



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1540 OF 2013**

**IRENE WAIRIMU GACHIE.....CLAIMANT**

**v**

**JETLAK FOODS LIMITED.....RESPONDENT**

**JUDGMENT**

1. Irene Wairimu Gachie (Claimant) was employed by Jetlak Foods Ltd (Respondent) on 1 April 2003 as a general worker.
2. On 1 November 2005, the Respondent sent the Claimant on compulsory leave and directed her to report back on 8 November 2005. No reasons for the suspension were disclosed in the letter.
3. On 25 September 2013 the Claimant (acting in person) instituted legal proceedings against the Respondent and she stated the Issues in Dispute as
  - a. Unfair and wrongful termination of employment without any account.
  - b. Failure by the Respondent to give or pay one month lieu of notice and terminal dues.
  - c. Payment of damages of opprobrium (public shame) and contempt in the eyes of people that my character is detestable besides other relief and costs.
4. The Respondent filed a *Statement of Response* on 27 January 2014 contending that the Claimant's employment was not unfairly terminated but that she deserted duty; that the cause was statute (time) barred; the Cause was an abuse of the court process and that there was no breach of contract/statute.
5. On 21 January 2015 the Claimant successfully moved the Court to amend the Memorandum of Claim.
6. The Respondent also filed an *Amended Statement of Response* on 27 February 2015.
7. The parties agreed to take up the preliminary issue on limitation and the Court ruled on the question on 18 June 2015 by directing that further inquiries be made.
8. As part of the inquiries, the Registrar of the Court wrote to the Ministry of Labour seeking an update on the trade dispute which had been reported by the Claimant's trade union in terms of the then existing legal framework. The Ministry did not respond to the letter from the Court.
9. On 27 October 2015, the Court directed that the Cause proceed to hearing without conclusively addressing the question of limitation/jurisdiction.
10. The Cause was heard on 19 July 2018. The Claimant testified and closed her case and the Respondent's case was closed without leading any evidence as the Court declined an attempt to secure an adjournment.
11. The Claimant filed her submissions on 30 July 2018 while the Respondent filed its submissions on 23 October 2018. The Court has considered the pleadings, evidence and submissions.

**Limitation**

12. The Court did not conclusively deal with the question of limitation.

13. Under the then prevailing legal framework, the Court could not take cognisance of a dispute unless after a reference by the Minister for Labour indicating that conciliation had failed.

14. The Court has seen documents on record which demonstrate that a trade dispute was reported by the *Kenya Union of Commercial Food & Allied Workers* and accepted by the Minister for Labour on 26 January 2007 but there was no resolution and that on 7 November 2007, the Union requested the Minister to refer the dispute to the Industrial Court. A reminder was sent on 26 February 2008 and on 24 August 2010.

15. The Court has also seen a letter to the Minister by the Registrar of the Court acting on the instructions of the Court seeking an update on the dispute. There was no response.

16. There being no responses to the letters to the Minister by the Union and the Registrar of the Court, and considering that the legal framework at the time the dispute arose empowered the Minister to refer dispute to the Court, this Court will find that the issue of limitation/jurisdiction does not arise as it is the Minister who failed to perform a statutory obligation imposed in his office.

17. It would cause the Claimant, a *lay person* acting for herself grave injustice if she were to be shut out on account of the Minister's inaction in light of the changed legal framework.

### **Unlawful termination of employment**

18. It is not in dispute that the Respondent sent the Claimant on *compulsory leave* through a letter dated 1 November 2005 and that the letter directed her to resume on 8 November 2005.

19. The point of divergence appear to be whether the Claimant reported back as instructed in the letter sending her on *compulsory leave*.

20. The Claimant gave sworn testimony and was cross examined. The Respondent did not lead any evidence.

21. The Claimant testified that she reported back on 8 November 2005 but was not allowed in on the instructions of the Managing Director, Anub Birdi, but when she insisted she wanted to know the reasons, the Managing Director came to the gate and told her she could *go anywhere* which led her to report to the Union and the Labour Office.

22. The testimony was not rebutted/controverted by leading of any inconsistent evidence (there was no evidence that the Claimant deserted) and the Court will therefore accept and find that there was wrongful/unlawful termination of employment.

23. For the wrongful termination of employment, the Court finds that the Claimant is entitled to 1 month pay in lieu of notice (Kshs 4,921/-) and compensation equivalent to 4 months wages (Kshs 19,648/-).

### **Breach of contract/Statute**

#### **Leave allowance**

24. The contract given to the Claimant did not provide for the payment of leave allowance.

#### **Unremitted National Hospital Insurance Fund contributions**

25. The Claimant contended that contributions towards the National Hospital Insurance Fund for 32 months totalling Kshs 2,560/- were deducted but not remitted.

26. The Respondent produced payroll returns to demonstrate the same were deducted and paid. The Claimant therefore should liaise with the Fund for reconciliation.

#### **Unremitted National Social Security Fund contributions**

27. The Claimant produced a *Provisional Member Statement of Account* showing that contributions for July, August, October 2003 and May 2004 were not remitted.

28. However, the Respondent produced payroll returns indicating that the contributions were remitted and the Claimant should follow up with the Fund to reconcile the accounts.

#### **Pension contributions**

29. The Claimant sought for Kshs 23,106/- on account of pension benefits.

30. In terms of the clause on staff pension scheme, the Claimant is entitled to 100% refund of her pension contributions and 50% of the Respondent's contributions.

31. The Respondent should direct the Claimant to the appropriate entity in charge of the pensions to enable her claim the refund if she has not been paid.

**Service pay**

32. The Claimant did not provide any contractual or legal basis for service pay.

**Conclusion and Orders**

33. The Court finds and holds that the termination of the Claimant's employment was unlawful and awards her

(a) Pay in lieu of notice Kshs 4,921/-

(b) Compensation Kshs 19,468/-

TOTAL **Kshs 24,605/-**

34. Respondent to issue certificate of service to the Claimant forthwith.

35. Claimant to have costs of Kshs 5,000/-

**Delivered, dated and signed in Nairobi on this 16<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

For Respondent Ms. Kanyiri, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Lindsey