



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.362 OF 2016

JARED ONYANGO ODINDO.....CLAIMANT

VERSUS

CIVICON LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent on 17.3.2014 as HR Manager and worked until 12.12.2014 when his services were terminated on account of redundancy. It is the Claimant's case that the redundancy was done in breach of section 40 and 41 of the Employment Act and it amounted to an unfair termination. He has therefore brought this suit against the Respondent terminal dues plus compensation for unfair termination. On 17.11.2017, he amended the claim to clarify and give particulars of the reliefs sought.
2. The Respondent has admitted that she laid off the Claimant but averred that she did that fairly after following the proper legal procedure as laid down in the employment Act. She averred that she served the Claimant with a prior notice, which invited him to a hearing if he had any objection to the decision to terminate his employment. In addition, the Respondent averred that the Claimant was paid all his terminal dues after termination and such the Claimant is not entitled to any further claim.
3. The suit came up for hearing on 8.12.2016 and 4.12.2017 when the Claimant testified as CW1 and the respondent called her HR Officer Mr. William Wekesa as RW1. Thereafter both parties filed written submissions which I have carefully considered herein.

Claimants' Case.

4. CW1 stated that he was employed as HR Manager by the Respondent from 17.3.2014 on permanent basis and he worked until 13.11.2014 when he was served with one month termination notice on account of redundancy. At the time of termination, his salary was Kshs.250,000 per month. In December 2014 he was paid additional Kshs.108,695 towards leave but he contended that the figure was less by 2.25 leave day and it unilaterally decided by the Respondent. He admitted payment of Kshs.141,632 as final dues vide the discharge voucher dated 10.12.2014 which he signed in order to get some money pending clearance with the company.
5. CW1 however maintained that his effort to get audience with the respondent's CEO, Mr. Jason Horsey was in vain. He therefore maintained that the termination of his employment contract was unfair and prayed for one month salary in lieu of notice, 2.25 leave days, pro-rated gratuity amounting to Kshs.41,691, compensation for unfair termination costs and interest. He explained that after termination he checked with Old Mutual and found that his gratuity had not been transferred to the pension scheme. He further explained that the payment in respect of leave made in December 2014 was for 10.5 days leaving a balance of 2.25 leave days.
6. On cross-examination, the CW1 admitted that his contract of employment provided for termination by either party by notice. He further admitted that the contract entitled him to service pay if he completed one year of service. He further admitted that he was given 30 days notice and he served the whole notice period.

Defence Case

7. RW1 testified that he joined the respondent in 2010. He explained that the respondent is part of the Civicon group of companies operating in East and Central Africa countries. He confirmed that the claimant was employed by the respondent by the letter dated 19.2.2014 and worked until 11.11.2014 when he was given a 30 days' notice of termination on account of redundancy. He contended that the claimant's position was rendered unviable and redundant following restructuring of its functions and operations.

8. RW1 contended that the termination was fair because the termination notice provided the Claimant with an opportunity to be heard by the respondent in respect of any objections to the decision to declare him redundant. He maintained that the respondent followed the proper legal procedures as laid down in the Employment Act and the relevant laws. He explained that she paid the Claimant all his terminal dues and legal benefits as per the discharge voucher dated 11.12.2014. He further contended that as at the time of termination, the claimant had utilized all his leave days and as such he had no accrued leave days. He therefore denied the reliefs sought by the Claimants.

9. On cross-examination, RW1 admitted that the termination notice stated that the claimant was to be heard and that the date and the venue of the hearing was to be communicated. He however did not know whether the hearing date and the venue for the hearing was ever communicated to the claimant. He further admitted that the termination notice was not copied to the labour officer and it never indicated tabulation of the dues payable to the Claimant. He further admitted that clause 10.5 of the appointment letter provided for payment of gratuity but he explained that from 1.7.2014, the gratuity scheme was abolished and amount transferred to a pension scheme and thenceforth a constant contribution of kshs15000 per month was remitted to the pension. He however stated that if the gratuity was never forwarded to the pension scheme, it should be paid by the Respondent.

10. On the leave issue, he stated that the claimant was entitled to 22 annual leave days and that he utilized 6 days. He further stated that as at the time of termination, the claimant had accrued 12 leave days. He admitted that the December pay slip indicated payment of allowances but he explained that the pay was indeed for notice and accrued leave.

Analysis and Determination

11. I have carefully considered the material presented to the Court and I now proceed to determine the following issues:

- a) Whether the claimant's employment was unfairly terminated.
- b) Whether the claimant is entitled to the reliefs sought.

Unfair Termination.

12. The burden of proving unfair termination is placed by section 47(5) of the Employment Act on the employee who alleges that he was so terminated after which the burden shifts to the employer to prove and justify the reason for the termination and the fairness of the procedure followed before the termination. In this case, there is no question that the Claimant was terminated on account of redundancy after 30 days a termination notice in writing. He has however contended that the section 40 and 41 of the Employment Act was not complied with and that rendered his termination unfair. The Respondent has on the other hand contended that she fully complied with the said provision of the law before the termination of the Claimant's employment and as such, the termination was fair.

13. Section 40 of the Act provides in mandatory terms that before terminating the services of an employee on account of redundancy, the employer shall first serve the employee (or his trade union) and labour officer with at least one month written notice, followed by fair selection process, then payment of salary in lieu of notice, accrued benefits plus severance pay to the employees selected for the redundancy. Failure by the employer to comply with the said mandatory procedure renders the termination unfair within the meaning of section 45 of the Act.

14. After careful consideration of the material presented before me, I find that the Claimant has proved on a balance of probability that the Respondent did not comply fully with the said mandatory procedure provided by of section 40 of the Act and that rendered the termination unfair. Firstly, she never served the termination notice on the area labour officer as required by subsection (1)(a). Secondly, she never conducted a fair selection process and heard the Claimant as required by subsection (1)(c). Thirdly, she failed to pay the Claimant cash in respect of all accrued leave as required by subsection (1)(e). Fourthly, she failed to pay salary in lieu notice as provided under subsection (1)(f). In my considered view, the employer's obligation to serve redundancy notice under subsection (1)(a)&(b) is not in the alternative to the obligation to pay salary in lieu of notice under subsection (1)(f).

Reliefs sought

15. Despite the foregoing finding that the termination of the Claimant's Contract of Service on account of redundancy was in breach of the mandatory procedure for redundancy provided by section 40 of the Act, I decline to make declaration that the contract was illegally terminated. The reason for the foregoing being that a party to a contract is entitled to exercise freedom of contract, provided that, when exercising such freedom, the employer is bound by international and municipal law to act fairly. Consequently, in my view, the Claimant should have prayed for declaration that the termination was unfair.

16. The foregoing notwithstanding, I have already made a finding of fact above that the claimant's employment contract was unfairly terminated and for that reason under section 49 of the Act I award him one month salary in lieu of notice, being Kshs.250,000 plus 6 months' gross pay being Kshs.1,500,000 as compensation for the unfair termination. In awarding the said compensation I have considered the fact that although the Claimant had served the Respondent for a fairly short time had the reasonable expectation to continue serving for many years because he was employed on permanent terms. In addition I have considered the fact, he never contribute to the termination through misconduct.

17. I dismiss the prayer for 2.25 leave days equaling to Kshs.17,292.40. The Claimant has admitted that in December 2014, he was paid Kshs.108,695 towards his accrued leave which he according to his calculation the money catered only for 10.5 leave days leaving 2.25 still outstanding. According to the contract, he was entitled to 22 days annual leave but the employer increased it to 24 days as per the endorsement on the leave application form produced as exhibit C.6. The Claimant served for 9 months equaling to 18 leave days earned. The Claimant utilized 6 days leaving 12 days x basic pay of Kshs.217,391.26 working days in a month equaling to Kshs.100,334.30. From the foregoing calculation it is clear that the Kshs.108,695 paid to the Claimant in December 2014 was even more than his rightful entitlement.

18. Likewise the claim for gratuity is dismissed because under clause 10.2 of the Claimant's contract of service he agreed that he shall not be entitled to pro-rata service pay if the contract is terminated before serving for one complete year. He served for only 9 months and therefore he is not entitled to claim gratuity on pro rata basis. Finally, the claim for severance pay is dismissed because the redundancy has herein above been treated as unfair termination and adequately compensated.

Disposition

19. For the reasons stated above, I enter Judgment for Claimant in the sum of Kshs.1,750,000 plus costs and interest from the date hereof. The said award will be paid subject to statutory deductions.

Dated and signed at Nairobi this 12th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE