



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 872 'B' OF 2015

(Before Hon. Justice Mathews N. Nduma)

JOSEPH OLANDO OLOO.....CLAIMANT

VERSUS

UNGA LIMITED.....RESPONDENT

J U D G M E N T

1. The Claimant seeks compensation for alleged unfair termination of employment on account of redundancy and payment of terminal benefits to wit:-

- (i) Severance pay calculated at 15 days salary for each completed year of service (18 years) in the sum of Kshs.682,175.16 and
- (ii) Refund of retirement benefits scheme contribution in the sum of Kshs.70,616.40.

Facts of the Claim

2. The Claimant was employed on 1st November, 1996 as a Chemical Technician by a letter of appointment dated 24th September, 1996. The Claimant was promoted to the position of Raw and Packing Materials Supervisor until 9th December, 2014. At the time of termination the claimant earned a gross monthly salary of Kshs.75,797.24.

3. According to the Human Resource Manual of the Respondent, Clause 6.4 on Redundancy provides for circumstances upon which redundancy may be declared to include when:-

- (i) Unga ceases partly or all of its operations for whatever reason.
- (ii) There is a reduction in the volume of work and it is not possible to transfer the employee.
- (iii) The skills requirement for the job has changed and the employee is unable to develop the necessary skills.

4. The Clause provides further:-

“Redundancy pay shall be in accordance with the law, currently fifteen (15) days basic salary for each completed year of service. However, Management will have the discretion to enhance payment per the following guidelines:-

<u>Service Period</u>	<u>Enhanced Pay</u>
5 Years	1 Month
6 – 10 Years	2 Months
11 & above	3 Months

5. Furthermore, the Respondent has concluded a Collective Bargaining Agreement with the Union and clause 13 thereof provides the Redundancy procedure as follows:-

(a) Employer to follow section 40(1) of the Employment Act.

(b) In selecting employees to be declared redundant, the employer shall give regard to seniority in time, skills, ability and reliability of each employee otherwise, the principle of 'last in first out' shall apply.

6. The employee declared redundant shall be entitled to the following benefits:-

(i) One month notice or one month salary in lieu of notice.

(ii) Payment of wage, overtime and any other remuneration due to him upon clearance.

(iii) Leave including pro-rated leave shall be paid in cash.

(iv) Severance Pay at the rate of 44.5 days pay for each completed year of service based on the FKE formula for paying employee (s) dues see CBA Appendix v.

7. In terms of the Human Resource Manual, employees with service period of seven (7) years above were entitled to three (3) months notice or payment in lieu of notice.

8. In terms of letter of appointment, Claimant and Respondent were to pay contribution to a personal scheme at 7.5% each deducted from the claimant's salary.

9. On 1st February, 2014, claimant was transferred from quality controller position in Nairobi to Nakuru feeds as a Raw & Packing Materials Supervisor.

10. On 8th December, 2014, the Claimant was declared redundant upon showing reluctance to proceed to Nakuru. The Claimant perceived the deployment as a demotion. The letter of redundancy dated 8th December, 2014 set out the terms of redundancy to be:-

(i) Salary up to 9th December, 2014.

(ii) Redundancy pay at 15 days for each completed year worked (18 years).

(iii) Leave earned and not taken up to 9th December, 2014.

(iv) One month pay in lieu of notice.

11. The Claimant was paid a sum of Kshs.727,161 computed as above.

12. The Claimant states that he was grossly underpaid and the Respondent was in mutual breach of the contract of employment in these respects:-

(i) Failure to pay accrued leave.

(ii) Failure to pay two (2) months notice pay.

(iii) Failure to pay contractual house allowance for July 2003 to December 2014.

(iv) Under paying terminal dues as outlined above.

Discrimination

(i) The Claimant discriminated the Claimant and wrongly targeted him for retrenchment contrary to provisions of the Employment Act.

(ii) Failure to pay terminal benefits as per Human Resource Manual and CBA.

(iii) Failure to follow selection criteria.

(iv) Failure to provide section 40(1) notice to the Claimant.

(v) Lack of valid reasons to terminate employment of the Claimant.

(vi) Failure to follow the contractual and statutory procedure for declaration of redundancy.

13. The Claimant prays to be awarded as prayed. The Claimant testified under oath and relies on the pleadings and list of documents thereof.

Response

14. RW1 testified for the Respondent. The Respondent states that the Claimant served in a management position and was therefore not unionsable. The letter of appointment however stated that the Respondent could not prohibit the Claimant from joining the trade union. From the records, the Claimant was not a member of the Union and did not hold any trade union position.

15. RW1 stated that the Respondent's management staff are regulated by the Human Resource manual. That the Human Resource Manual relied upon by the Claimant was just a draft and was never adopted by the Respondent.

16. Therefore the Human Resource Manual and CBA were not applicable to the Claimant. That Material Packaging Supervisor was a management position.

17. RW1 confirmed that the Claimant worked for the Respondent for 18 years from 1996 to 2014.

18. RW1 further stated that by a letter dated 21st September, 2003, following a job evaluation exercise the remuneration of employees including the Claimant was consolidated. The various allowances became part of the gross salary in order to enhance pension benefits. Accordingly, the Claimant's basic salary, house allowance and other allowances were consolidated for the benefit of the Claimant. The Claimant is therefore not owed any of the claimed allowances or at all. The Claimant has never complained of non payment of any allowance.

19. RW1 added that on 28th November, 2014 the Respondent transferred the Claimant to Nakuru Feeds – Mineral Plant which transfer was subject to review. This was because the Respondent's grain buying centers had been closed and the Respondent was trying to find an alternative position for the Claimant.

20. The Respondent's Managing Director did not approve the said transfer and the Claimant was then offered a job as a grader at the Respondent's Eldoret Premises. The Claimant declined the posting.

21. The Respondent was left with no alternative but to declare the Claimant redundant. The Respondent issued the letter dated 8th December, 2014 to the Claimant. By a copy of the said letter, Labour Officer was duly notified of the Claimant's redundancy.

22. The Claimant was paid terminal benefits set out in the said letter as follows:-

- (i) 9 days worked in December, 2014 Kshs. 24,117.05
 - (ii) Severance Pay @ 15 days
per 18 years Kshs. 930,229.75
 - (iii) One month salary in lieu of notice Kshs. 75,796.50
- Total Kshs.1,030,143.30**

Less Taxation Kshs.727,161.

These calculations are in terms of the section 40 of the Employment Act, 2007.

24. The Claim has no merit. The termination was lawful and fair and terminal benefits were paid according to law. The Respondent prays that the suit be dismissed with costs.

Determination

25. The Issues to determination are as follows:-

- (i) Was the termination of employment of the Claimant on account of redundancy lawful and fair?
- (ii) Is the Claimant entitled to the reliefs sought?

Issue i

26. The Letter of Appointment dated 24th September, 1996 appointing the Claimant to the position of Chemical Technician excluded the Claimant from joining the union. The letter is signed by the Claimant. The Claimant remained in management positions until his employment was terminated. The payslip produced by the Claimant for the month of October 2014, confirms the evidence by RW1, that the Claimant received a gross salary of Kshs.75,797.24 per month. This was a consolidated salary inclusive of all allowances including house allowance.

27. Considering the evidence by the claimant vis a vis that by RW1 the court is satisfied that there was a need to redeploy the claimant upon closure of cereal buying centres of the Respondent. There is however no explanation why the Managing Director refused to approve the position the Claimant was deployed to by the Human Resource Department. The Claimant was then redeployed to a junior position which was clearly a demotion after 18 years service in senior management positions. The Claimant was justified to refuse the demotion and therefore the suggested position.

28. To my mind, there was justification in the circumstances to consider declaring the Claimant redundant on fair terms having served the Respondent diligently and faithfully for so many years.

29. The Claimant has produced a Human Resource Manual which RW1 would want to believe was a draft and therefore not an official document. The court is not amenable to such a suggestion by RW1. The manual was available to the staff including the Claimant and the same provided legitimate expectation to the Claimant and other staff in management that, on the event of being declared redundancy they would be offered the terms provided under clause 6.4 of the 'UNGA HOLDINGS LIMITED, HUMAN RESOURCES MANUAL.' It is farfetched for RW1 to tell the court that because the document is not signed by the Respondent is not genuine. This court handles Human Resource Manuals from different organisations on a routine basis, and rarely, do the documents bear any signature. These documents are communicated to staff via memos and letters signed by the conveyer. The manuals hardly bear signatures at all.

30. The Court is confident that the favorable terms in this document, which are similar to the favorable redundancy terms for unionsable staff under the Collective Bargaining Agreement applied to management staff and therefore the Claimant.

31. Accordingly, the Claimant who had served the Respondent for eighteen (18) years should have been paid severance pay calculated at three (3) months salary for each completed year of service.

32. For comparative purposes, unionsable employees under the Collective Bargaining Agreement provided under clause 13(iv) that severance pay to all unionsable employees shall be calculated at 44.5 days' pay for each completed year of service. The court refuses to be persuaded that a long serving management employee would then be retrenched and paid severance pay calculated at the statutory minimum 15 days pay for each completed year of service.

33. The Respondent had clearly enhanced severance pay for all its employees in management and those unionsable.

Notice Pay

34. With regard to Notice pay, Clause 6 on termination provides for termination notice of one month or payment of one month salary in lieu of notice. The claim for two months notice pay is without merit therefore is dismissed.

Leave Pay

35. RW1 did not indicate whether or not the Claimant had exhausted his leave days. The Claimant testified that he was owed 18 days leave as at the time of termination. The court awards the Claimant accordingly. The claim for leave days accrued during notice period is rejected for want of merit. Court awards Kshs.45,468 in this respect.

36. The Claim for compensation is dismissed the court being satisfied that the declaration of redundancy was for a valid reason. However, the Claimant was not paid what he was entitled to. This amounted to unfair discrimination. This has been corrected by the award of enhanced severance pay in terms of the Human Resource Manual produced before court.

37. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

(i) Severance pay calculated at three months salary for the 18 years completed service in the sum of Kshs.4,093,038 (Less the paid amount of Kshs.930,229.75) Kshs.3,162,808.25.

(ii) Payment in lieu of 18 days leave Kshs.45,468.

Total award Kshs.3,208,276.25.

(iii) The award is payable with interest at court rates from date of filing suit till payment in full.

(iv) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 20th day of July, 2018

Mathews N. Nduma

Judge

Delivered and Signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances:

Mr. Omollo for Claimant

Mr. Kibanya Advocate for Respondent

Anne Njung'e: Court Clerk