



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1924 OF 2013

BENARD JUMA KHAEMBA.....CLAIMANT

VERSUS

TARPO INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. Benard Juma Khaemba (Claimant) instituted legal proceedings against Tarpo Industries Ltd (Respondent) on 2 December 2013 and he stated the issue in dispute as *wrongful dismissal*. He also alleged breach of contract in regard to National Social Security Fund deductions.

2. In its Amended Statement of Response, the Respondent stated the Issues in Dispute as

1. Whether the Claimant's employment was unfairly terminated on 2 January 2013

2. Whether the Claimant is entitled to the reliefs outlined in the Statement of Claim filed on 2/12/2013.

3. The Cause was heard on 26 June 2018. The Claimant and the Respondent's Human Resources Coordinator testified.

4. The Claimant filed submissions on 26 July 2018 while the Respondent filed its submissions on 27 August 2018.

5. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as, *whether the Claimant was a casual employee, whether the Claimant resigned or was unfairly dismissed, whether there was breach of contract and appropriate remedies*.

Nature of employment

6. The Claimant's testimony was that he was employed by the Respondent in 2003 and produced a copy of *Provisional Member Statement of Account* from the National Social Security Fund to demonstrate the relationship.

7. The Respondent's witness on the other hand maintained that according to the employment records he had looked at, the Claimant was employed in 2010 as a *casual/on call contract*. He produced several *call contracts* to support the nature of the employment relationship and when it commenced.

8. The Court has looked at the *Provisional Member Statement of Account* from the National Social Security Fund. It shows that the Claimant was employed on 1 January 2004 and the name of the employer as Tarpo Industries Ltd.

9. The Statement also show that the first monthly contribution was remitted in November 2003.

10. The applicable law in 2003/2004 was that monthly contributions were remitted/paid on behalf of regular employees (not casual employees who were not registered by name and issued with individual accounts by the National Social Security Fund).

11. In the view of the Court, a *Provisional Statement of Account* from the National Social Security Fund can serve as secondary evidence to demonstrate an employment relationship where there is no formal contract.

12. Considering the Claimant's testimony and the *Provisional Statement of Account*, the Court finds that it is more probable that the contractual relationship herein commenced in 2003 or at the latest January 2004.

13. And because the Respondent was deducting and making monthly contributions in respect to the Claimant, he was not a casual employee

as defined in law.

Resignation or unfair termination of employment

14. Although the Respondent pleaded that the Claimant voluntarily resigned, no evidence in that respect was placed before the Court.

15. The Respondent's witness evidence rather was that the Claimant's contract expired on 30 September 2012 and that on humanitarian grounds, he was paid wages up to December 2012 (it is not usual that an employer would continue paying an employee wages on humanitarian grounds after expiry of contract).

16. The Claimant on his part testified that he was dismissed without notice when he sued for compensation arising from injuries he had sustained in the workplace (he sued the Respondent CMCC No. 7313 of 2012 and was awarded Kshs 350,000/-).

17. In his submissions, the Claimant attempted to rely on the principle of legitimate expectation.

18. However, the Claimant did not plead legitimate expectation but presented his case as one of outright unfair termination of employment. In the view of Court, this line of challenge was an afterthought.

19. On the question of prove of unfair termination, the Claimant did not disclose the name or position held by the Respondent's staff who told him his services were no longer required. It cannot be that he did not know the name or position.

20. Regrettably therefore, the Court finds that the Claimant did not discharge the low threshold burden imposed on him by section 47(5) of the Employment Act, 2007.

21. The Court declines to find that there was unfair termination of employment. And pay in lieu of notice and compensation are therefore not available to the Claimant.

Breach of contract/statute

22. The Claimant asserted that the Respondent deducted but did not remit Kshs 38,327/- towards the National Social Security Fund and he produced a copy of a Provisional Statement from the Fund.

23. The Provisional Statement has clearly indicated the months and years during which the contributions were not made and therefore the total amount is simply an arithmetical question.

24. The Court finds the Respondent was breach not only of contract but statute by not remitting the deductions and that the Claimant is entitled to a refund.

Service pay

25. The Claimant having been a contributor to the National Social Security Fund is not entitled to service pay by dint of section 35(5) of the Employment Act, 2007.

Conclusion and Orders

26. The Court finds and holds that the Claimant failed to establish that there was unfair termination of employment and is not entitled to remedies which would have accrued therefrom.

27. The Court however finds that the Claimant is entitled to and is awarded

(a) Unremitted NSSF deductions **Kshs 38,327/-**

28. Claimant to have costs at half scale.

Delivered, dated and signed in Nairobi on this 26th day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyambane instructed by Omas Omosa & Co. Advocates

For Respondent Mr. Makori instructed by Macharia Mwangi & Njeru Advocates

