



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1271 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 19th December, 2018)

EDDAH ANYANGO AKUMU.....CLAIMANT

VERSUS

AAR INSURANCE KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant is suing the Respondent for wrongful and unfair termination and seeks the following prayers:

1) A declaration that the Respondent jointly and severally unfairly terminated the employment services of Eddah Anyango Akumu at AAR Kenya Limited;

2) A declaration that in terminating the employment of Eddah Anyango Akumu, AAR Kenya Limited breached the fundamental right of Eddah Anyango Akumu to fair labour practices under Article 41 of the Constitution of Kenya;

3) An order directing that AAR Kenya Limited makes the following payments to Eddah Anyango Akumu:-

a. 21 years' salary being the remainder years of her employment to retirement age in terms of AAR Kenya Limited Human Resource Policy and Procedures Manual at KShs. 158,317.20 per month amounting to KShs. 39,895,934.40;

b. 1 months' salary in lieu of notice amounting to KShs. 158,317.20;

c. Salary arrears for the days worked in the month of June 2014 amounting to KShs. 94,990.32;

d. 17.98 accrued leave days at the time of termination amounting to the sum of KShs. 94,884.77;

e. Pension contribution accruing to Eddah Anyango Akumu as at the date of termination in the sum of KShs. 1,575,677.73;

f. 7.5% of the basic salary in the Respondent's pension contribution to the Claimant's pension fund for 21 years being the remainder years of her employment to retirement age in terms of AAR Kenya Limited Human Resource Policy and Procedures Manual amounting to KShs. 2,992,195.00;

4) An order directing the Respondent to issue the Claimant with a Certificate of Service that is not prejudicial to the Claimant;

5) Any other or further relief that this Honourable Court deems fit, just and appropriate to grant.

2. The Respondent denies the allegations set out in the Memorandum of Claim and prays that the Claimant's Claim be dismissed with costs to the Respondent.

The Claimant's case

3. On 1st December 2008, the Claimant was employed as a procurement officer on a permanent and pensionable basis with the AAR Kenya Limited. Her employment was confirmed upon the successful completion of the 3 months' probation period. The Claimant was tasked with the management of the Procurement Departments for the insurance and healthcare businesses of the company.

4. The termination of the Claimant's employment was to be upon issuance of 1 months' notice or 1 months' payment in lieu of notice by the company or issuance of the Claimant's resignation with 1 months' notice in writing. Upon termination, leave payment was to accrue at the rate of one and four fifths for each completed month of service in the year of termination.

5. The Claimant's contract terms were reviewed vide the letter of appointment dated 11th March 2013 wherein the Claimant was transferred to AAR Insurance Kenya Limited and her gross salary increased to Kshs. 137,000.00 per month. Her salary was reviewed on 24th April 2014 to Kshs. 158,317.20.

6. At the beginning of the year 2014, the Respondent set out performance targets for the Claimant which were to be performed by the stated deadlines. In the quarterly performance appraisal carried out on 20th May 2014, the Respondent appraised the Claimant and reported that the Claimant had met her yearly performance targets, most of which were due way beyond April 2014.

7. On 19th March 2014, the Respondent's General Manager summoned the Claimant to her office in the presence of the Human Resource Manager and handed the Claimant a pre-written Performance Improvement Agreement with a demand that the Claimant signs the Agreement without reservation. The Respondent had not warned the Claimant of any lapse in her performance. The Claimant did not agree with the contents of the agreement that sought to bring forward the Claimant's performance target timelines for the year 2014. The Agreement was prepared without interviewing or hearing the Claimant on her performance levels and also excluded the performance targets that the Claimant had performed. The Claimant signed the Performance Agreement but informed the Respondent's general manager vide an e-mail dated 19th March 2014 that she had done so under duress. The Respondent's general manager responded to the email terming the Claimant's allegations as being "***a cantankerous, belligerent, defeatist and insubordinate attitude.***"

8. The Claimant avers that she was ambushed with a warning letter on 20th March 2014 which enumerated adverse unsubstantiated allegations against the Claimant's performance at a time when performance targets for the year 2014 were not due. The Claimant was ambushed with a second warning letter on 6th May 2014, which reiterated the contents of the first warning letter.

9. In response to the allegations set out in the warning letters, the Claimant wrote a letter to the Managing Director on 4th June 2014, clarifying the misrepresentation and misdirection that the Respondent had taken in the allegations contained in the warning letters. The Claimant avers that since the Respondent had not notified her about the allegations set out in the warning letters, she had no opportunity to respond to them in advance and could only respond to them after the warning letters had been issued.

10. The Respondent terminated the Claimant's employment vide a letter dated 18th June 2014 on the ground that the Claimant had in-subordinated the office of the Respondent's General Manager and Human Resource Manager.

11. The Claimant avers that the termination of her employment breached the provisions of ***the Employment Act 2007*** as the Respondent failed to issue the Claimant with a notice to show cause and an opportunity to be heard. Further, the termination letter did not mention the quarterly performance appraisal conducted on 20th May 2014 in whose appraisal report indicated that the Claimant had "***met her yearly performance targets***" most of which "***were due way beyond April 2014.***"

12. The Claimant further avers that the termination was because of the Respondent's General Manager's personal vendetta against her and had nothing to do with the Claimant's professional performance. The Claimant avers that the Respondent breached its own Human Resource Policy and Procedure Manual in failing to accord the Claimant an opportunity to appeal against the decision to terminate her employment.

13. The Claimant avers that the Respondent has not paid the Claimant any terminal benefits due to her and has refused to clear the Claimant from the company.

The Respondent's Case

14. The Respondent avers that the Claimant's transfer to AAR Health (K) Limited was part of the reorganization of the internal corporate structure, giving rise to the Respondent as an insurance company separate from other businesses of AAR Holdings Limited, which involved the taking over of the employees' accrued benefits from AAR Health Care (K) Limited by the Respondent.

15. The Respondent avers that the Claimant has embellished her roles and performance as a procurement officer. The Restructuring was through teamwork and not solely through the Claimant's efforts as claimed. Further, the Claimant did not carry out any roles unexpected of her position and performance and during the material time, her performance was found wanting.

16. The salary review and bonuses in 2013 and 2014 by the Respondent were not related to the Claimant's performance and in particular, the salary review was related to the cost of living, equity within the job categories and the ability to sustain salaries as shown in the Claimant's increment letter dated 28th June 2013. Further, under clause 5.5 of the AAR Human Resource Policy and Procedures Manual, staff remuneration was based on the annual salary review, profit share and share option with the salary review being aimed at achieving appropriate job grades structure. In addition, the one-off bonus awarded to the Claimant by the letter of 25th April 2014 was a blanket bonus that was awarded to all staff on account of the company's performance and not individual performance.

17. The Respondent avers that the Claimant and her supervisor prepared a work plan where the Respondent set out the Claimant's targets. However, the targets were clear and measurable and the Claimant was supposed to meet and seek the Chief Finance Officer's approval as

well as other approvals timeously and whenever necessary. Further, staff performance appraisal and evaluation were to be done quarterly and annually and was an ongoing process.

18. The Claimant and her supervisor held a performance management discussion in relation to the Claimant's performance gaps leading to a Performance Improvement Agreement for the review done on 19th March 2014 and a further performance improvement agreement following a further review. The performance appraisal of 20th May 2014 noted in many instances that the Claimant had not satisfactorily achieved the targets that had a time frame of up to May 2014.

19. The Respondent avers that the Claimant signed the Agreement after the performance management discussion between the Claimant, her immediate supervisor and the General Manager. The Respondent avers that the Claimant had been warned of lapse in her performance prior to signing of the Agreement. Therefore, the Claimant's allegation that she signed the Agreement under duress is untrue and which issue was addressed extensively by the General Manager in the email of 20th March 2014.

20. After the performance review of 19th March 2014, the Respondent issued the Claimant with a first warning letter dated 20th March 2014 which set out the key areas lacking focus in the Claimant's docket, warned the Claimant of severe disciplinary action in the event of repetition and required the Claimant to make an improvement within a month of the said letter. The Respondent issued the Claimant with a similar second warning letter dated 6th May 2014 after a performance review on 29th April 2014. The Claimant acknowledged receipt of the warning letters and was therefore not ambushed. The Claimant responded on 4th June 2014 and offered an explanation but she never stated that she was not accorded a hearing. The Respondent further avers that the warning letters were drafted after several discussions with the Claimant of her poor performance.

21. The Respondent terminated the Claimant's employment vide the letter dated 18th June 2014 due to her negative attitude towards performance management and the insubordination of her superiors.

22. The Respondent avers that the Claimant's termination was fair and in accordance to **Article 41 (1) of the Constitution** and **Section 41 (2) of the Employment Act 2007**. Further, the Respondent avers that the Claimant has been issued with a certificate of service dated 1st August 2014.

The evidence

23. CW1, Eddah Anyango Akumu and the Claimant in this case, testified that the Respondent terminated her services on 19th June 2014 without any due process or substantiated grounds. She avers that the Respondent put her on a Performance Improvement Plan (PIP) on 19th March 2014 and 29th April 2014 without conducting any appraisal as provided for under clause 7.3 of the Respondent's Human Resource Manual.

24. The Claimant stated that on 20th March 2014, she was issued with her first warning letter as a consequence of a disciplinary process which she was not privy to. A second warning letter followed on 6th May 2014 without any disciplinary process.

25. Upon cross-examination, the Claimant conceded that the email dated 12th February 2014 from the Human Resource Business Partner, concerned drafting of score card and once she drafted it, her HOD was to approve and copy to her. The Claimant confirmed that the Human Resource Manual indicated that performance appraisal was an ongoing process and was done so as to review the weaknesses or strengths of employees. Further, where a superior identified a weakness, they were to assist an employee and recommend termination for that employee whose performance had not reached the required standard.

26. The Claimant revealed that after submitting her scorecard, she had several meetings with the HR Business Partner. She admitted that her Business Score Card (BSC) for 25th February 2014 was incomplete. She amended her BSC draft, which was then approved. By the end of the 1st quarter, her scorecard was evaluated and the gaps identified were lack of a clean plan for the procurement area, dismal performance in the Claimant's area on key deliverables and lack of follow through on key focus areas in the Claimant's department. She was to ensure compliance by the end of April 2014.

27. The Claimant testified that she had agreed to have a work plan progress report, however, the action plan was yet to be signed off. She admitted that she had not done her action plan. She also conceded to the fact that by the end of April 2014, she had not completed making supplier payments but counteracted that fact by stating that she had declared that process outstanding. She was not fired and her deadline was extended instead.

28. In the performance appraisal conducted on 20th May 2014, the Claimant's target performance was found to be below 2 which meant that her targets had partially been met. She however, revealed that some targets had not been due at that time. On the issue of training, the Claimant contended that she was to attend one in June of 2014. She also admitted to completing a task on 5th May 2014, whereas it was due on 30th April 2014.

29. She confirmed that she was paid for days worked in June, 1-month pay in lieu of notice, leave days and pension. She also stated that she never appealed the termination decision.

30. Upon re-examination, the claimant stated that no balanced score card was shown to her and that the issue of lack of a clear action plan was not in her balance scorecard. She asserted that she delivered on the issue of dismal performance on key deliverables. She stated that according to the HR manual she was supposed to be summoned and given 48 hours. She was not given any show cause letter or heard before her employment was terminated and as such the disciplinary procedures were not followed.

31. DW1, Peter Gakuya and the HR Business Partner of the Respondent, sought to clarify the difference between goal setting and preparation of BSC, arguing that goals came earlier. He testified that the evaluation of 19th March 2014 was not as per BSC because the Claimant had not finalized on her BSC. He made reiterations on what was averred in the Memorandum of Response.

32. DW1 stated that the Claimant had been paid 1-month salary in lieu of notice, salary for days worked in June 2014 and accrued leave of 17.94 days. He disclosed the fact that pension was managed by trustees and the Respondent had executed the form supplied by the Claimant to access pension funds and it was the duty of the Claimant to follow up on payment.

33. Upon cross-examination, DW1 stated that the goals for the organization for 2014 were first communicated to the Claimant in February 2014. The Claimant responded and availed a draft BSC which was submitted so that they could have a discussion. He conceded to the fact that he did not know when the Chief Executive Officer responded to the draft BSC. He further conceded that delay in the submission of BSC was not the Claimant's fault. He also admitted that there was a distinction between performance appraisal and performance improvement and went ahead to state their differences.

34. DW1 did not have the appraisal that happened before the performance improvement agreement, which orchestrated the issuance of the first warning letter. He did not have the minutes for the discussion concerning the review of 19th March 2014. He admitted to the fact that there was no show cause before the second warning letter was issued. Further, he stated that by April 2014 the Claimant had met some of her annual targets.

35. During re-examination, DW1 explained the importance of the BSC and its distinction from goals. He asserted that the even though the Claimant had achieved 101,210, she had not met her target. She was expected to have installed all signage by end of May, which had not been installed for 4 of the Respondent's 15 branches come that time. The Claimant failed to explain how she had achieved her CSR target.

36. DW1 also stated that section 14 of the Human Resource Manual was not followed in cases of poor performance and the right procedure to be followed in the case of performance management was that of clause 7.6.1, which clause has no provision for notice to show cause.

The Claimant's Submissions

37. The Claimant, in her written submissions dated 24th September 2018 and filed in court on 25th September 2018, submitted that the Respondent breached the contract of service between it and the Respondent (sic) by purporting to place the Claimant on a performance improvement plan without an appraisal and reviewing the Claimant's performance within 1 month instead of the 3-month review period. The Claimant relied on the case of **Jane Samba Mukala vs. Ol Tukai Lodge, Nairobi ELRC Cause No. 823 of 2010 [2013] eKLR** which held that performance improvement must be preceded by an appraisal.

38. The Claimant further submitted that the termination of the Claimant's employment on 18th June 2014 was patently unlawful and unfair contrary to **Section 45 of the Employment Act 2007**. The Claimant relied on **Section 41 (1) of the Employment Act (Cap 226)** (sic), **Jane Samba Mukala vs. Ol Tukai Lodge Limited [Supra]** and **Everlyn Lynn Kagendo vs. Statpack Industries Limited, Nairobi HCCC No. 2081 of 2011 [2013] eKLR** where it was held that when the employer is terminating an employee's services, they must state the reasons for termination as per **the Employment Act 2007**. Further, the Claimant relied on the case of **John Wafula Simiyu vs. the Star Publications Limited Kericho ELRCC No. 240 of 2015 [2016] eKLR** and **Everlyn Lynn Kagendo vs. Statpack Industries Limited [Supra]** where the Court held that performance monitoring proceedings are not disciplinary proceedings thus cannot be used as a substitute to disciplinary proceedings.

39. The Claimant submitted that as at 20th May 2014, she met all her performance targets that were due and was firmly on course to meeting her performance targets that were not yet due by the stipulated timelines. As such, there was no valid reason to terminate the Claimant's employment on grounds of non-performance. Further, that it is grossly frivolous for the Respondent to contend that the Claimant in-subordinated the General Manager when she expressed the Respondent's non-compliance with the HR Manual.

40. The Claimant avers that she received payments in respect of prayers 43 (iii) (b) to (f) of the Statement of Claim and a Certificate of Service. The Claimant therefore seeks compensation for unlawful and unfair termination of employment in terms of prayer 43 (iii) (a) of the Statement of Claim, costs of the suit and interest on compensation from the date of judgment until payment in full.

The Respondent's Submissions

41. The Respondent in its submissions dated 1st October 2018 and filed in court on even date, submitted that there were valid and overwhelming reasons for terminating the employment of the Claimant. The Claimant's performance was below the minimum acceptable standard of performance, and she was also liable for insubordination. The Respondent relied on section **45 of the Employment Act 2007** which sets out what constitutes unfair employment and **Section 41 of the Act** which vests the burden of proving there were valid reasons for termination on the employer.

42. The Respondent relied on **section 41 of the Employment Act 2007** which sets out the procedure to be followed prior to a termination, to submit that the Claimant has not established a case for unlawful termination. The Respondent submitted that the provisions of its Human Resource Manual were not in conflict with the provisions of **Section 41 of the Act** as it allowed for the provisions of **Section 41** to be implemented in a manner that was fair to the Claimant by allowing for a transparent manner of communicating the reasons for termination should the Claimant fail to improve. In addition to that, the Respondent communicated the shortfalls in the Claimant's performance in clear and unambiguous terms and in a language she understood. The Claimant was aware of her right to have another employee of her choice present during the explanation. Lastly, the Respondent heard and considered the representations of the Claimant in response to the grounds of poor performance and insubordination.

43. The Respondent submitted that the Claimant had not proved unlawful termination to warrant payment of damages and urged the court to be guided by the provisions of **Section 49 (b) (k) of the Employment Act 2007** and to find that the Claimant caused her own termination.

44. In conclusion, the Respondent submitted that the Claimant's case was incompetent because the reliefs sought are not capable of being granted against the Respondent.

45. I have examined all evidence of the parties and submissions filed. I set the issues for determination as follows:-

1. Whether there were valid reasons to warrant the claimant's termination.

2. Whether the Claimant was given an opportunity to be heard before her termination.

3. Whether the Claimant is entitled to the prayers sought.

46. The Claimant has contended that she was terminated unlawfully and unfairly for no apparent reasons but due to personal differences, she had with her Managing Director.

47. The Claimant was terminated vide a letter dated 18/6/2014. The letter indicated that her services were terminated due to negative attitude towards performance management and continuous insubordination to the General Manager's office.

48. The letter indicated that there had been various discussions and correspondence on the same but that her negative attitude towards performance management was not aligned to the company's objective of having a performance driven culture.

49. From this letter, it appears that the Claimant had performance issues and indeed there were some discussions about the same. The starting point of the Performance Indicators was February 2014 when goals of the organization were 1st communicated to the Claimant as per RW1's evidence. The Claimant indeed responded with her draft BSC. RW1 conceded that he did not know when the Chief Executive Officer responded to the draft BSC. He further conceded that the delay in the submissions of BSC was not the Claimant's fault.

50. The Respondent also indicated that they had no approval that happened before the performance improvement agreement, which orchestrated the issuance of the first warning letter nor the minutes for discussions concerning the review of 19th March 2014.

51. DW1 however asserted that the Claimant had not met her targets as expected.

52. The Claimant had explained that no BSC was shown to her and she averred that she delivered on the issue of dismal performance on key deliverables. It is apparent that the Claimant did not perform as expected.

53. She was however not terminated due to poor performance but due to negative attitude to performance. It is not clear what the parameters of this "poor attitude" were as the Respondents did not set out the facts that constituted the same.

54. Other than the said, negative attitude to performance, the Respondent also indicated that the Claimant had insubordinated the General Manager. On this, the act of insubordination was also not explained to Court for the court to appraise itself of what acts or omissions were committed by the Claimant for the issue of insubordination to be understood.

55. It is my understanding that the Respondents have a duty to show they had valid reasons that led them to terminate the services of the Claimant. This is as provided for under Section 43 of Employment Act 2007 which states as follows:-

"(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

56. The Respondent however failed to prove to this Court that they had valid reasons to warrant termination of the Claimant.

57. On the issue of due process, the Respondents own Human Resource **Manual provides as follows:-**

"Article 7.6 Performance Improvement Intervention

AAR requires a minimum standard of performance. If an employee does not meet this standard, AAR will take appropriate corrective action. This includes guidance, on the job training, coaching and mentoring.

Employees requiring performance improvement will be consulted and provided the opportunity to reach the standards expected of them".

58. The Respondent aver that the Claimant was placed on Performance Improvement on 19.3.2014. Under the Human Resource Manual

Article 9.6.1(a) ***“The employee will be provided with a Performance Improvement Plan for a period of three months upon which the performance will be reviewed. The Performance Improvement Plan should include clear milestones and deliverables”.***

59. The Claimant was put on Performance Improvement Plan (PIA) on 19.3.2014, and on 20.3.2014. She was issued with her 1st warning letter and a 2nd one on 6/5/2014 and terminated on 18/6/2014. The timelines for the Claimant on Performance Improvement Plan (PIA) as provided for in the Respondent Human Resource Manual of 3 months was definitely ignored in the whole process. Even the help that the Claimant was to be given was not given.

60. I find that the Respondents totally ignored their own Human Resource Manual and terminated the claimant even before the 3 months period of improvement was over.

61. Other than flouting their own internal disciplinary processes there is no indication that the claimant was subjected to a disciplinary hearing process as envisaged under Section 41 of Employment Act 2007.

62. Section 41 of Employment 2007 states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

63. There is no letter inviting the Claimant to any disciplinary hearing. There are no minutes of any disciplinary process if any – it is therefore my finding that the Claimant was condemned unheard and therefore was not given any fair disciplinary process before the termination.

64. Section 45 of Employment Act 2007 states as follows:-

(2) ***“A termination of employment by an employer is unfair if the employer fails to prove:***

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

65. Given that the Respondent did not have valid reasons to terminate the Claimant and also did not accord her due process, I find the termination of the Claimant unfair and unjustified.

66. In terms of remedies, I find that Claimant was paid her terminal dues as admitted. I will therefore award her:-

1. 12 months’ salary as compensation for unfair termination = 12 x 158,317= 1,899,804

2. The other prayers are not tenable.

3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **19th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Lakicha for Respondent – Present

No appearance for Claimant