



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1406 OF 2016

AGNES ONGADI.....CLAIMANT

v

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. On 5 April 2016, the acting Managing Director of the Kenya Electricity Transmission Company Ltd (Respondent) issued a *show cause letter* to Agnes Ongadi (Claimant) asking her to show cause why disciplinary action should not be taken against her for gross misconduct (Claimant was serving as Chief Manager, Human Capital & Administration).
2. The particulars of the gross misconduct was that the Claimant had *unilaterally varied a board decision and issued a confirmation letter to one Charles Odhiambo Oguoko on 5 March 2016*.
3. The Claimant responded to the *show cause* on 6 April 2016, and on 28 April 2016 the Respondent informed the Claimant that her response had been found unsatisfactory, and therefore she was being suspended pending determination of the case.
4. The letter did not specify the length of the suspension.
5. On 10 June 2016, the Respondent wrote to the Claimant seeking her responses on *weaknesses and non-compliance issues* identified during a special audit of the human resources policies, procedures and controls.
6. The Claimant replied to the request on 13 June 2016 and apart from making appropriate responses, sought to be furnished with a copy of the audit report and other documents to enable her make a more comprehensive response.
7. On 15 June 2016, the Claimant sent an email to the Managing Director's office indicating that she would pass by the office to pick the documents she had requested for.
8. In a response, the Claimant was informed that the Managing Director had found her responses of 13 June 2016 sufficient (the audit queries did not lead to any disciplinary action against the Claimant).
9. On 5 July 2016, the Respondent wrote to the Claimant, inviting her to attend a disciplinary hearing before *the Staff & Remuneration Committee* of the Board on 13 July 2016.
10. In a response dated 6 July 2016, the Claimant informed the Chair of the Board Committee that the Respondent had breached clause L3 of the *Human Resources and Procedures Manual* while handling her case but never the less went away to make further representations on the subject of the *show cause* letter.
11. On 14 July 2016, the Respondent issued a Memo to staff informing them that the Board had approved a new organizational structure and appointed named employees to act in certain offices.
12. The Claimant was appointed to act as Senior Manager, Human Resource & Administration, but because she was away on suspension, another employee was requested to act).
13. The Memo also informed the staff that the former positions which had been restructured and to which acting appointments had been made had been declared redundant.

14. On 15 July 2016, the Respondent advertised in a daily newspaper the new positions.
15. Alarmed, the Claimant moved Court on 18 July 2016 alleging unfair/unlawful disciplinary process, labour practices and violation of the bill of rights.
16. Among the reliefs sought were orders lifting the suspension and reinstating the Claimant to employment, injunction restraining recruitment of a Chief Manager, Human Capital & Administration and an order that the advertisement was unlawful and void.
17. Accompanying the *Memorandum of Claim* was a motion under certificate of urgency.
18. When the application was placed before the Duty Court, the Court issued interim conservatory orders staying the disciplinary process, and recruitment of a Chief Manager, Human Capital & Administration.
19. After an *inter partes* hearing, the Court rendered a ruling on 13 October 2016 stopping the recruitment for the position of Chief Manager, Human Capital & Administration, declaring the disciplinary process unlawful and a nullity, lifted the suspension of the Claimant and reinstating the Claimant with all benefits.
20. The Respondent was not satisfied and it preferred an Appeal to the Court of Appeal.
21. On 9 February 2018, the Court of Appeal allowed the Appeal and directed that the Cause herein be heard by a different Judge, and that the Respondent be restrained from recruiting a Chief Manager, Human Capital & Administration pending either determination of the Cause or completion of the disciplinary process against the Claimant.
22. Armed with the Court of Appeal decision, the Respondent moved with speed and on 13 February 2018 wrote to the Claimant informing her that it had been decided that she be *summarily dismissed* with immediate effect.
23. Taken by surprise with swift turn of events, the Claimant moved this Court on 15 February 2018 seeking a conservatory order restraining the Respondent from replacing or removing her from the payroll.
24. The Court issued a temporary conservatory order pending *inter partes* hearing which led to a raft of applications.
25. When the parties appeared in Court on 28 February 2018 for *inter partes* hearing of the application, the Court suggested and the parties agreed that applications be abandoned in favour of hearing of the Cause on an expedited basis.
26. In this respect, the Claimant filed an *Amended Memorandum of Claim* on 2 March 2018 and the Respondent filed an *Amended Response to Memorandum of Claim*.
27. The parties also filed witness statements and tomes of documents.
28. Because the parties did not agree on the *Issues in Dispute* and filed separate Issues, the Court settled the Issues for Determination on 20 March 2018. The hearing commenced on the same day.
29. Further hearings were conducted on 30 April 2018, 21 May 2018, 25 June 2018, 18 July 2018, 25 October 2018, 27 November 2018 and 10 December 2018.
30. The Claimant filed her submissions on 9 January 2019 while the Respondent filed its submissions on 6 February 2019.
31. The Court will address and evaluate each party's contestations while looking at the specific Issues as agreed and settled before commencement of the hearing.
32. The Court wishes to observe that issues 1, 2 and 3 from the Respondents list all fall under the rubric of valid and fair reasons for the termination of the Claimant's employment and that Issue A in the Respondent's submissions was not part of the settled Issues.

Whether the termination of the Claimant's employment was lawful

Procedural fairness

Statutory requirements

33. Section 35(1) of the Employment Act, 2007 envisages written notice of termination of employment (unless it is a case of summary dismissal on account of fundamental breach of a contractual obligation as contemplated by section 44(3) of the Act).
34. In general terms, the notice under section 35(1)(c) of the Employment Act may be the *show cause* outlining the allegations against the employee and informing her of the probability of disciplinary action/termination of employment.
35. Apart from the written notice, an employer is under an obligation under section 41 of the Act to hear and consider any representations the employee may wish to make in response to the allegations.

36. In the present case, the Claimant was informed through a show cause letter of the allegations against her and requested to make representations. The Claimant did make the representations.

37. After the documented process, the Claimant was invited to appear before a Committee of the Board to make oral representations.

38. It is not in dispute that the Claimant made written representations to the Committee of the Board ahead of the oral hearing. The Claimant also admitted that she appeared before the Committee of the Board.

39. What is disputed is whether the Claimant was afforded sufficient time and facilities to defend herself, and or whether the Respondent's Managing Director gave her any oral assurances.

40. The Court has keenly looked at the Claimant's response to the show cause. She did not indicate in the said response that there were documents which were material to her response and which she required to enable her make further responses.

41. In regard to the Claimant's assertion that the Respondent's Managing Director gave her oral assurances that her explanations had been found satisfactory, and therefore there was no need to escalate the disciplinary process, the Court is of the view that such assurances if indeed were given cannot override the suspension letter of 28 April 2016 which expressly stated that the Board had found the explanations unsatisfactory, for it was the Board which had ultimate authority over the disciplinary process and not the Managing Director.

42. In terms of statutory requirements, the Court is satisfied that the Respondent was in compliance with the essentials of procedural fairness.

Contractual requirements

43. The Respondent had a *Human Resource Policies & Procedures Manual*. The same being a contractual document would afford the Claimant additional protections over and above the statutory minimums.

44. The *Human Resource Policies & Procedures Manual* provided for a *show cause* with the employee given 7 days to respond. The Claimant herein was given 7 days.

45. The Respondent was not satisfied with the response and by the letter dated 28 April 2016, the Claimant was informed that the explanations were not satisfactory, and that the case would be determined by the Board.

46. On 3 July 2016, the Claimant was invited to appear before the *Staff & Remuneration Committee* of the Board and she appeared before the Board on 13 July 2016.

47. Before appearing before the Board, the Claimant had made another written response on 6 July 2016.

48. Prior to disciplinary process, the *Human Resource Policies & Procedures Manual* expects that preliminary investigations would be carried out and that a summary of the evidence would be furnished to the employee to enable the employee make appropriate representations.

49. In the case of the Claimant, the Managing Director was supposed to carry out preliminary investigations and make a report to the Board.

50. The Claimant's immediate supervisor was the Managing Director. In his testimony he did not expressly admit or deny that he carried out the preliminary investigations. He also did not explicitly admit that the Board sanctioned the issuance of the *show cause* letter.

51. It is apparent that the Respondent did not strictly comply with the terms of its own disciplinary procedures.

52. The failures or infractions in the view of the Court, were minor and not decisive infractions as the Claimant was unambiguously aware of the allegation(s) against her and was afforded an opportunity to make both written and oral representations.

53. The failure to carry out preliminary investigations could not have caused the Claimant any prejudice or injustice, and she did not demonstrate any prejudice or injustice.

54. The Court finds that the Respondent was in substantial compliance with both the statutory and contractual provisions of procedural fairness.

Substantive fairness

55. The ground upon which the Claimant was dismissed was stated as *gross misconduct*.

56. The reasons or particulars were issuing a confirmation letter to one Charles Odhiambo Oguoko without Board approval (altering Oguoko's terms to permanent and pensionable from fixed term contract, *with attendant backdating of remuneration*).

57. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of not only proving the reason(s), but that the reason(s) were valid and fair.

58. To put context to the valid and fair requirements, it is necessary to have a common understanding of the two terms.

59. According to Black's Law Dictionary, Tenth edition, valid is defined as

1. Legally sufficient; binding <a valid contract>. 2. Meritorious<that is a valid conclusion based on the facts presented in this case>.

60. Fair, on the other hand is defined as

1. Characterized by honesty, impartiality and candor; just; equitable; disinterested<.....>. 2. Free of bias or prejudice<.....>.....

61. The Claimant was responsible to the Board through the Managing Director.

62. The Board had approved the employment of some 4 named Assistant Land Economists on permanent terms.

63. The Claimant issued a confirmation letter to a Land Economist who was not in the list of names approved by the Board.

64. In the view of the Court, that action constituted a *valid* reason to terminate the employment of the Claimant. But the question still arises whether dismissal was *fair* in the circumstances of the case.

65. Fairness goes beyond *validity* and within this context looks at the nexus between the reason for *misconduct* and the *sanction*. The penalty should fit the offence.

66. *Fairness* would require an employer to consider all the obtaining circumstances including disciplinary record of the employee.

67. The Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & Ar* (2014) eKLR adverted to what fairness would entail by citing a passage from South African case, *Nampak Corrugated Wadeville v Khosa* (1998) ZALAC 24 that the determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case, the sanction was reasonable.

68. The obtaining circumstances herein were that the Board approved the alteration of the terms of employment of 4 Assistant Land Economists from fixed term contracts to *permanent* terms of employment.

69. One the employees in respect of whom an approval had been given was Martin Cheboror Kipngetich. The approval by the Board was on 24 February 2016.

70. However, the said Cheboror had a day earlier on 23 February 2016 issued a notice of resignation addressed to the Claimant. The notice was copied to the Managing Director.

71. Upon receipt of the notice, the Managing Director noted it and *minuted* to the Claimant to accept the resignation.

72. Around 3 March 2016, the Claimant and the head of department where the Land Economists worked exchanged emails on the resignation of Cheboror and the Head of Department Eng. Mativo proposed the name of Charles Odhiambo Oguoko as a replacement for Cheboror.

73. Eng. Mativo had proposed the name of Oguoko after a recommendation from the Senior Manager directly in charge of the Land Economists, Johnston Muthoka.

74. On 5 March 2016, the Claimant wrote to Charles Odhiambo Oguoko (and 3 others) informing them that their contracts had been varied from fixed term contracts to permanent and pensionable terms, backdated to 1 July 2015.

75. In the meantime, the Claimant informed Cheboror on 8 March 2016 that his resignation had been accepted.

76. When the Respondent became aware of the situation, it caused the acting Chief Manager, Human Capital & Administration to write to Charles Odhiambo Oguoko to inform him that the confirmation letter of 5 March 2016 was null and void, and had thus been revoked.

77. On 5 April 2016 the Claimant was issued with a *show cause* and on 10 May 2016, a schedule indicating the recovery of the overpayments made to Charles Odhiambo Oguoko and 3 other employees on the strength of the confirmation letters was issued.

78. The Claimant did not make any written request to have Cheboror replaced by another Assistant Land Economist.

79. The Respondent filed earlier records to show that the Claimant had made written requests to the Managing Director to approve recruitment of employees who had resigned.

80. The present case was not one of fresh recruitment but variation of terms and conditions of employment.

81. The Managing Director must have aware during the Board meeting of 24 February 2016 that one of the Assistant Land Economists whose name was up for alteration of terms and conditions of service had resigned but did not bring it to the attention of the Board (the

resignation letter had been copied to him and he did not deny receiving his copy during testimony).

82. The Claimant did not personally choose Charles Odhiambo Oguoko for confirmation/alteration of terms and conditions of service. He was recommended by his line managers.

83. There was no evidence that there was any sinister or untoward relationship between the Claimant and Charles Odhiambo Oguoko.

84. The confirmation was revoked and the excess payments to Charles Oguoko were recovered.

85. The Claimant had no untoward disciplinary record. She had performed well in her performance appraisal.

86. In the Court's humble view, the summary dismissal of the Claimant was a reaction to a mosquito bite with a hammer, the Respondent could even have considered *normal* termination or the other severe sanctions provided for in clause L.11 of the *Human Resources Policies and Procedures Manual*.

87. The dismissal was not *reasonable* in terms of the legal principle adverted to in the *Shollei* case.

88. In the view of the Court, the summary dismissal of the Claimant was therefore not fair. It was too heavy a sanction, and the Court so finds.

Appropriate remedies

89. The Claimant sought a number of reliefs. Some (such as lifting of suspension) have been overtaken by passage of time and the Court will not consider them.

Reinstatement

90. Reinstatement is one of the primary remedies where the Court makes a finding of unfair termination of employment.

91. Before ordering reinstatement, the parties ought to put sufficient material before Court to demonstrate practicality or lack of otherwise of reinstatement. That was not done in this case.

Compensation

92. Compensation is another primary remedy.

93. It is discretionary and the factors the Court should consider have been set out in section 49(4) of the Employment Act, 2007.

94. The Claimant served the Respondent for about 9 years. In consideration of the length of service, the Court is of the view that the equivalent of 7 months gross salary would be fair (thousands of pages of documents were filed but not one indicating gross wages).

Conclusion and Orders

95. The Court finds and holds that though the summary dismissal of the Claimant was valid it was not fair and awards her

(a) Compensation equivalent to 7 months gross salary.

96. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mutua, SC instructed by E.K. Mutua & Co. Advocates

For Respondent Mr. Mbaka/Mr. Lutta/Mr. Akwabi instructed by Muciimi Mbaka & Co. Advocates

Court Assistant Lindsey