



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1237 OF 2015

DAVID ITHAU WAMBUA.....CLAIMANT

VERSUS

LIBERTY KENYA HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide the Memorandum of Claim filed on 15th July 2015. However, the Claimant sought to amend his claim vide the Notice of Motion Application dated 5th October 2015. By the consent dated 18th April 2016 and filed on even date, the claim was amended vide the Further Amended Memorandum of Claim dated 15th February 2016. The Claimant's claim is based on the violation of his constitutional rights and the unconstitutional, unlawful and unfair declaration of redundancy. He seeks the following reliefs:-

a. A declaration that the purported redundancy amounted to unfair termination of the Claimant's contract of employment hence null and void ab initio.

b. A declaration that payment of lower salary and benefits to the Claimant than those paid to his white predecessor for doing the same work or work of equal value was discrimination on the ground of race and nationality and violated the Claimant's right to equality and freedom from discrimination.

c. A declaration that payment of lower salary and benefits to the Claimant than those paid to an employee who was junior to and was under the supervision and guidance of and reported to the Claimant violated the Claimant's right to fair remuneration that is commensurate with the value of the work done, magnitude of responsibilities borne and attendant risks.

d. A declaration that the failure by the Respondent to subject the Claimant to bi-annual performance appraisal in accordance with the Respondent's own policies violated the Claimant's right to fair labour practices.

e. A declaration that as a result of the failure by the Respondent to appraise the Claimant's performance and base the Claimant's annual salary review and bonuses on the outcome of the appraisal, the Claimant was being underpaid in terms of annual salary increment and annual award of bonuses.

f. A declaration that the Claimant fully achieved his targets and as such entitled to the highest award of bonus and salary increment hence the Claimant is entitled to the difference arising from all the underpayments.

g. A declaration that the Claimant was entitled to the same pay and benefits commensurate with Job Grade 1 just as his white South African predecessor hence the Claimant's compensation and benefits should be calculated based on his predecessor's salary and benefits at Job Grade 1.

h. A declaration that the refusal by the Respondent to furnish the Claimant with information required by the Claimant for the enforcement of his right violated the Claimant's right of access to information as per article 35 of the Constitution.

i. An order for compensation of damages in terms of article 23 of the Constitution to the Claimant for violation of his rights as enshrined under the Bill of Rights.

j. An Order for reinstatement of the Claimant without any loss of benefits.

k. In the alternative or in addition to the reinstatement, an order for compensation for unlawful termination equivalent to 12

months gross pay together with compensation, bonuses, allowances and refund in terms of paragraph 9 of the Claim calculated on the basis of Job Grade 1 hence salary and benefits for Job Grade 1 totaling to KShs. 29,299,687.00 or based on the criteria that this Honourable Court may deem fit.

l. Any other or further order that this Honourable Court may deem fit to award to meet the ends of justice.

m. Costs of the Claim.

Facts of the case

2. The Claimant avers that on 16th May 2012, he was employed by the Respondent, then known as CFC Insurance Holdings Limited, to a position of Regional Head Marketing and Communication on permanent and pensionable terms. The position had been previously held by Ms. Sarah Band whom the Claimant avers was a white South African. It is the Claimant's case that upon reporting to work, the Respondent advised him that he would be the Head of Marketing and Communication in charge of Kenyan affairs only.

3. He was informed that his job description stood orally amended but he would still retain the title of Regional Manager, Marketing and Communication. It was further explained to him that the amendment was sufficient and there was no need for an amended appointment letter because his duties and responsibilities would be the same as that of his predecessor.

4. The Claimant commenced his employment which was initially on probationary terms but was later confirmed into permanent and pensionable terms. The Claimant avers that his employment has since been terminated on account of redundancy.

5. It is the Claimant's case that during the subsistence of his employment, he was discriminated against and subjected to unfair labour practices which he complained of but the matter was never addressed. For instance: his performance was not appraised bi-annually, he was not awarded bonuses at all and he was paid salary and benefits lower than that which was paid to his predecessor.

6. It is the Claimant's position that under the Respondent's policies, the amount to be paid as annual bonuses is determined based on an individual's performance, which performance is established through a performance appraisal. He explains that the levels of management employees were divided into three categories, for the purpose of awarding bonuses. Namely: partially achieved with 2%, fully achieved with 7-10% and exceptionally achieved with 10-13%. He avers that his performance during probation was rated at 8% but reduced to 2% or 3% when he was confirmed. In his view, this was unjustified and maliciously intended since the tasks assigned to him were fully achieved.

7. The Claimant further avers that he made a complaint concerning the poor performance ratings, payment of low annual bonuses and low percentage of annual salary increment. Upon receipt of the complaint, he was called to the Respondent's offices in Nairobi by Mr. Mike du Toit, a representative, who admitted that the payments beyond his expectations and performance were wrong and informed him that he was entitled to 9% annual bonus award and an annual salary increment of 8%. He was assured that he would receive a back pay of the difference of underpayments from the previous years. This was never done and was only partially factored in when his terminal dues were paid to him. His annual bonus percentage was increased to 9% and he was paid the difference of 6% for that year only. His annual salary was also increased to 5% and he was paid the 3% difference. In his view, since the Respondent admitted that he was entitled to more than what they had paid, he was then entitled to the same.

8. He avers that his arbitrary and unjustified rating as an underperformer without his performance being appraised will make it hard for him to secure employment as he will be shunned for being incompetent.

9. On 13th May 2015, he received a notice of the Respondent's intention to declare him redundant on the ground that the position of Regional Manager, Marketing and Communication had been abolished. He further avers that his retrenchment was not understandable since the Respondent's positive financial results for the year ended 31st December 2014 were attributed to him.

10. Further, at the time of his redundancy his roles relating to marketing and communication were still intact and needed by the Respondent. It is his position that declaring his junior employee redundant was a ploy to hoodwink the Claimant into believing that the redundancy affected all employees. This is because, the Claimant believes that the junior employee still works for the Respondent.

11. The Claimant avers that his redundancy is unlawful and unconstitutional as it is a move that lacks justifications and is full of contradictions.

12. The Claimant further avers that the terminal benefits paid to him were based on computations based on wrong percentages of annual salary increments and, on the assumption, that this was a case for a lawful redundancy. Further, he is entitled to a refund of travel allowances incurred during the subsistence of his employment and car insurance premium deductions which the Respondent unlawfully continued to deduct from his salary.

13. The Claimant avers that his redundancy was unconstitutional, unlawful and procedurally and substantively unfair. The Claimant never observed key principles of good corporate governance like meritocracy and competence in considering an employee's terms and conditions of employment. Instead, the Respondent discriminated against him.

14. The Respondent filed its Memorandum of Response dated 8th September 2015 in response to the Claimant's claim. The same was not amended even after the Claimant amended his claim twice. In their response they clarify that the Respondent is a member of Liberty Holdings Limited. The Respondent admits that the Claimant was employed to replace his predecessor. They aver that the Claimant held himself as the Regional Head of Marketing and Communications within the Group and outside until 31st May 2015, but deleted his signature from electronic mail on or about 26th March 2015, in the course of negotiations towards his exit.

15. The Respondent contends that the Claimant was engaged in the terms set out in his employment Contract dated 16th April 2012. Further, that his salary was negotiated during his interview and he was offered Kshs. 400,000.00 which was more than the Kshs. 250,000.00 that he had sought. Further, the salaries of each individual are based on their qualification, experience and the nature of their responsibilities.

16. The Respondent further avers that an email was sent to the Group's staff on 7th March 2014, informing them about the impending reorganization which would not result to job loss. On 2nd March 2015, the Claimant was duly notified that the marketing and communication structure would be abolished and that he was at liberty to apply for vacant posts within the business units of the Respondent.

17. Thereafter, the Claimant engaged in negotiations towards his exit and even prepared handover notes. The position was abolished and the Claimant left the employment of the Respondent on 31st May 2015 with a redundancy package that comprised of the following:-

a. Severance pay for KShs. 700,812.00 being 15 days basic pay for every year of service;

b. KShs. 467,208.00 being 1 months' salary in lieu of notice.

c. KShs. 355,078.00 being the outstanding 19 leave days.

d. KShs. 467,208.00 being 1 months' ex gratia salary.

18. The Respondent avers that the Claimant did not avail himself for evaluation when concerns were raised about his performance. Further, he did not challenge or invoke the appeal procedure against any performance review or the scores awarded to him. He made the first complaint on 26th March 2015, after the decision to abolish his post was communicated to him. Consequently, his annual salary increment for 2015 and bonus for the year 2014 was revised and communicated to him vide the letter dated 27th May 2015. However, it is the Respondent's position that payment of bonuses and annual salary increment are not mandatorily paid annually.

19. It is the Respondent's position that the claim that the Claimant was discriminated against on the ground that he was paid less than his predecessor and even his junior, is malicious. According to them, Mr. Githae was Regional Communication and CSI Manager Job Grade 2 and not the Claimant's deputy.

20. The Respondent avers that the Claimant's position was operational and that he was aware of the impending redundancy. As such, the redundancy was procedural and lawful and that the Claimant's claim had no basis.

21. The Respondent avers that the Claimant's car insurance premium and the travel expenses were refunded through the direct payment by the Respondent to the service providers. They further aver that the Claimant's claim is ill intended as he has sought compensation for refund of expenses expended while he was on duty within East Africa Region and beyond.

22. The Cause proceeded to trial and was heard on diverse dates where the Claimant testified as CW1. The Respondents called two witnesses: Jackson Mbutia Kiboi who testified as RW1 and Lisa Shaka Shubaka who testified as RW2.

23. CW1 testified that his junior, Githae Kiareini, a CSI General & Communications Manager, earned a higher salary than him, yet he reported to the Claimant. The larger part of CW1's testimony reiterates the content of his pleadings.

24. Upon cross-examination, CW1 admitted that he had been paid his dues in terms of basic pay, redundancy pay and leave pay. He maintained that no other position was declared redundant, save for his. He denied being aware that the Respondent had given the Notice of redundancy to the labour officer.

25. He conceded that the complaints for 2014 were addressed. He admitted that before he joined, he had no knowledge that his position belonged to job grade 1. He further admitted that his terms of engagement were different from those of his predecessor, Sarah Band.

26. CW1 testified that at the time of his appointment he had been offered Kshs. 295,000.00 and a net salary of Kshs. 285,000.00. He maintained that he was entitled to a higher salary than his predecessor and his junior.

27. Upon re-examination, he reiterated his evidence in-chief. He added that the organogram was approved by the Board and maintained that he was never notified of his impending redundancy.

28. RW1 testified that the Respondent did not have any employees at the time of the trial. He stated that the Respondent was a non-operation holding company and certain roles would be performed by staff of the subsidiary.

29. It was his testimony that the redundancy procedure was done in accordance with the Act where two positions were declared redundant: that of the Claimant and that of Githae. He denied that the Claimant's employment was terminated due to his performance. According to him, the positions were still inexistent.

30. It was his testimony that the Claimant's predecessor earned a higher salary because she did not enjoy some of the benefits that the Claimant enjoyed. The Claimant was entitled to leave allowance, he was a member of the pension scheme, could join a social club with entry fee cut at Kshs. 300,000.00 and was entitled to have subscription to professional bodies paid by the Respondent.

31. It was his further testimony that the Claimant and his predecessor did not perform the same roles as the Claimant did not take up all the

responsibilities and duties performed by his predecessor even though he retained the title. His job was commensurate to his job description as such there was no discrimination. Further, Githae's salary increased as his contract subsisted due to the salary increments.

32. RW1 testified that the organization structure that was proposed by the Claimant was not adopted. It was his view that it was not the Claimant's role to create an organizational structure. It was also his testimony that the Claimant was subjected to a performance appraisal and his bonus was paid based on his performance. It was his view that payment of bonuses was discretionary. RW1 was of the opinion that the Claimant's prayers were overtaken by events.

33. During cross-examination, he testified that the new structure was a proposal and had not been approved. However, he later shifted his position and stated that the structure was approved by the Board for implementation. He admitted that under this new structure, some positions were still vacant. When questioned about Githae's qualifications, he stated that he was unaware that his position required less qualifications as opposed to that of the Claimant. He maintained that the Claimant was granted a loan to purchase a car.

34. Upon re-examination, RW1 testified that the position was no vacancy for the Claimant's position.

35. RW2 testified that the Claimant's position was a first of its kind as no one had been recruited for the position before. She also testified that the job grade and pay was determined at the recruitment stage and asserted that the Claimant was not filling Sarah Band's position.

36. As regards the performance appraisal, an individual self-assessed themselves and was thereafter assessed by their supervisor. If they were aggrieved by the appraisal, they were supposed to appeal within 3 months. It was her position that the Claimant only raised a dispute concerning the appraisal process in April 2014, which was amicably resolved by reviewing his bonuses and salary increment. He was awarded an additional 6% bonus and his salary increased by 3%.

37. It was her testimony that on 13th May 2015, the Labour Officer was notified of the impending redundancies. She maintained that the Claimant had been offered a car loan facility by the Respondent.

38. During cross-examination, she maintained that the Claimant was not hired to replace her predecessor, which contradicted paragraphs 5 and 7 of the Respondent's response. However, she contended that the statements were not contradictory. She admitted that a new job structure was not developed and that employees were paid according to the value of the job as graded.

39. It was her testimony that all the employees who were declared redundant lost their jobs. She admitted that some of the employees got other jobs with the Respondent but was unaware of whether the same was after formal applications were made. She contended that it was not an unfair labour practice to downgrade a position after replacement. It was her testimony that she was unaware whether the Claimant's salaries increment and bonuses were reviewed.

40. Upon re-examination, she maintained that bonus payment was a guarantee to every employee and pointed out that Sarah Band's employer was Liberty Africa.

Submissions by the Parties

41. In his submissions dated 18th February 2019, the Claimant submits that it is his constant complaints concerning the several acts of unfair labour practice that triggered his termination. By the time the position of Regional Head Marketing and Communication was being abolished, such a position did not exist since there was a re-alignment that created a new organizational structure under which many employees including the employees got new positions. As such, a non-existent position could therefore not be abolished. The Claimant's new position was that of General Manager Marketing and Communications, which was not abolished or even mentioned in the redundancy notice.

42. The Claimant submits that his redundancy was discriminatory since he was the only employee declared redundant. He further submits that there was no organizational restructuring as indicated in his redundancy notice as no organogram was produced to support the Respondent's claim of reorganization.

43. The Claimant submits that his rights under Article 41 (1) of the Constitution was violated when the Respondent inadequately remunerated him a salary not commensurate to his performance and by downgrading his position to justify his low pay.

44. He further submits that his right under Article 27 was infringed when the Respondent paid him a lesser salary than what his predecessor earned. It is his view that his right under Article 35 (1) (b) was also violated when he was denied information regarding his predecessor's remuneration.

45. The Claimant concludes his submissions on the matter that the Respondent has failed to discharge its burden of proving that the alleged discrimination did not take place, as required by section 5 (6) of the Employment Act. As such, he was discriminated against based on his nationality.

46. The Claimant submits that his prayers for declaratory orders, injunction, compensation and general damages are well founded pursuant to Article 23 (3) of the Constitution.

47. In his submissions, the Claimant acknowledges that the relief of reinstatement has been overtaken by time and requests the Court to compensate him the equivalent of his salary covering the period from his dismissal until the date of judgment calculated at the rate of his predecessor's entry salary. He relies on the case of **Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR** where the Court of Appeal prescribed a formula for compensation in cases of disparities in payment arising from discriminatory practices. He urges the Court to take into consideration the Respondent's violations in rewarding him general damages.

48. The Respondent submits that he has demonstrated that he fully repaid the loan granted to him and urges this Court to order the Respondent to release his logbook to him that they are holding as security for the loan. The Claimant also submits that he is entitled to terminal dues as the amount paid to him was not what he was entitled to. He proposes that the amount he was paid in terminal dues should be deducted from his compensation.

49. The Respondent filed their submissions dated 6th March 2019, on the same date. They submit that the right procedure as set out in section 40 of the Employment Act for terminating an employee on account of redundancy, was followed and as such the Claimant's termination was fair.

50. Further, the reason for declaring the Claimant redundant were valid because its re-organization led to the loss of the Claimant's employment and could not re-deploy the Respondent to any of its subsidiaries because it no longer had control of those services. As such, it has proved that the reason for terminating the Claimant's employment was fair as required by section 45 (2) of the Employment Act.

51. The Respondent submits that the Claimant was not discriminated against because he was better remunerated than his predecessor. Further, the Respondent submits that negotiation of a contract is done individually and salary awarded in accordance with individual value additions, qualifications, experience and responsibilities.

52. The Respondent has failed to prove his case for the violation of his right to fair remuneration on the ground that his junior was paid more. No evidence was adduced to prove that Mr. Githae was paid more than him. However, the Respondent has shifted positions and claims that there is a likelihood that Mr. Githae could have been paid more since he had an additional responsibility, had served the Respondent two years longer as compared to the Claimant and that he was not the Claimant's junior. Further, it is their view that the Claimant cannot raise concerns over salary because he accepted the terms as set out in his employment letter.

53. It is the Respondent's submissions that performance appraisals do not constitute fair labour practice and as such, the Claimant's right was never violated. They rely on the case of *Peter Wambugu Kariuki & 16 Others vs. Kenya Agricultural Research Institute [2013] eKLR* where the Court held that:-

“Fair labour practices encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote or protect fairness at work.”

54. The Respondent submits that the claim for underpayment and bonuses is not justifiable and the same should fail. They rely on the case of *Stephen K. Kachila vs. Bamburi Cement Limited [2015] eKLR* the Court rejected the claim for salary increment because no performance appraisal results were adduced to prove the Claimant's good results.

55. Further, the Respondent submits that the claim regarding review of bonuses and salary is time barred as it was raised within the 12 months period required continuing injury claims under section 90 of the Employment act.

56. The Respondent submits that the Claimant has not proved his claim for travel allowance. In their view, an air ticket is not sufficient proof of payment. It is the Respondent's further submissions that the claim for car insurance premium paid has not been proved, hence is not refundable.

57. I have examined all the evidence and submissions of the Parties. The issues for this Court's determination are as follows:-

1. Whether the Claimant was unfairly terminated on account of redundancy.

2. Whether the Claimant was treated in a discriminatory manner in relation to his processor on account of his salary and other benefits and dealings at work.

3. Whether the Claimant is entitled to the remedies he has sought.

58. On the 1st issue, the Claimant has submitted that he was unfairly terminated as he was not served with any notice before the redundancy the fact the Respondent deny.

59. The letter that declared the Claimant redundant was dated 13.5.2015 and read as follows:-

“Dear David

Re: Notification of Redundancy

I am writing to confirm our recent discussion concerning the changes in the Group Marketing and Communication Structure. As mentioned during the discussion, the Liberty Group has abolished the Regional Marketing and Communication Structure at the Group level and going forward each respective business unit will drive and manage its Marketing and Communication Services.

As a result of this change, the role of Regional Head Marketing and Communication will be rendered redundant with effect from 31st May, 2015.....”

60. From this letter, it is not clear when “recent discussion” on these changes had been made and therefore it can be safely stated that the 1st time the Claimant is informed of this redundancy is on 13th May 2015 and the redundancy was to be effective on 31st May 2015.

61. It is therefore also clear that there was no proper redundancy notice period as provided under Section 40 of Employment Act which states that the notice period is 1 month. The Claimant was given a notice period of about 18 days and therefore this was unfair and unjustified.

62. Other than the limited notice period given to the Claimant before his termination, the Claimant has also submitted that he has complained of failure by the Respondent to subject him to a job performance appraisal on 26.3.2015. He is on the view that his contract complaints of several acts of unfair labour practices triggered his termination.

63. This is not a matter that can categorically determine from the mere assertion. However from Claimant’s Doc No. 4 at page 181 of the Claimant’s documents, is an email dated 7.3.2014 to all staff about the new structure from the Respondent’s Executive Managing Director. It stated as follows:-

“.....subject, RE: Re-alignment organizational structure I am pleased to inform you that the revised structure was approved by the Board for implementation.....

I wish to emphasize that the process will not lead to loss of jobs but is just a realignment of the key pillar of the business to support growth.....”.

64. The new structure is at page 182 of the Claimant’s documents. Under this new structure, there were only four positions that were vacant i.e. General Manager Group Business, General Manager Retail Life, Manager Customer Service and R & D. 2 of these positions were at the General Manager’s position.

65. The Claimant’s realigned position of General Manager (Marketing & Communication (Comms)) was not shown as vacant since the Claimant was occupying it until the time of his purported redundancy.

66. The Claimant has submitted that his new position of General Manager (Marketing and Communications) was not the one mentioned in the redundancy letter but the one that was abolished long before the purported redundancy and before the new structure.

67. This averment by the Claimant is indeed the correct position as there is no evidence from the Respondent that there was any other change after the 7.4.2014 email reviewing the Claimant’s position when for other staff their positions remained that of General Managers.

68. Having now considered the manner in which the Claimant was declared redundant with 18 days’ notice period and without any evidence of consultation as alluded, I refer to **CA No. 46 of 2013 – Kenya Airways Limited vs Aviation & Allied Workers Union** where JA Maraga (as he then was) explained the reason as to why ample notice should be given in redundancy situation. He rendered himself as follows:-

52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro’s criticism of the learned trial Judge’s reliance on the UK Employment Appeals Tribunal’s decision in *Mugford v. Midland Bank*, UK Employment Appeal Tribunal, 10 and the treatise by Rycroft and Jordan, - “A guide to the South Africa Labour Law” both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on.

53. In this case, although consultation was not provided for in the Collective Bargain Agreement (CBA) of the parties, it was nonetheless contained in the 10 App No. 760 of 1996 IRLR 208 (1997). Recognition agreement between the parties dated 18th December 2008. Even without that provision, the appellant held two consultative meetings with the 1st respondents on 3rd and 10th August 2012 and a third one would have been held the following week had the 1st respondent not obtained an injunction in Industrial Court Cause No. 1360 of 2012 halting all the appellant’s activities in the redundancy programme. I am not bothered by the issue of whether or not the people who purported to represent the 1st appellant in those meetings, were authorized to negotiate the dispute on behalf of the 1st respondent. The evidence on record shows that there were wrangles in the leadership of the 1st respondent and the appellant cannot therefore be blamed for consulting with the officials it thought represented the 1st respondent. What concerns me is the fact that both the parties regarded consultation as an important step in the redundancy programme. The issue is whether or not, before the 1st respondent obtained an injunction, proper and effective consultations were held or were possible and this is where the issue of the validity of the notice the appellant gave comes in.

54. Section 40(1) of the Employment Act requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable

notice, as was stated in the English case of *Williams v. Compare Maxam Ltd*¹¹ is:

“to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.”

55. *Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand Chief Judge succinctly expressed this point in the case of *Cammish v. Parliamentary Service*¹²: “Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done.” [Emphasis supplied]*

56. *In this case, as I have pointed out, the notice of the proposed redundancy was given by appellant’s Chief Executive Officer on 1st August 2012 and the negotiations commenced on 3rd August 2012. That is not a notice of at least 30 days. It is therefore obvious that with hardly two days, the 1st respondent cannot have prepared for meaningful negotiations. The 1st respondent’s views on whether redundancy would have been avoided by say a freeze on salary increments and how the employees’ hardships arising from redundancies could be minimized were never considered. In the circumstances, even without the said injunction that the 1st respondent obtained which halted all activities in pursuance of the proposed redundancy, I do not think that any meaning consultations would have taken place. I therefore agree with the learned Judge and find that the appellant flouted the requirements of notice and consultation”.*

69. There is no indication in the instant case that there was consultation between Respondent and Claimant before the redundancy. I therefore find the redundancy was done without following due procedure and was therefore unfair and unjustified.

70. On the 2nd issue, the Claimant has averred that he was discriminated upon by being paid a lower salary than his predecessor.

71. It was admitted by RW1 that the Claimant took over duties previously performed by Miss Sarah Band. It is also not in dispute that her salary had been higher than that of the Claimant and her qualifications lower than those of the Claimant.

72. The Claimant however alluded to the fact that although he had been employed as Regional Head Marketing & Communication, this role was later orally amended and changed so that he was only in charge of Kenya Operations. This means that Ms. Sarah Band’s scope of employment was greater than that of the Claimant’s. Ms. Band’s salary was 650,000/= and that of the Claimant 400,000/=.

73. The Respondent has tried to explain that though Miss Band earned a higher salary, her benefits were fewer than those of the Claimant who was also entitled to club membership, leave allowance and membership to a pension scheme.

74. Given however that a contract of employment is a negotiated contract between a particular employee and the employer, it follows that the Claimant having negotiated his contract with the Respondent, he cannot turn around and start insisting on earning salary equivalent to his predecessor and who had negotiated her own contract to a particular salary. In my view, the Claimant cannot rely on this aspect to plead discrimination.

75. This Court has in **Cause 413/2011 Miguna Miguna vs the Attorney General (eKLR) 2012** where the Claimant had alleged discrimination held that since the Claimant had accepted the contract terms as negotiated, he could not plead discrimination on discovering that another employee was earning a higher salary than his.

76. The Claimant also averred that his junior one Mr. Githae Kiereini was earning more than him. The Respondent submitted that this was not the correct position as Mr. Githae was not the Claimant’s junior. Even assuming that it is true that Githae’s salary was more, this could also be informed by other circumstances including promotions, salary rises, experience, length of service etc. In the circumstances I do not find the contention of the Claimant that he was unfairly treated as being viable.

77. On issue of unfair labour practices being meted against the Claimant, the Claimant cited infringement of his rights under Article 41 of the Constitution by the Respondent for not appraising him, by underpaying him his annual salary increments and bonuses and not furnishing him with information. On these issues, I am of the view that indeed Article 41 of the Constitution guaranteeing every worker a right to fair labour practices.

78. However in the Claimant’s case, the failure to award him a bonus was rectified and he was fully paid. He had complained of this issue and this was corrected. He also complained of not being subjected to annual appraisals. This could have been an omission but the **Claimant has not pointed out whether what was used against him or in turn worked against him.** In my view the issue of unfair labour practices is not established.

79. The last issue is on remedies sought. Having found that the redundancy was carried out in an unfair manner without ample notice and commutation, I find for Claimant and I award him 8 months’ salary as compensation for the unfair redundancy = $8 \times 476,280 = 3,810,240/=$.

80. I also issue an order that his log book in respect of his motor vehicle be released to him.

81. I also order the Respondent to pay costs of this suit.

Dated and delivered in open Court this 30th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Wambola for Claimant – Present

Respondent – Absent