



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 268 OF 2018

PAUL OCHIENG MICHAEL.....CLAIMANT

v

NAIROBI AVIATION COLLEGE.....RESPONDENT

JUDGMENT

1. Paul Ochieng Michael (Claimant) instituted these proceedings against Nairobi Aviation College (Respondent) alleging unfair termination of employment and breach of contract.
2. In a *Reply to Memorandum of Claim* filed on 19 November 2018, the Respondent contended that the termination of the Claimant's employment was justified and was on account of redundancy. Breach of contract was denied.
3. The Cause was heard on 14 March 2019 when the Claimant and the Respondent's Administrator testified.
4. The Claimant filed his submissions and list of authorities on 17 April 2019 while the Respondent filed its submissions on 8 May 2019.
5. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination into 3
 - (i) Whether the termination on account of redundancy was unfair
 - (ii) Whether there was breach of contract and
 - (iii) Appropriate remedies/orders.

Unfair redundancy

6. A declaration of redundancy has to be procedurally fair and substantively justifiable.
7. Section 40(1) of the Employment Act, 2007 addresses the procedural aspects of redundancy while section 45(2)(b)(ii) provides for redundancy. Section 47 of the Act may also be implicated.
8. The Claimant was issued with a *Notice of Termination of Contract of Employment* dated 8 September 2017, and the notice indicated that the termination of employment was effective immediately.
9. In terms of section 40(1)(b) of the Employment Act, 2007, the Respondent should have notified both the Claimant and the local labour Officer at least a month in advance of the intended redundancy.
10. An employer considering termination on account of redundancy should also have a selection criteria (based on skill, ability, seniority and reliability of the employee).
11. There was no evidence from the witnesses that either the Claimant, or the local labour officer were notified in advance of the redundancy. Equally there was no evidence on the selection criteria used by the Respondent.
12. The Court can therefore conclude that the termination of the Claimant's employment on account of redundancy failed the procedural fairness test (see *Thomas De La Rue v David Opondo Omutelema* (2013) eKLR.
13. Although the redundancy notice cited *serious economic crunch worldwide*, the Respondent did not attempt during the presentation of

evidence to demonstrate what *serious economic crunch* the world was undergoing in September 2017 or how the *crunch* had affected its operations.

14. However, the Claimant admitted in cross examination that the Respondent had financial difficulties, and that other employees were affected.

15. The Court therefore finds that the Respondent had genuine or valid operational requirements to separate with the Claimant.

Breach of contract

Salary arrears for 2015/2016/ September 2017

16. Payment of salary is one of the *essentialia* of an employment contract, and failure to pay the remuneration as it falls due is not only a breach of contract, but violation of statutory law.

17. The Claimant sought Kshs 163,593/- in respect of salary arrears for 2015, Kshs 186,770/- for 2016, and Kshs 5,334/- salary arrears for 2017, and despite testifying in regard to the same, the Respondent's witness did not attempt to address the arrears issue in the witness statement or during oral testimony.

18. The Respondent, despite knowing it was facing a salary arrears claim did not file pay records.

19. The Court therefore finds that the Claimant was owed the salary arrears as claimed.

Contributions to National Social Security Fund and National Hospital Insurance Fund

20. No evidential foundation to these heads of claims was placed before the Court.

Unpaid leave

21. The Claimant pleaded he did not go on annual leave for 5 years, and sought in lieu thereof Kshs 100,000/- but made no reference to the head of claim in the witness statement or during oral testimony.

22. The Court declines to find in his favour.

Certificate of Service

23. The Claimant was issued with a *Recommendation Letter* and nothing therefore turns on this complaint.

Appropriate remedies

Severance pay

24. In terms of section 40(1)(g) of the Employment Act, 2007, the Claimant was entitled to *severance pay* at the rate of 15 days' pay for each completed year of service.

25. However, the parties did not compute the same and the Court will decline to award *severance pay* but consider the failure in awarding compensation.

Pay in lieu of notice

26. The Claimant was entitled to at least one month notice and because none was given (Respondent did not produce any evidence of payment despite contending payment was made), the Court finds he is entitled to Kshs 20,000/- (pay slip produced in Court show basic salary of Kshs 20,000/-).

Compensation

27. The Claimant served the Respondent for about 5 years and in light of the length of service, and failure to award severance pay, the Court is of the view that the equivalent of 10 months gross wages would be fair (gross wage was Kshs 20,000/-).

Salary arrears

28. The Claimant is awarded Kshs 355,697/- on account of salary arrears.

Conclusion and Orders

29. The Court finds and holds that the termination of the Claimant's employment on account of redundancy was unfair, and also that the Respondent was in breach of contract.

30. The Claimant is awarded

(i) Pay in lieu of Notice Kshs 20,000/-

(ii) Compensation Kshs 200,000/-

(iii) Salary arrears Kshs 355,697/-

TOTAL Kshs 575,697/-

31. Claimant to have costs on half scale for having filed/served submissions outside the agreed timelines.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muinde instructed by Apollo Muinde & Partners Advocates

For Respondent Mr. Otieno instructed by Brian Otieno & Co. Advocates

Court Assistant Lindsey