



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 338 OF 2015

ANDREW NYAWADE OMONDI.....1ST CLAIMANT

CATHERINE MULWA.....2ND CLAIMANT

VERSUS

PLAN INTERNATIONAL INC.....RESPONDENT

RULING

1. The 1st claimant pleaded that he was employed by the respondent on or around February, 2006 as Research Assistant and later promoted to Sponsorship Coordinator Homabay Program Unit at the time he left employment. The 2nd claimant was employed as Data entry Clerk in January 2011.
2. The 1st claimant worked for the respondent for a period of approximately eight years and seven months until 30th October, 2014 when the respondent advertised his position while he was still in office. According to the 1st claimant the purported advertisement was after the respondent convened a disciplinary hearing to try the 1st claimant on an accusation of lost sponsorship gift which the 1st claimant was not liable for.
3. According to the 1st claimant on 7th October, 2014 he was informed by his staff that there was a missing gift being a calculator and birthday card to one of the children and he immediately initiated investigations since the gift had been logged into the system and yet it had not been received. When the lost gift could not be recovered he consulted with the CDF and agreed on an alternative gift of a calculator to be sent to the child as he was sitting for his end year exams and needed it.
4. On 23rd October, 2014 a disciplinary hearing was held on the issue and various conclusions were made among them that the 1st claimant visits the sponsored child/family to explain to them about the lost gift by 30th October, 2014. According to the 1st claimant, it was not the first time that a gift had not been accounted for, for various reasons. On previous occasions there had been cases of gifts being packed and shipped to wrong units.
5. The claimant further pleaded after the disciplinary hearing there was no communication from the respondent and according to the claimant the recommendations of the committee contained various findings which did not warrant termination from employment. The claimant was forced to resign on 31st October, 2014 after the respondent advertised his position as vacant.
6. The 2nd claimant on her part stated that she was called for disciplinary hearing on 23rd October, 2014 where she explained that she was aware of the missing gift on 29th September, 2014 but she did not fill out the incident reporting form as she was not aware of the procedure. According to her, she believed the missing gift was misplaced within the office and would be found and that she was aware that a replacement had been recommended.
7. The 1st claimant's salary at the time termination was Kshs 146,133/= while the 2nd claimant's was Kshs 53,986/=. According to the claimants the loss and or misplacement of the post card and calculator did not amount to gross misconduct under respondent's staff manual to warrant their termination from service.
8. The respondent on the other hand pleaded that the 1st claimant was invited for disciplinary hearing involving loss of a sponsorship gift on grounds that he failed to carry out his duties as per his job description and further that he failed to supervise his subordinates.
9. The disciplinary hearing was conducted on 23rd October, 2014 and was officiated by the respondents representatives plus a witness called

by the 1st claimant. Upon conclusion of the hearing a report was prepared and forwarded to the 1st claimant on 27th October 2014. The outcome of the said report was that the 1st claimant was found liable for the loss that had occurred and recommended that his service be summarily terminated for gross misconduct however the respondent's panel as a sign of good faith taking into consideration the number of years the 1st claimant had worked discussed and agreed with him that he resigns from work so as not to forfeit his termination dues if he was summarily dismissed. The claimant resigned and took his full benefits and terminal duties as envisaged in the respondent's manual and operational policy.

10. The respondent further stated that if the 1st claimant was not satisfied with the recommendations of the disciplinary panel he could have appealed but did not. The respondent stated that contrary to 1st claimant's assertion, loss of sponsor gift at the program unit was a serious flaw which attracted a warning letter. Regarding the 2nd claimant, the respondent stated that she was similarly invited on 17th October, 2014 for a disciplinary hearing with respect to loss of a sponsorship gift under her department/control. The said gift had prior to its loss, been handled directly and specifically by the 2nd claimant the fact that she was aware of and admitted.

11. The disciplinary hearing in respect of the 2nd claimant was carried out on 23rd October, 2014 in the presence of the claimant and a witness of her choice. At the conclusion of the same the 2nd claimant was found liable for negligence and report to that effect sent the 2nd claimant. The 2nd claimant without waiting for the formal recommendations to be made by the respondent wrote a resignation letter on 28th October, 2014 effective 27th November, 2014 however in a sudden change of events, the 2nd claimant on 6th November, 2014 made a formal appeal from the disciplinary process.

12. The respondent obliged and reviewed the disciplinary process whose outcome was that the 2nd claimant was indeed negligent in her duties and was liable for gross misconduct and that pending her appeal she would be sent on suspension. Upon receipt of suspension letter the 2nd claimant again had a change of heart and immediately wrote to the respondent withdrawing her appeal and reinstating the resignation process. Purely on good will and taking into consideration the time of service by the 2nd claimant, the respondent allowed her resignation to stand so as to ensure she earned all her benefits.

13. Concerning advertisement of claimant's positions as vacant. The respondent pleaded that as an international organization it had begun a restructuring and realignment process sometimes in 2014 which process was aimed at streamlining its workforce. All employees were actively engaged in the process and were allowed to make contribution on how they felt the process could be handled best. The restructuring process did not in anyway affect the claimant's disciplinary cases and was not a factor considered during the disciplinary hearing.

14. In his oral evidence, the 1st claimant reiterated the averments in the statement of claim and stated further that he got communication on the lost gift on 7th October, 2014 through email. He checked with the staff under him and the system and found the gift was received by the 2nd claimant who by then was on leave. On 17th October, 2014 he received a letter inviting him to a disciplinary hearing. The hearing was scheduled for 24th October, 2014. It was later brought forward to 23rd. The letter of invitation informed him he could call someone as a witness but he was not able to because the hearing was brought forward. The report of the disciplinary hearing was subsequently sent to him via email. He thereafter received a call from the Human Resource manager asking him to resign immediately which he did but claimed he did so under duress.

15. In cross examination he stated that he was a supervisor and that staff had direct responsibility over gifts. His work was to ensure quality of service. According to him, loss of service was moderately serious since gifts do get lost in the process of transmission. It was his evidence that the child concerned needed a calculator to sit for exams and that he got him a replacement. He further stated that loss of a gift could lead to loss of sponsorship. It was further his evidence that he knew about the restructuring and that it could have ended up with some redundancy being declared. He also stated that he was paid his benefits upon termination of his service with the respondent.

16. The 2nd claimant additionally stated that she was called from leave by the 1st claimant and asked about the missing gift. According to her, she did not know about it. It was her evidence that there was a report that she was the one who logged in the gift. She was therefore asked to file an incident report by 10:00 am but did so around 3 pm since she was not familiar with the process. She thereafter received a letter inviting her to a disciplinary hearing. The report was subsequently sent to her and on receipt thereof she was asked by the Human Resource Manager to resign or lose her benefits.

17. In cross-examination she stated that she took her work seriously and felt someone should have been warned at least twice before dismissal. According to her the sponsorship book required one to be warned verbally twice then issued with written warning before dismissal. It was her evidence that she resigned but withdrew the resignation when she felt she did so under pressure and filed an appeal against the disciplinary recommendations. The appeal was allowed and she was to be subjected to disciplinary process she therefore rescinded her request for appeal and opted to resign.

18. The respondents witness Ms Felicity Kinoti informed the court that she was the respondent's Head of Human Resource. According to her loss of a gift or money could lead to loss of trust therefore was considered serious. It was her evidence that a disciplinary hearing was called to establish how the gift was lost. The 1st claimant blamed the 2nd claimant for the loss. She confirmed that the claimants replaced the lost calculator however the intrinsic value could not be replaced.

19. It was further her evidence that the claimants were found culpable and were to be dismissed summarily but considering their years of service it was recommended they resign so that they do not lose their benefits. In cross-examination she stated that the claimants disciplinary hearing took place after three days' notice and that it was brought forward because of operational issues however the claimants were already aware and involved in the issue at hand. She denied the claimants were coerced to resign.

20. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. The rest for reasons for dismissal or termination

