



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1364 OF 2014

EMMA WAMBUI MBURU.....CLAIMANT

v

AAR HEALTH SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. Emma Wambui Mburu (Claimant) was employed by AAR Health Services Ltd (Respondent) as a Secretary through a letter of appointment dated 14 August 2006.
2. On 23 January 2014, the Claimant's Unit Manager wrote to the Claimant asking her to respond to certain allegations. The Claimant responded on 24 January 2014.
3. The Respondent suspected that the Claimant's response was drafted by a person outside the company and that the Claimant might have in the process shared confidential information with an outsider.
4. According to the Respondent, the sharing of the information was in violation of clause 2.1 of the IT Policy and clause (ii) of the email policy.
5. In this respect, the Respondent wrote to the Claimant on 12 February 2014 informing her that her contract was being terminated.
6. The Claimant appealed the decision through a letter dated 20 February 2014 but it was to no avail, prompting the Claimant to institute legal proceedings on 15 August 2014 contending that the termination of her employment was unfair. The Claimant also alleged breach of contract in respect of house allowance.
7. The Respondent filed its *Response* and documents on 30 September 2014 and the Claimant filed a *Reply to the Response* on 18 November 2014.
8. The parties filed witness statements ahead of the hearing on 17 December 2018. The Claimant testified and closed her case on the said date while the Respondent's witness, a Branch Manager testified on 19 December 2018.
9. The Claimant filed submissions on 29 January 2019 while the Respondent filed its submissions on 15 February 2019.
10. The Court has considered the pleadings, evidence and submissions. Two main issues as examined hereunder arise.

Unfair termination of employment

Procedural fairness

11. Section 35(1)(c) of the Employment Act, 2007 requires *written notice of termination of employment* of at least 28 days for employees paid by the month. The notice may serve as a show cause notice.
12. After the notice, an employer is under an obligation to conduct a hearing in terms of section 41 of the Act, (the hearing may consist of documented/written exchanges or an oral hearing, or a combination of both).
13. The Respondent gave two reasons for terminating the Claimant's contract.
14. One was sharing confidential information with a stranger and violation of the email policy (it is clear from the letter of termination that

the initial questions regarding the conduct of the Claimant regarding her Unit Manager were not the immediate cause of separation).

15. Despite setting out the reasons in the dismissal letter, the Respondent did not produce any *written notice* as contemplated by section 35(1)(c) of the Act to demonstrate that the Claimant was put on notice that the termination of her employment was under consideration and that she should make representations before a decision could be taken.

16. The Court has also looked at clauses 3.11, 3.12 and 3.18 of the Respondent's *Human Resource Policy and Procedures Manual* filed in Court.

17. The Clauses required written notice and also provided for a disciplinary process running from a supervisor to General Manager to the Human Resources Manager.

18. The Respondent did not place any material before Court to show that the Claimant was called upon to make representations on the two allegations which formed the basis of the decision to terminate in terms of the provisions of the *Human Resources Policy and Procedures Manual*.

19. The Court in the event finds that the termination of the Claimant's employment did not meet both statutory and contractual procedural fairness test.

Substantive fairness

20. Because the procedural fairness test is mandatory and having concluded that the termination was tainted, it is not necessary for the Court to examine whether the Respondent had valid and fair reasons to terminate the Claimant's contract as required by sections 43 and 45 of the Employment Act, 2007.

Compensation

21. For the unfair termination of employment, and in consideration of the length of the Claimant's employment of 8 years, the Court is of the view that the equivalent of 8 months gross salary as compensation would be appropriate (gross salary proved was Kshs 57,000/-).

House allowance

22. The Claimant asserted that she was not paid house allowance during the tenure of employment. She prayed for Kshs 341,172/- on this account.

23. Clause 2 of the letter of appointment provided that the salary would be gross, and the Court therefore finds that the salary included house allowance as contemplated by the Employment Act, 2007.

Conclusion and Orders

24. The Court finds, holds and declares that the termination of the Claimant's employment was unfair and awards her

(a) Compensation **Kshs 456,000/-**

25. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 1st day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Chege instructed by Muchoki Kangata Njenga & Co. Advocates

For Respondent Mr. Gichangi instructed by Muri Mwaniki & Wamiti Advocates

Court Assistant Lindsey