



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 269 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PHOEBE ADHIAMBO BONDO.....CLAIMANT

-VERSUS-

GREEN FOREST SOCIAL INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

By memorandum of claim dated 26th September 2013, amended on 29th January 2014, the claimant avers that she was in the employ of the Respondent from 23rd November 2009 to 28th March 2013, when she voluntarily resigned from service to engage in other gainful activities.

She states that she was employed in the capacity of General Manager Micro Finance and she later took up the additional duties of the office of the General Manager, Support Services, Human Resource on the understanding that she would be remunerated for the tasks undertaken besides her normal duties as was the tradition of the Respondent Company.

That she took up the additional duties of the then General Manager, Support Services and Human Resource for a period of 1 year up to the time she left the Respondent's employment. She further avers that at the time she was leaving employment, the Respondent offered to pay her a discretionary bonus on terms that were clearly identified. The Claimant contends that vide a letter of 4th February 2013 the Respondent failed to feature the said terms and subsequently left out the tabulation in the final remuneration. The Claimant pleads for unconditional release of the following benefits: -

a) Additional responsibility allowance	Kshs. 1,593,558.00
b) Bonus offered	Kshs. 265,593.00
c) One month severance pay	Kshs. 26,599.00
d) Severance pay for additional responsibility	Kshs.1,115,485.00
e) Lost pension	Kshs. 200,772.00
f) House allowance for additional responsibility	Kshs. 318,708.00
Total	Kshs.3,520,675.00

g) Costs of the claim plus interest therein.

The Claimant avers that the acts of the Respondents are actuated by malice which are particularised as:

- a. The Respondent despite having known that the Claimant is entitled to the above emoluments, have continued to unlawfully withhold the same.
- b. The Respondent failed to give or provide justifiable grounds and or reasons for their acts.

- c. The Claimant was made to work for the entire period without payment and went ahead to release the Claimant without making good the payments.
- d. Denying the Claimant payment of the discretionary pay as mutually agreed.
- e. Tabulating the final remuneration while excluding the rightful benefits of the Claimant.

The respondent filed a response to the claim in which it denies the averments in the memorandum of claim. The respondent however admits that sometime in March 2012 changes were made to the structural operations of the Respondent with managers including the Claimant being given additional responsibilities in order to absorb the impact of the departure of senior employees in key positions.

The respondent avers that under Article 17 of the Human Resource Manual the Claimant by virtue of her job group was expressly excluded from entitlement to any acting allowance.

As to the claim of discretionary bonus the respondent avers that the offer was made to the Claimant in utmost good faith which the Claimant declined and as such did not impose on the respondent a contractual obligation or confer upon the Claimant a contractual right in respect thereof.

The Respondent contends that it paid the Claimant all her terminal dues in accordance with her contract of employment, the HR manual and the law wherefore she is not entitled to all or any part of the purported benefits set out in paragraph 10 of the Statement of Claim. The respondent prays that the claim be dismissed with costs.

The case was heard on 8th December 2016. The claimant testified on her behalf while the respondent called its Accountant Tom Odiyo McAnyango who testified on its behalf.

The claimant was represented by Mr Madialo instructed by S. O. Madialo and Company Advocates while the respondent was represented by Ms Mweisigwa instructed by Behan & Okero Advocates. Both parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that she was employed by the respondent on 23rd November 2009, and voluntarily resigned on 28th March 2013. At the time of resignation, she was General Manager Micro Finance. She led evidence that her departure from the Respondent was as a result of retrenchment and as at the said time she was earning a gross salary of Kshs. 318,000.00.

She stated that her claim herein is for discretionary bonus arising out of duties undertaken after the Respondent's General Manager Support Services was sacked in February 2012 and his duties assigned to her. That she performed the said duties from February 2012, to March 2013 when she resigned. That the Directors of the Company deemed it fit to grant her the discretionary bonus. It was her evidence that she fulfilled all the terms pertaining to the award of the bonus and that she had never received communication to the contrary. She stated that the bonus she expected from the respondent was equivalent to one month's salary to the tune of Kshs. 318,000.00.

She testified that when she took up the additional duties it was her expectation that she would be paid an extra 50% of her basic salary, as was tradition of the Respondent. She referred to an email communication dated 4th December 2012, from Rik Hazewinkel to Paul SGF and Hellen Gura copied to her in which they were being advised to pay one Harrison some extra allowance for additional duties undertaken irrespective of the fact that the manual did not allow for such payment.

The Claimant further stated that she was claiming one month's pay, which was left out in computation of her final dues for the retrenchment. That the Respondent based the computation on ten (10) months and left out three months' pay which she immediately informed the respondent who proceeded to pay for two months and failed to pay for one month. She prayed for her claim to be allowed.

In cross-examination, she was referred to the Human Resource Manual that provided for a 10% acting allowance as compared to the 50% she was asking for. She stated that the 50% was based on the fact that she took over the office substantively and was not holding it in an acting capacity.

She admitted that she was paid Kshs.1.5 Million on departure from the respondent but in her opinion, she ought to have been paid more for the extra responsibility allowance. She also stated that she was offered a discretionary bonus which she declined because she felt that the conditions had changed from what she had discussed with the Directors. She also admitted that the discretionary bonus was made in good faith and it was not an obligation on the Respondent.

In the written submissions filed on behalf of the claimant, it is submitted that the respondent was clinging to the provisions of Human Resource Manual whereas it had disregarded it before when it paid staff below grade G. That other staff were paid 50% of their actual pay in compensation for extra responsibilities as compared to the 10% allowed in the HR Manual. That by the conduct of the Respondent it would be safe to assume that it was its tradition to compensate staff for additional responsibilities.

Counsel for the Claimant also submitted that this was extra responsibility and not an acting allowance since after the Company restructured there was no vacancy left to be filled. The '*acting*' clause in the manual was therefore redundant and of no application to the case at hand.

Counsel urged the Court to allow the claim in light of the provisions of Article 41 of the Constitution of Kenya which provides for fair labour practice.

Respondent's Case

The respondent called one witness, Tom Odiyo McAnayngo, its Senior Accountant who testified and confirmed that the Claimant started working with the respondent on 23rd November 2009 until 31st March 2013.

He stated that sometime in March 2012, structural changes were made to the Respondent with managers including the Claimant given additional responsibilities in order to absorb the impact of the departure of senior employees in key positions. That by Article 17 of the HR Manual the Claimant by virtue of her capacity as a Manager in job group G was expressly excluded from entitlement to any acting allowance. That prior to her departure the Claimant was offered a discretionary bonus by the Respondent which she declined.

He stated that the Claimant was paid all her dues in accordance with her contract of employment, the HR Manual and the law. He prayed for the claim to be dismissed with costs.

In the submissions filed for the respondent, it is submitted that the claimant voluntarily assented to the terms of her appointment which she executed on 21st November 2009 and she was expressly subject to the terms of the Respondent's Human Resource policies and procedures contained in the HR manual. They cited **Misc. Civil Application No. 24 of 2014 R v Kenya Airports Authority & Anor ex parte Moses Echwas** where it was held:

"The Human Resource manual is a quotidian instrument of Human Resources management which becomes an enforceable contract, if expressly incorporated in the individual employment contract. It is properly a contract falling within part 3 of the Employment Act 2007."

That the provisions of the HR Manual thus bound the Claimant and by virtue of this she is not entitled to an acting allowance of 10%.

It is also submitted that the Claimant did not satisfy the burden of proof in establishing her claim as provided in section 107 of the Evidence Act cap 80, Laws of Kenya. Counsel urges that the burden to prove that the Claimant assumed responsibilities and tasks of a position in higher grade squarely lay on her and she did not discharge the burden by adducing tangible evidence to the fact that the position she was acting in was in fact higher in grade than her own in strict compliance with the Article 17 of the HR Manual. That in her evidence the Claimant admitted that she did not know the job group of the person whose duties she had assumed.

Counsel for the Respondent also submitted that the payment of discretionary bonus is not mandatory and thus non-payment of the same does not amount to unfair labour practice. Furthermore, that the Claimant declined the discretionary bonus offered to her and the change of mind in the instant claim is clearly an afterthought.

As to the severance claim sought it is submitted that there is no provision in the law for the payment of severance pay save for cases of redundancy as was held in the case of **Civil Appeal No. 26 of 2015 Masoud Noorani vs General Tyre Sales Ltd.**

The Respondent's counsel submits that the claim for house allowance on the alleged additional responsibility is not payable as this was not additional responsibility on the substantive role the claimant held during her employment and if awarded it would amount to unjust enrichment. The respondent prays that the claim to be disallowed with costs.

Determination

I have carefully considered the pleadings, evidence on record and the submissions of the parties. I have also considered the authorities cited. There is no contention on the facts of the case. The only issue for determination is therefore if the claimant is entitled to her prayers for damages in the sum of Kshs.1,859,151.00 as prayed. The said sum is broken down as follows –

- (a) Full payment of additional responsibility allowances being 50% of basic pay for the period running March 2012 to March 2013 at the rate of Kshs.132,796.50 per month hence Kshs.1,593,558.00.
- (b) Discretionary allowance Kshs.265,593.00.
- (c) Accrued severance pay, service pay and house allowance.

(a) Responsibility Allowance

The claimant testified that she was entitled to responsibility allowance at the rate of 50% of her basic pay. Her justification is that after re-organisation of the respondent she took over additional duties of the General Manager Support Services and Human Resource Manager from March 2012 and performed those duties to the date she left employment on 31st March 2013.

The claimant admitted that responsibility allowance was not provided for in the terms of service applicable to her and that she sought payment of the same only because it had been applied to another employee by the name Harrison. The claimant attached an email sent to staff by the General Manager Rik Hazewinkel which reads as follows –

"Dear Paul, Hellen,

In relation to Harrison I got the impression that he was not given any additional compensation for his increased duties.

I checked this with Hellen and got confirmation that is true. Based on that I asked Hellen to see what we can do.

An acting allowance is not feasible since the manual does not provide for his job grade in that.

Currently he earns about 20,000 including housing allowance. Given his greater responsibility and his performance and commitment, I find it justified to increase this to 30,000 (inclusive housing allowance or monthly bias, adjusted in retrospect since he got responsibility). This increase is also justified given the responsibility he has to take in relation to the (temporary) close of the factory. (This put him at same level as Tom Electrician, Elvar store, Zadok mechanic.)

In short it is not acting allowance but revision of salary due to new responsibility.

Hellen can you please prepare the letter? I will sign thereafter.

Best, Rik”

[Emphasis added]

The email is self-explanatory. It relates to revision of salary in recognition of additional responsibility. The said Harrison was a fairly junior employee – the email states that the salary adjustment by 50% raised his salary to Kshs.30,000 per month inclusive of housing and put him at the same level as Tom the electrician, Elvar of stores and Zadok the mechanic. These are not people the claimant should be using as precedent for purposes of payment of responsibility allowance.

Besides the foregoing, I note from the record that the claimant wrote to the respondent seeking payment of that which was not included in her terminal benefits. She did not mention the responsibility allowance. She carried out the extra responsibilities for one year but there is no evidence that she ever raised the issue of responsibility allowance. Did she finally figure out that she should have been paid the same long after she left employment?

I find that the claimant has not proved that she is entitled to responsibility allowance and dismiss the claim for the same.

(b) Discretionary Bonus

The claimant prays for payment of discretionary allowance of Kshs.265,593. In her evidence she stated the allowance was offered to her and she rejected it. Among the documents filed by the claimant is the letter offering to pay her the discretionary bonus and her response to the same. The payment of the discretionary bonus was on conditions stated in the letter offering the same. In the claimant’s response she states as follows –

“Dear Andrew,

The letter to me dated 4th February on the above subject matter and signed by Alfred Geitenbeek and Rik Hazewinkel refers.

I appreciate the fact that the management and leadership of this organisation recognise the contribution that I as a person has made and will continue to make even as I leave the organisation by 31 March 2013. I am also very grateful for the bonus offer that was made to me on the 25th January by both Alfred and Rik. The bonus was to be one month basic pay to be paid with the retrenchment package.

However due to personal reasons, I wish to decline the offer.

One again I would like to than the management and directors for the confidence they bestowed upon me.

Regards

SIGNED

Phoebe Bondo

General FI, Building & Maintenance, Transport & Workshop, ICT

Cc Alfred Geitenbeek

Rik Hazewinkel”

[Emphasis added]

The claimant admitted as much in her testimony. She further admitted that the respondent made the offer to her alone and that she did not accept the offer. She further stated that the bonus was not an obligation but an offer made by the respondent in good faith.

Having rejected the bonus, the claimant is estopped from making a claim on the same. There is no legal or contractual obligation on the respondent to pay the bonus which it offered to the claimant in good faith but was rejected.

I thus dismiss the claim for discretionary allowance.

(c) Accrued severance pay, service pay and house allowance.

The claimant did not assign any figure or explain the basis upon which she made the claim. She did not make reference to this prayer in her testimony.

I find that the claim has not been proved and dismiss the same.

Conclusion

In conclusion I find that the claimant has failed to prove any of her prayers with the result that the entire claim is dismissed.

There shall be no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 19TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE