



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1868 OF 2016

FATUMA ABDIRAHMAN.....CLAIMANT

- VERSUS -

OXFARM NOVIB.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 09.09.2016 through Anne Babu & Company Advocates. She prayed for judgment against the respondent for:

- a) A declaration that the respondent unfairly and wrongfully terminated the claimant's employment.
- b) Compensation in accordance with section 49 of the Employment Act, 2007 in a sum of Kshs.3, 779, 376.00.
- c) Costs of the suit.
- d) Interest on the above until payment in full.

The memorandum of reply was filed on 14.10.2016 through Hamilton Harrison & Mathews Advocates. The respondent prayed that the suit be dismissed with costs.

There is no dispute that the respondent employed the claimant as a Programme Officer, Community Therapeutic Care with effect from 15.04.2009. The claimant served with a clean record until 01.07.2014 when she was employed on an indefinite contract of service – whereas other employees were on fixed term contracts. The claimant's case is that as a Humanitarian Programme Officer her docket was large ranging from working with one partner in one region of Somalia to working with 5 partners in 3 regions with 3 members of staff and significant funding of US\$ 10 Million.

The claimant was sent on compulsory leave by the letter dated 30.09.2015, the claimant was sent on compulsory leave for 7 days, extended to 90 days as per letter of 06.10.2015 and a further 22 days per letter of 26.01.2016. By the letter dated 03.02.2016 the claimant was asked to show cause why disciplinary action should not be taken against her and she replied by her letter email of 09.02.2016. A disciplinary hearing was held on 11.02.2016. The claimant was dismissed by the letter dated 03.03.2016. she appealed and the termination was upheld per letter dated 24.03.2016.

The **1st issue** for determination is whether due procedure was followed during the disciplinary process. The Court returns that the claimant was accorded a notice about the allegations and was given a disciplinary hearing as provided for in section 41 of the Employment Act, 2007 and the respondent's applicable human resource policies and procedures.

Nevertheless, while making that finding the Court has considered the truthful evidence by the claimant that under Article 3.7 (4) of the respondent's National Staff Terms and Conditions the claimant was entitled to be heard with assistance of a counsellor but that was breached. The Court finds that the omission has been shown to have occasioned manifest injustice and it was not excusable as the compulsory leave constituted the foundational basis of proceedings where it was desired to immediately dismiss an employee per Article 3.7 (1). Further the Court considers that the disciplinary procedure was not properly commenced as the claimant was not properly heard with the assistance of a counsellor as per Article 3.7 (4) and as per the prevailing policies. Thus the court returns that the termination was unfair to the extent that there was no due procedure at the commencement of the disciplinary proceedings in view of the breach of Article 3.7 (4).

The **2nd issue** for determination is whether the reasons for termination were valid. The letter of termination listed the reasons for termination as follows:

- 1) Failing and/or neglecting to ensure the additional due diligence checks were carried out on partner organisations, specifically Development Initiative Access Link and Somali Aid.
- 2) Failing and/or neglecting to ensure that Blue Sky Travel Agency Limited had an export health certificate required under Regulation 10 of the Food, Drugs and Chemical Substances (General) Regulations, 1978.
- 3) Failing and/or neglecting to keenly monitor and evaluate the implementation of the project carried out in partnership with DIAL.
- 4) Failing and/or neglecting to ensure that DIAL'S AUDIT, narrative and financial reports had been uploaded onto SAP before approving the transfer of MFS funds to DIAL on SAP system and Action Extent of Involvement.
- 5) Failing and/or neglecting to carry out your duties specifically to initiate and facilitate knowledge and information management with local partners.

The claimant denied all the allegations and made detailed explanations towards exculpation during the disciplinary hearing. The Court has perused the record of the disciplinary hearing and nowhere is the claimant's explanation found wanting or deficient. In particular there are no remarks or evidence to suggest that the claimant had failed to be fully exculpated. The matters and analysis the respondent might have taken into account as at the time of termination to find that the claimant was culpable remained unknown to the Court.

The respondent's witness (RW) was Marina Van Dixhoorn, the respondent's Country Relations Manager (Africa). She filed a detailed witness statement. However, during the cross-examination she testified as follows:

- a) The claimant had a clean record of service and she had no warnings.
- b) The preliminary risk report dated 03.04.2013 and filed for the respondent was not available when the claimant was interviewed during the disciplinary hearing of 09.02.2016. The record of the interview never referred to the report.
- c) The witness RW had not been involved in field projects and so she could not establish the claimant's deficiencies, if any, in her field assignments.
- d) The respondent had a logistics and transport team and matters falling in that department would not be the claimant's direct responsibility – so that allegations as levelled falling in that area would be unfair.
- e) Prior to commencement of the project the respondent knew issues surrounding DIAL.
- f) The security situation in Somalia was volatile at the time the projects in issue were being implemented so that some of the projects were monitored remotely without actual ground visits.
- g) The concerns the donors might have raised about implementation of the projects were not filed.
- h) The witness had no documentary evidence to show that the claimant uploaded funds prior to receiving the relevant documents as a basis of such uploading.

The Court has considered the record of the disciplinary hearing and the evidence by RW and returns that the respondent has failed to discharge its evidential burden to show that it had a valid reason to dismiss the claimant as at the time of the dismissal and as envisaged in sections 43(1) and 45 (2) (a) and (b) of the Employment Act, 2007.

To answer the **3rd issue** for determination, the Court returns that the claimant's termination was unfair for want of valid reasons and for want of due procedure as found earlier in this judgment.

The **4th issue** is whether the claimant is entitled to the remedies as prayed for. The claimant prays for 12 months' salaries in compensation under section 49 of the Act. It is clear that the claimant desired to continue in employment and having been employed on an indefinite contract of service due to her good performance. She served with dedication and shouldered heavy responsibilities in her expanded range of duties and partners she worked with in Somalia; and which at all material times was a volatile territory. Her record of service was clean but for the ensuing disciplinary proceedings which have been found to have been unfair. She had served for over 5 years and looking forward to continued and indefinite service with the respondent. The claimant worked in a team and it is not clear why she was targeted to answer the allegations including those falling outside the scope of her duties. It was submitted that she had been unable to secure alternative employment in view of the manner she had lost her job. The Court considers that the 12 months' pay as prayed for in compensation for unfair termination will meet the ends of justice as awarded under section 49 of the Act.

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

- a) The declaration that the respondent unfairly and wrongfully terminated the claimant's employment.
- b) The respondent to pay compensation in accordance with section 49 of the Employment Act, 2007 in the sum of **Kshs.3, 779, 376.00** by 01.09.2018 failing interest to run thereon at court rates from the date of this judgment till full payment.

c) The respondent to pay claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 6th July, 2018.

BYRAM ONGAYA

JUDGE