



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 312 OF 2018

JADIAH M. MWARANIA.....CLAIMANT

- VERSUS -

KENYA REINSURANCE CORPORATION LIMITED...RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th July, 2018)

JUDGMENT

The claimant Jadiah M. Mwarania filed the statement of claim on 14.03.2018 through J.A. Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination of his contract of employment was unfair, unjustified, illegal, null and void.
- b) Reinstatement to his employment in the capacity of the Managing Director of the respondent without any loss of benefits.
- c) An injunction against the Board of Directors of the Respondent restraining it from interfering with and or sabotaging the claimant's terms of employment in force.
- d) Salary for the entire period the claimant has been out of employment.
- e) Damages for wrongful and unlawful termination.
- f) Costs of the suit with interest thereon.

The claimant in paragraph 6 of the statement of claim pleaded the particulars of special loss and damage as follows:

- a) Pay of salaries in respect of the balance of the contract term of 37 months times Kshs.1, 863, 500.00 making Kshs.68, 949, 500.00.
- b) Leave for 3 years at 3 months' salaries Kshs.5, 590, 000.00.
- c) Leave allowance for 3 years Kshs.5, 590, 000.00.
- d) Annual salary increment for 37 months:
 - i. 12 months @ 52,000.00 making Kshs.624, 000.00.
 - ii. 12 months @ 52,000.00 making Kshs.624, 000.00.
 - iii. 12 months @ 52,000.00 making Kshs.624, 000.00.
- e) Telephone allowance at Kshs.10,000.00 for 37 months Kshs.370, 000.00
- f) Total Kshs.82, 372, 500.00.

The respondent filed the memorandum of reply on 04.05.2018 through Oraro & Company Advocates and Mr. H. Chacha Odera Advocate appeared in that behalf. The respondent prayed that the claim be dismissed with costs. The claimant filed on 16.05.2018 the response to the respondent's memorandum of reply.

The claimant was employed by the respondent in 1990 straight after graduating from the University of Nairobi. He was employed as a management trainee. He has worked with dedication for over 27.5 years and it was in 2012 that he was promoted and appointed to the apex office of the respondent's establishment being Managing Director. His first term as Managing Director was from 12.04.2012 to 11.04.2016. It was a successful service and the contract was renewed for a further term of 5 years from 12.04.2016 to 11.04.2021.

By a letter dated 08.06.2017, signed by Joseph K. Kinyua, Chief of Staff and Head of the Public Service in the Executive Office of the President, it was conveyed that the Government of the Republic of Kenya held the controlling 60% stake in the respondent corporation. Further, terms of service of three directors of the respondent's board were coming to an end being terms for one David Kibet Kemei also as Chairman, Maina Mukoma as member, and Chiboli Induli Shakaba as member. The letter stated that the three were retiring on rotation and therefore were not eligible for re-election at the 19th AGM of the respondent that was scheduled for 09.06.2017 and they were to be replaced by nominees being Michael O. Monari, Hilda G. Muchunku, and Julius Kiprotich Koros. The letter of 08.06.2017 was addressed to the Cabinet Secretary, the National Treasury and copied to the Principal Secretary, the National Treasury and the claimant as the respondent's Managing Director towards implementing the same. By the letter dated 15.06.2017, addressed to the Chief of Staff and Head of Public Service the claimant confirmed having processed the nominees and that what remained was for the National Treasury representative to ensure compliance at the respondent's 19th annual general meeting. The letter was copied to the Cabinet Secretary and the Principal Secretary, the National Treasury.

The claimant's case is that he had a clean record of service throughout his employment with the respondent until the respondent's Chairman of the Board of Directors one David Kemei issued to him the warning letter of 15.06.2017 alleging perennial lapses in the management of the respondent (the warning curiously coincided with the claimant's letter dated 15.06.2017, addressed to the Chief of Staff and Head of Public Service and about the preparation for retirement of David Kemei and the said two other Board members). The alleged grounds of the warning included lapses in the implementation of installation of integrated security solution; handling of IRA onsite inspection; communication and Board matters; and worsening debt situation. The warning letter concluded that the lapses had not been corrected even after the said concerns had been verbally communicated to the claimant, and further, **"This letter serves as a warning to you, as the managing director of the Corporation, to take firm action to correct all these lapses and report to the Board."** The claimant's case is that the allegations in the warning letter had not been raised before and that the Board members had got wind of the letter by the Chief of Staff and Head of Public Service dated 08.06.2017 and received by the claimant on 08.06.2017 so that the Board had acted against him unfairly by issuing the warning letter. The claimant's further case was that he discussed with the Chairman the matters in the warning letter and mutually agreed to put the matters to rest.

However, the matter did not rest for long and the same Chairman issued another letter of 03.08.2017 addressed to the claimant. The letter was titled **"MANAGEMENT LAPSES/IRREGULAR CONDUCT"**. It alleged that contrary to the respondent's policies on engagement of staff in acting capacity, two members of staff being one Mrs. Jennifer Sigei and one Mr. James Njui Mburu had served on acting capacity for periods beyond the one prescribed in policies. It was further alleged that by the letter dated 05.05.2017 the claimant had unilaterally written to Chief of Staff and Head of the Public Service concerning the claimant's own salary without any consultation with the Board contrary to laid down policy and good practice. The letter stated thus, **"The purpose of this letter is to seek explanation from you on the above lapses and to show cause why disciplinary action should not be taken against you. Your detailed response to the above issues should reach the undersigned within seven days of the date of this letter"** The letter was signed by David Kemei, Chairman Board of Directors.

The claimant replied by the letter dated 09.08.2017. He explained that the delay in confirmation of the two officers had been delayed due to failure by their line managers to escalate the two cases for the confirmation and which was regretted. The two line managers were General Manager Finance and the Manager Human Resources respectively. The officers had since been confirmed by 07.08.2017 and the claimant further proposed changes on the applicable policy to avoid similar future delays. On his salary, the claimant explained that in renewing the contract the Board had stated in clause 8 of the contract as renewed that he was awarded 20% salary increase subject to approval of the increment by the government. The chairman had written the letter of 07.04.2016 seeking the government approval and since 07.04.2016 he had been waiting for the government approval. The claimant had been informed that there was no substantive secretary at the State Corporations Advisory Committee (SCAC) and so he had been advised to seek concurrence from the Chief of Staff and Head of Public Service and which he did. He had acted per advice, out of frustration of waiting for too long, and he meant absolutely no offence to the Board. He concluded the letter thus, **"I wish to state that compliance to the laid down policies and procedures is the cornerstone to the success of any organization and confirm that I have and will always comply with the policies, procedures and board directives."**

The claimant's further case was that he sensed bad faith and wrote a further letter dated 10.08.2017 replying to the earlier warning letter of 10.08.2017.

The matters went silent until the claimant received the letter dated 01.03.2018 alleging matters said to arise from an audit report. The letter stated as follows:

"RE: MANAGEMENT LAPSES

This is with reference to the recent audit report containing findings that show serious lapses with regard to the management of the Corporation including but not limited to the following:

- **Revenue losses;**
- **Deteriorating management processes including weak management controls;**
- **Poor risk management.**

These are serious lapses that are not only contrary to section 2.3 and 2.4 of the corporation's Code of Conduct but have also affected the overall performance of the Corporation including the downgrading of our very good credit rating by A.M Best. You will recall that these are also the critical areas you were engaged to perform as Managing Director.

We note with great concern that your responses to the audit points were inadequate.

Due to the foregoing, you are required to show cause why disciplinary action should not be taken against you. Your detailed responses should reach the undersigned by 10am on Monday 5th March 2018.

Yours faithfully,

For: Kenya Reinsurance Corporation

Signed

Chairman, Board Human Resources Committee"

The claimant confirmed receiving the letter the same 01.03.2018 and he replied by his letter dated 05.03.2018. His response was to the following effect:

- a) The draft quality assurance report of 07.02.2018 by PricewaterhouseCoopers (PWC) was a draft for which the final report was yet to be submitted to the Corporation.
- b) The audit had not been on the office of the Managing Director but the operations of Reinsurance Division, Property Division, Supply Chain Department, Risk and Compliance Department, Finance Department and ICT Department. The departments had been directly audited without reference to the claimant. PWC had been instructed by the Board to directly report to the Board through the Board Audit Committee (BAC). BAC had discussed the report at its meeting of 31.01.2018 which the claimant had been invited to attend. The management had requested BAC to be given time to review the report and the claimant had convened a meeting on 05.02.2018 and with all relevant line managers and the team had come up with comprehensive comments on the report (as highlighted in the claimant's replying letter).
- c) On revenue losses PWC draft report had not reported any revenue losses but inaccurate computation of tenants' rental income was the audit issue.
- d) On deteriorating management issues including weak management controls, management processes and controls had been raised and line departments had acted closing the audit issues or addressing each of the issues as was raised.
- e) Audit issues on poor risk management as raised had already been closed.
- f) Management had done all that needed to be done on A.M Best ratings through a committee the claimant had appointed for that purpose.
- g) The claimant had conducted himself within the provisions of the Code of Conduct and there were no actions or omissions established against him. He had upheld the duty of efficiency, honesty, transparency, accountability and truthfulness.
- h) Thus there was no cause for disciplinary action.

The claimant was invited for a disciplinary hearing on 09.03.2018 on the matter of management lapses or irregular conduct; and on 10.03.2018 on the matter of perennial lapses in the management of the corporation. The letter of invitation dated 08.03.2018 advised the claimant that he was free to come alone or to be accompanied by an employee or a Board member of his choice.

It is not in dispute that on 08.03.2018 the claimant contacted the Chairlady of the Board Human Resource Committee one Felistas Ngatuny on telephone and by the letter dated 08.03.2018 seeking for more time to prepare for the hearing. The reason was that the claimant had become sick that night and had been attended to at the Aga Khan University Hospital in Nairobi. It was his evidence that he had become unwell in view of the pressure he was receiving from the Board and its Chairman. In the letter dated 08.03.2018, the claimant stated that the scope of the allegations had expanded and he needed adequate time to prepare as he would need input from General Manager (GM), Property; GM, Finance; Manager Risk and Compliance; and Corporation Secretary. The two days as allowed in the letter of invitation to the hearing dated 06.03.2018 had therefore been short to prepare.

The claimant also sent a text message to the Chairperson of the Board Human Resource Committee explaining his difficulties about attending the meeting on 09.03.2018 arising out of the said short notice to prepare and the claimant's being on a no state of mental and bodily health to productively participate in the disciplinary hearing. The Chairperson replied by a text message thus, **"Good afternoon MD. This is to wish you a quick recovery. The other members (HR Comm) have sent their well wishes and prayers too. Please let us know once the Doctors give you the okay to resume duty. All the ..."** The Committee proceeded to convene on 09.03.2018 at 9.30 am in the absence of the claimant. The Committee considered the claimant's request for more time and the turn of events that he was unwell and resolved thus, **"In view of the foregoing, the Committee resolved that the progress made so far be reported to the full Board for further deliberation and direction."**

Minutes on record show that on Monday 12.03.2018 at 8.00am the respondent's full Board met, dispensed with the need for a notice to convene the meeting, discussed the report of the Human Resource Committee about the claimant's disciplinary case, found that the claimant had not given satisfactory answers, and that the board had lost confidence and trust in the claimant as the Managing Director of the respondent. The meeting decided that the employment contract for the claimant be terminated immediately and one Michael Mbeshi was appointed acting Managing Director. It was further resolved that the Board Chairman one David Kemei would represent the respondent in all media statements, legal proceedings if any and any other matter relating to the exit of the claimant from the respondent.

The claimant testified that on 12.03.2018 he arrived at work at 8.00am and he was informed that the Board of Directors was meeting in the Boardroom. The claimant walked to the Boardroom and the Board Chairman immediately delivered to him the termination letter. The letter of termination dated 12.03.2018 stated as follows:

"RE: TERMINATION OF EMPLOYMENT CONTRACT

As the Managing Director, the overall performance of the Corporation including the responsibility for risk management, financial performance, compliance with the Corporation's Code of Conduct, human resource management policies and indeed the law lies with you. The Board is concerned that critical audit findings have not been well closed and that there have been significant lapses with regard to risk and financial management including non-compliance with the Code of Conduct, the law and some important human resource policies. The net result is that the Corporation has suffered losses in various areas and has been exposed to critical risks that have led to the down grading of its credit rating by the rating agency. The Board is particularly concerned that despite these matters being pointed out to you severally, your performance in these areas has deteriorated to a level which the Board can no longer tolerate.

It has also come to our attention that in spite of the fact the Board was seeking to resolve these matters with you internally in line with due process, you have gone ahead and involved external parties contrary to the policies of the Corporation and the Corporation's Code of Conduct.

The above amounts to gross misconduct and has led to loss of trust and confidence in you by the Board.

The Board has therefore, decided to terminate your contract of employment. The Board, however, has waived the requirement to serve notice and will instead pay you three months' salary in lieu of your serving the notice. The termination of employment will, therefore, be effective immediately. Following this termination, all benefits associated with your position will no longer be available to you. Please bear in mind that you continue to be bound by the Corporation's Code of Conduct and any information that you have received in the course of your work, regarding the Corporation's processes as well as its customers, suppliers and partners must not be disclosed to any external party. Such information must also be deleted from all your personal devices.

Accordingly, upon compliance to all the exit and clearing procedures and processes of the Corporation and returning any property of the Corporation that may be in your possession, you will be paid the following:

- a) Salary and all applicable allowances up to 12 March 2018;**
- b) Accrued leave days earned and not utilised as at 12 March 2018;**
- c) Three months' pay in lieu of notice;**
- d) Gratuity payment prorated as per your completed tenure of service.**

Your Certificate of Service is attached to this letter.

Yours faithfully,

For: Kenya Reinsurance Corporation

Signed

DAVID KIMEI

CHAIRMAN, BOARD OF DIRECTORS"

The 1st issue for determination is whether the termination of the claimant's employment was unfair. It is not in dispute that after the show cause letter the claimant replied to the allegations and was invited to the disciplinary hearing. The claimant requested for more time and further could not attend the disciplinary hearing on account of the ensuing ill health. The Chairperson of the Human Resource Committee by the text messages on record sympathised with the claimant's predicament and asked him to notify when he would be able to report on duty. Taking the communication into account, the Court returns that the claimant's requests had been granted by the Committee. The record of the Committee's proceedings on 09.03.2018 shows that the Committee had to report the progress to full Board for directions in view of the turn of events. The Court returns that as at the time of termination, the claimant had not been accorded a hearing on the allegations as envisaged in section 41 of the Employment Act, 2007. That amounted to unfair disciplinary process.

Further the Court returns that having not been heard, the respondent cannot genuinely say and has not shown that as at the time of termination, there were valid reasons for termination as envisaged in section 43 of the Act. In any event, the Court notes that in the termination letter the respondent introduced extraneous matters which had not been part of the show cause notice such as allegations that the claimant had involved external partners in the disciplinary case contrary to the policies. Such are matters which the claimant had not been given chance to defend himself. In **National Cereals and Produce Board –Versus- John Kirui Tongorei [2017]eKLR**, the Court of Appeal (G.B.M. Kariuki, Sichale, and Kantai, JJ.A) it was held, “**....When the respondent was summoned to an administrative employment meeting, allegations were made notice of which had not been served upon the respondent. This was wrong. The appellant should have adhered to fair administrative action by notifying the respondent in advance of new allegations and giving him ample opportunity as required by law to prepare and present a response or defence to the allegations and to be represented by a representative to the said meeting if he so wished. This the appellant failed to do and in the process the respondent was denied a fair hearing. By terminating the respondent’s services for reasons that were different from the reasons given in the suspension letter, the appellant breached the respondent’s rights and the learned Judge was right to find that termination of the respondent’s employment was unfair. We agree with that finding and can find no error in the way the trial Judge dealt with the same.**”

Thus in the present case the Court finds that the termination was procedurally unfair for want of proper hearing under section 41 of the Act and for want of valid reasons under section 43 as read with section 45 of the Employment Act, 2007.

It was submitted for the respondent that the claimant voluntarily entered into the contract of employment and submitted himself to the terms of the contract including the termination clause under which he was terminated with pay of three months in lieu of the relevant termination notice. The contract having been terminated in accordance with clause 28 of the contract, the termination was in effect done not as a disciplinary process but in exercise of the Board’s powers under the contract. The respondent relied on **William Barasa Obutiti –Versus- Mumias Sugar Company Ltd [2004]eKLR**, (Sergon J) where it was held that it is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. Further, “**....in such circumstances, the agreement will be effective to override formal or substantial restrictions placed on the termination of the contract by the original contract itself.**” The respondents further relied on **National Bank of Kenya Ltd –Versus- Hamida Bana & 103 Others [2017]eKLR** (Visram, Karanja, and Koome JJ.A) thus, “**Albeit an employment relationship as it stands in this country is now regulated by the Constitution and legislation, it is still subject to the general principles of the law of contract**”

The Court returns that indeed the law is as cited for the respondent. However in the present case, there is no established contract or agreement by the parties independent of the original contract by which parties agreed to separate as was done in the termination letter. Further, the Court finds that once the respondent made allegations of poor performance or misconduct against the claimant as per the show-cause letter, the respondent became bound to conclude the disciplinary procedure per provisions in section 41 of the Act and to establish valid or genuine reasons for termination per section 43 as read with section 45 of the Act. The Court holds that it is not open to the employer to initiate a disciplinary process and then whimsically aborts it by invoking another clause in the contract of service such as the termination clause with notice or with pay in lieu of agreed notice as the respondent purported to proceed in the instant case.

Even where the employer wishes to rely on a soft landing, it must be shown that the parties opted accordingly by way of agreement and as per the holding in **William Barasa Obutiti –Versus- Mumias Sugar Company Ltd [2004]eKLR**. The court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus, “**The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer’s discretion, it is the court’s considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.**”

Thus, if a disciplinary process is allowed to abort at the employer’s unilateral instance like in the present case, the employee’s record of service is left with the scar of unanswered allegations which subsequently may be used adversely to deny the affected employee future job opportunities. The Court finds that such outstanding questions due to disciplinary proceedings that are not concluded at the employer’s unilateral instance are obviously adverse to the employee’s plight and shall therefore not be permitted as they amount to an unfair labour practice in violation of Article 41 of the Constitution of Kenya, 2010.

The Court has also considered the reason for termination in the letter of termination thus, “**The above amounts to gross misconduct and has led to loss of trust and confidence in you by the Board.**” The court finds that the respondent has not demonstrated the alleged loss of trust and confidence because the same allegation was founded upon allegations which the Court has already found not to have been established as genuine or valid as at the time of termination and for want of a disciplinary hearing in that regard. Thus the respondent has failed to show the claimant’s conduct which can validly be relied upon to establish loss of trust and confidence. Indeed there were warnings but the Court finds that the claimant effectively explained and exculpated himself thereby vindicating himself from any further liability in that regard. The Court finds that the warnings did not therefore constitute a basis for loss of trust and confidence. The evidence and the record is clear that in all instances, the claimant took the necessary corrective measures like convening a meeting to discuss and remark on the PWC draft reports, proposed policy changes for improvement such as on policy to prevent delays in confirmation of staff on acting capacity, and the respondent’s Board or Board Chairman did not show dissatisfaction with the claimant’s explanations until the empty allegations of loss of trust and confidence in the letter of termination. In such circumstances the Court finds that there is no established behaviour on the part of the claimant that is so serious as to constitute gross misconduct or poor performance that would return an affirmative answer to the alleged loss of trust and confidence between the parties. In particular the Court finds that the claimant is not said or shown to have failed to improve or perform his duties after the request to improve in one way or another. As at termination, the respondent had reported a profit in its last financial years and which the Court returns showed the claimant’s otherwise good performance. The Court further holds that for breakdown of trust and confidence to constitute a fair reason for termination, the respondent needed to give the claimant a

chance through due process by informing the claimant the material particulars of such loss of trust and confidence as per section 41 and 45 of the Employment Act, 2007. Thus the Court holds that an employer who cannot establish gross misconduct or poor performance as at the time of termination cannot be said to fairly terminate an employee's contract of service by simply invoking and alleging an empty assertion of loss of trust and confidence as was done in the present case.

It is not in dispute that the PWC audit report was a draft and the final report was not filed or shown to have been issued at all. The Court further finds that the A.M. Best ranking was at organisational level and the respondent did not show how the ranking was more attributable to the sole performance of the claimant and not other employees or the respondent's Board of Directors. Further the Court finds that the claimant had a valid concern that it would be unfair to visit him with adverse consequences when clearly there had been line managers responsible for the prompt or timely action towards confirmation of the two officers who had been serving in an acting capacity. The Court further finds that there was no dispute that upon renewal of the claimant's contract of service the respondent's Board of Directors awarded the claimant a 20% salary increment subject to approval by the Government and as an administrative follow up, the Court returns that there was no established misconduct when the claimant wrote to the Chief of Staff and the Head of Public Service about the increment. In view of such findings the Court returns that the respondent's allegation of loss of trust and confidence was unfounded.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for.

In the supplementary submissions filed for the claimant on 06.07.2018 it was submitted that reinstatement is a statutory remedy provided for under section 49 of the Employment Act and for good reason should be given preference where it is clear as in the present case that the respondent's action was laced with malice and bad intention. It was further submitted for the claimant that he had entered into a 5 year contract with the respondent which took effect on the 12.04.2016 and was due to lapse on 11.04.2021. The said contract provided for a termination clause at paragraph 28 which clause is subject to compliance with the requirements of sections 45, 49, and 50 of the Employment Act, 2007. The claimant testified that he had unexpired 37 months of service and he wished to complete his term of service. The claimant in his evidence urged that he had established the particulars of malice, irregularity and illegality as pleaded in paragraph 5 of the statement of claim and he prayed that he be given his job back.

In opposing the reinstatement, it was submitted that the respondent had discretion on who to hire for the respective positions. Further, the respondent enjoyed the right to terminate the contracts of service of its employees. The claimant's contract of employment was terminated in accordance with the contract of employment (clause 28) and the claimant had been paid in lieu of the termination notice. It was further submitted that section 49(3) provides that reinstatement is one of the remedies that can be extended to an aggrieved claimant but it is not to be whimsically granted and the Court must be guided with the provisions of section 49(4) (a) to (m) of the Act including practicability of reinstatement or re-engagement as may be ordered by the Court. The respondent relied on the Court of Appeal decision in Kenya Power & Lighting Company Limited –Versus- Aggrey Lukorito Wasike [2017]eKLR (Waki, Karanja, & Kiage JJ.A) where in holding that matters in section 49(4) (a) to (m) must be seriously considered before granting the remedy of reinstatement, the Court stated, **"A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a judge ought to set out factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute."** Mr. Chacha Odera Advocate for the respondent further referred the Court to the decision upheld by the Court of Appeal in the foregoing case being New Zealand Educational Institute –versus- Board of Trustees of Auckland Normal Intermediate School [1994]2 ERNZ 414 CA thus, **"Whether...it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justice of the cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impractical to reinstate the employment relationship."**

The Court has considered the submissions and is bound by the provisions of section 49(4) and the holdings by the Court of Appeal.

In the present case, **first**, it is clear that the claimant would like and is willing to complete his unexpired five year term of service, being 37 months from the date of termination. **Second**, the circumstances are such that the claimant did not contribute to his termination. It has been established that he desired to be heard towards exculpation and further requested for time to adequately prepare. The Board's Human Resource Committee granted the claimant's requests not to attend the disciplinary hearing on account of ill health and the request for more time – as verified by the communication between the claimant and the Chairperson of the Committee also being RW2. **Third**, it was by Court order that the vacancy held by the claimant was preserved and the suit was fast-tracked for hearing and determination. Thus, the vacancy is still available and in that one sense, there would be no difficulty in terms of practicability of the intended reinstatement, the vacancy being preserved accordingly.

Fourth, the Court has considered the common law principle that there should be no order of specific performance in a contract of service except in very exceptional circumstances. In that regard the Court has considered the claimant's efforts in building his professional reputation over 27.5 years in the respondent's service. The Court has found that the allegations as levelled against the claimant remained unsubstantiated or determined one way or the other. The claimant desired to be heard towards exculpation and if he is not reinstated his professional life will have to remain with the scar of the allegations in the disciplinary process that the respondent unilaterally commenced and subsequently terminated without any reasonable justification. The Court has considered the balance of justice for the parties. If reinstatement is allowed, the respondent as the employer might still have an opportunity to deal with the allegations in accordance with the law and terms of the contract of service whereas, if reinstatement is not allowed, the claimant may permanently not have chance to remove that scar of allegations as levelled in the aborted disciplinary process. The Court has further considered that the claimant having built his professional reputation, the said ensuing scar will seriously prejudice his circumstances making the opportunities available to the claimant for securing comparable or suitable comparable employment with another employer to greatly diminish or dissipate all together. The Court further considers that reinstatement in the instant case cannot be said to be inappropriate because the reasons which led to the termination have been found not to have been established as at the time of termination. The Court considers that such reasons that were not established as at the time of termination as envisaged in section 43 of the Act cannot be said to have gone to the heart of the employment relationship

between the parties – in this case whereby the respondent is a public body or a quasi-government enterprise as will be shown latter in this judgment. The Court has earlier in this judgment found that the allegation of loss of trust and confidence was empty or not established at all.

While considering the practicability of reinstatement, the Court has considered the availability of the remedy of compensation for the unfair termination capped at a maximum of 12 months' gross salaries as at the time of termination and as provided for in section 49 of the Act. If that was to be awarded, and which in the circumstances of this case would be justifiable, the same will be a sum of **Kshs.22, 362, 000.00** as submitted for the claimant.

The evidence is that the respondent is in the reinsurance enterprise with undisputed tax payer's or public controlling stakes at 60%. Under section 2 of the Public Service Commission Act, 2017, "**a public body**" includes (a) any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; (b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition." The Court finds that the respondent is a public body under the section. Further section 3 of the Act states, "**3. Subject to Articles 155 (3) (a), 158 (3), 234(2) (a), 234 (3) and 252 (1) of the Constitution and section 28 of the Kenya Defence Forces Act, this Act shall apply to all public bodies and persons holding office in the public service.**" Consequently, the office held by the claimant is regulated as well as it is an office in the public service. For avoidance of doubt, it was the undisputed evidence that the claimant's 20% salary increment as awarded by the Board could not be implemented without the relevant government's approval – manifesting the public or tax payer's stakes in the respondent. The Court considers that in this case where the claimant is willing and is able to continue in service, it would be oppressive and unfair to impose the payment of **Kshs.22, 362, 000.00** in this case of glaring substantive and procedural unfair termination. The respondent's Board must be bound by the provisions of Article 232 (1) (b) of the Constitution on the efficient, effective and economical use of resources. Considering the public interest against that principle and value of public service delivery, the Court cares that such high sum of public money is not paid out in circumstances whereby there is no reasonable justification as a bar to the claimant to be reinstated and to only earn after he has worked accordingly. The Court considers that in balancing the justice for the parties in the case, there is favour and justification for the reinstatement of the claimant who is willing and able to work and be paid in terms of the prevailing terms and conditions of service between the parties.

Fifth, the Court returns that the claimant had served for 27.5 years and he reasonably expected to serve for the full 5 years fixed term contract with 37 unexpired months of service as at the time of termination. It was not in dispute that prior to the letter by the Chief of Staff and Head of the Public Service dated 08.06.2017, the claimant had a clean record of service. In that consideration, the court returns as credible the claimant's account that his acting upon that letter, as was his duty, was the proximate causation in the chain of the subsequent events culminating into his termination. The Court further returns that it would be unfair for the claimant to suffer loss of his hard earned professional reputation and employment in circumstances that are linked to his actions in discharge of official duty. Thus Article 236 of the Constitution provides for protection of public officers thus, "**236. A public officer shall not be: (a) victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without the due process of law.**"

The Court returns that this was a proper case for reinstatement than for compensation so that damages or compensation being alternative to the remedy of reinstatement and its consequences, the Court will not delve into the claims and prayers for damages for unfair termination or as particularised in the statement of claim.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the claimant's termination of his contract of employment was unfair, unjustified, illegal, null and void.
- b) Reinstatement of the claimant effective 12.03.2018 to his employment in the capacity of the Managing Director of the respondent without any loss of benefits; and the respondent by itself, its Board or agents to forthwith permit the claimant to resume duty accordingly.
- c) Consequential to the reinstatement, the injunction restraining the Board of Directors of the Respondent from interfering with and or sabotaging the claimant's terms of employment in force.
- d) Salary for the entire period the claimant has been out of employment; and to be paid by the respondent by 01.09.2018 failing interest to be payable thereon at Court rates from the dated of this judgment till full payment.
- e) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 20th July, 2018**.

BYRAM ONGAYA

JUDGE