officer is hereby revoked and instead, she is reinstated to her substantive position of Human Resource Officer forthwith.

(b) The claimant is awarded costs of the suit plus interest at court rates.

Dated and delivered at Nairobi this 24th day of September, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE