



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 533 OF 2012

CATHERINE AKHWABA WEKESA.....CLAIMANT

v

CAREER LINK LIMITED.....RESPONDENT

JUDGMENT

1. Catherine Akhwaba Wekesa (Claimant) was employed by Career Link Ltd (Respondent) as Operations Manager with effect from 1 July 2008.
2. On 26 March 2011, the Respondent's Director D. Machio wrote to the Claimant informing her that she had been summarily dismissed and the reason given was
... publicly available information about your change of jobs from us in June 2010 to ITMC Ltd as the Chief Executive Officer from June 2010 to present, providing similar services as Careerlink Ltd as well as other services which provide a direct conflict of interest.
3. The dismissal aggrieved the Claimant and on 12 April 2011, her legal advisers sent a demand notice before action to the Respondent.
4. The demand was followed by the institution of the present Cause to which the Respondent filed a Replying Memorandum around 11 December 2012. The parties also filed documents.
5. The Cause was heard on 24 January 2018 when the Claimant and the Respondent's aforesaid Director testified.
6. The Claimant thereafter filed her submissions on 6 February 2018 while the Respondent filed its submissions on 16 February 2018.
7. The Court has considered the pleadings, evidence and submissions and identified the issues arising for determination as, *whether the summary dismissal was unfair, whether Claimant had outstanding contractual entitlements by time of dismissal, whether counterclaim was proved and appropriate remedies.*

Whether dismissal was unfair

Procedural fairness

8. In terms of section 41 of the Employment Act, 2007, a termination of employment on account of *misconduct, poor performance or physical incapacity* must be preceded by a hearing.

9. The Respondent contended that the Claimant absconded (*misconduct*) when she was requested to explain the allegation of conflict of interest.

10. And in an attempt to demonstrate that the Claimant was afforded an opportunity to be heard, the Respondent produced a copy of a Memo dated 7 January 2011 inviting her to a meeting on 14 January 2011.

11. The Respondent also produced minutes to show that the Claimant did not honour the invitation.

12. The Claimant denied receiving the *invitation memo* and further stated that the Respondent had a system where memos would be delivered, acknowledged, signed and dated.

13. Apart from stating that the Claimant declined to acknowledge the Memo, the Respondent's director did not deny that there was a system in place for delivery and acknowledgment of Memos.

14. Considering the non rebuttal of this evidence, the Court can conclude that the *invitation Memo* was not delivered to the Claimant, and thus she was not afforded an opportunity to make representations before her dismissal.

15. And even if it is true that the Claimant absconded (and the Court notes the dismissal letter did not refer to it all), that was a further *misconduct* which warranted a distinct show cause. It was not demonstrated one was given.

16. The Court finds that the dismissal was procedurally unfair.

Substantive fairness

17. Ordinarily it is the employer who is privy to the reasons for dismissing an employee thus the burden placed on them by sections 43 and 45 of the Employment Act, 2007 to prove the reasons, and that the reasons are valid and fair.

18. In an attempt to discharge that burden, the Respondent produced a screenshot/profile from Facebook in the name of one *Kate Wekesa*.

19. The Claimant denied having anything to do with the Facebook page/profile.

20. In the view of the Court, the Facebook extract did not pass legal muster.

21. One, the Facebook screenshot did not meet the evidential threshold to be accepted as evidence in a Court of law. There was no mention of the person who printed it, from where and using which equipment.

22. Two, there was no iota of evidence that the Claimant and *Kate Wekesa* were or could be the same person.

23. On the allegation that the Claimant had served or was serving as the Chief Executive Officer of another organisation (ITMC Ltd), the Court notes that no employment records or corroborative evidence, which could easily have been discovered were presented in Court to show that the Claimant had secured alternative employment apart from her engagement with the Respondent.

24. The Respondent did not even attempt to show that ITMC Ltd existed as an employer, business or juristic person.

25. In the view of the Court, the Respondent miserably failed to prove the reason for dismissing the

Claimant and/or that the reason was valid and fair the following reasons.

26. The reason for the dismissal of the Claimant was not proved, and the Court finds the dismissal substantively unfair.

Contractual entitlements

Salary for March 2011

27. The Claimant's testimony that she was not paid for the 26 days worked in March 2011 was not rebutted by the Respondent through production of employment records as required by law (employer has duty to keep employment records).

28. The Respondent also did not address the amount of the salary as computed by the Claimant.

Leave

29. On account of leave, the Claimant testified that she was entitled to 76 leave days by time of separation.

30. In rebuttal of the claim, the Respondent's response was that the Claimant did not apply for leave and that leave could be encashed.

31. That testimony can only lead to the conclusion that the Claimant did not go on the leave as asserted, and in terms of sections 10(3) and 74 of the Employment Act, 2007, a finding in favour of the Claimant is inevitable.

Counterclaim

32. The Respondent counterclaimed against the Claimant in respect of Kshs 765,000/- alleged to be salaries she received for 9 months while working with it and *ITMC Ltd.*

33. The Respondent however failed to prove that the Claimant received the money or worked with its competitor or that indeed *ITMC* existed.

34. The Respondent further sought Kshs 1,800,000/- lost business. It did not provide proof of any such loss.

Appropriate remedies

Pay in lieu of notice

35. The Court has concluded the dismissal of the Claimant was unfair.

36. Clause 3 of the appointment letter provided for 3 months' notice or pay in lieu of notice.

37. The head of claim is therefore contractually available to the Claimant (basic pay was Kshs 96,405/-).

Salary for March 2011

38. The Claimant is entitled to the earned salary as of right. The same was computed as Kshs 73,658/- and it is allowed.

Leave

39. On account of leave, the Claimant sought Kshs 220,994/- and it is allowed.

Compensation

40. The Claimant served the Respondent for about 3 years and on account of the length of service, the Court is of the view that the equivalent of 3 months gross wages would be fair (gross wage was Kshs 113,418/-).

Conclusion and Orders

41. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards her

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|-------------------------------------|-----------------------|
| (a) 3 months' pay in lieu of notice | Kshs 289,215/- |
| (b) March 2011 salary | Kshs 73,658/- |
| (c) Leave days | Kshs 220,994/- |
| (d) Compensation | Kshs 340,254/- |
| TOTAL | Kshs 924,121/- |

42. Claimant having failed to file/serve submissions within the agreed timeline is denied costs.

Delivered, dated and signed in Nairobi on this 23rd day of February 2018.

Radido Stephen

Judge

Appearances

Mr. Wangila instructed by A.S. Kuloba & Wangila Advocates For Claimant

Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates For Respondent

Court Assistant Lindsey