



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 402 OF 2014

LILIAN J. KIRUI

CLAIMANT

v

LAIKIPIA UNIVERSITY

FORMERLY EGERTON UNIVERSIT RESPONDENT

JUDGMENT

1. Lilian J. Kirui (Claimant) sued Laikipia University (formerly Egerton University) (Respondent) on 5 September 2014 and she stated the issues in dispute as

1. Unfair termination

2. Two punishment for the same offence, contrary to the provisions of the law and natural justice

3. Discrimination.

2. The Respondent filed a Memorandum of Response on 15 October 2014 contending that the Claimant was on a contract which was not renewed on expiry, and therefore there was no unfair termination of employment.

3. The Respondent also counterclaimed against the Claimant. (It also filed a Supplementary List of Documents on 18 January 2016).

4. The Claimant filed a Reply to the Response on 17 November 2014.

5. On 16 October 2014, the Court referred the parties to go for conciliation before the County Labour Office. The order appeared unacceptable to the Claimant and she applied for a review.

6. On 21 November 2014, the Court vacated the order referring the dispute to conciliation.

7. The Cause was heard on 19 January 2016, 23 March 2016, 25 July 2016, 6 October 2016 and 17 November 2016 after which the Claimant filed her written submissions on 28 November 2016. The Respondent's submissions were filed on 16 January 2017.

8. The Court has given due consideration to the pleadings (needlessly verbose and vague, and the Memorandum of Claim run into some 15 or so pages), the evidence and submissions and identified the issues for determination as, *the nature of the employment relationship, whether there was unfair termination of employment, whether there was double punishment, whether the Claimant was*

discriminated against, whether the collective bargaining agreement between Respondent and KUDHEIHA applied to the Claimant and appropriate remedies including entitlements accruing out of the employment relationship.

Nature of contract

9. Employment records produced in Court show that the Claimant was engaged as early as October 2003 by Egerton University but deployed to Laikipia Campus as a *casual employee* and that this relationship of *casual employment* continued until 2012 when she was granted a 3 month fixed term contract.

10. The Claimant testified that she served the Respondent continuously and this testimony was not successfully rebutted by the Respondent.

11. Considering the testimony and the definition of casual employee in section 2 of the Employment Act, 2007 which came into effect on 2 June 2008, the Court can conclude that at least from 2008, the Claimant was not a casual employee in the legal sense, but was pursuant to the deeming provisions of section 37 of the Act, an employee on term contract, that is paid by the month until she was granted a fixed term contract.

12. In this respect, the Claimant's assertions that she was a *permanent* employee has no evidential or legal foundation if by permanent she meant a contract of indefinite duration or with a known retirement age.

Unfair termination of contract

13. The Claimant was granted a 3 month fixed term contract through a letter dated 26 June 2013 effective 1 July 2012. When the contract expired, it was renewed through a letter dated 27 September 2012 for a duration of 1 year effective 1 October 2012. The terms and conditions of service remained the same.

14. When this renewed contract expired, it was further renewed through a letter dated 3 October 2013 for a duration of 2 months effective 1 October 2013.

15. By dint of its term, this 2 month contract was to expire on or around 30 November 2013 and on 5 December 2013, the Respondent wrote to the Claimant informing her that her contract would not be renewed.

16. The decision not to renew the contract by the Respondent was precipitated by issues of discipline which are not in dispute and the Court therefore will not go into them in any detail.

17. Briefly, it was alleged that the Claimant who was an employee of the Respondent and at the same time was a student had been involved in examination malpractices for which she was taken through a disciplinary process and got *expelled as a student*. The decision was conveyed through a letter dated 4 October 2013.

18. At around the same time, the Respondent decided to take disciplinary action against the Claimant as an *employee*, and she was served with a show cause letter dated 5 November 2013.

19. The Claimant responded to the show cause through a letter dated 11 November 2013 after which she was invited to attend an oral disciplinary hearing scheduled for 5 December 2013.

20. The Staff Disciplinary Committee met and this was followed with the letter the same day notifying the Claimant of the non-renewal of her contract.

21. The contracts produced in Court are rather brief as to the *terms and conditions of employment* but more relevant to the question of unfair termination of employment is that there was no express provision as to renewal of the contract(s). Equally there was no express provision as to the giving of reasons for failure to renew.

22. It cannot also be disputed that the contract in question had lapsed. It had expired by effluxion of time and in my view, the fact that the Claimant was facing a disciplinary process at around the same time is not material in the circumstances presented here.

23. This is so because the Respondent as an employer reserved the right to bring the relationship to an end before its due expiry date of 30 November 2013, where such action was merited or justified like in any other contract, provided that due process as envisaged in section 41 of the Employment Act, 2007 or any agreed contractual terms were complied with.

24. In the instant case, that process was commenced by the Respondent but it appears to have been overtaken by events.

Although the parties did not address the question, it is debatable in the view of the Court whether an unfair termination of employment may be implied where an employer decides to give reasons for not renewing a fixed term contract. But because of the way this case was pleaded and prosecuted, that debate must await an appropriate case.

26. The Court would therefore conclude that there was no unfair termination of employment.

Double punishment

27. The Claimant was both *an employee* and *a student*. As a teaching institution, the Respondent reserved the right to take disciplinary action against those registered as students. Under that umbrella, it cannot be said that the Respondent was acting as an employer.

28. As an employer, the Respondent was also clothed with the inherent right to take disciplinary action against the Claimant, as *an employee*.

29. The Court would therefore find that there was no double punishment as contended by the Claimant.

Discrimination

30. The Claimant also advanced a case of discrimination on the grounds that the Respondent engaged other *casual employees* on *permanent* terms despite her long duration of service. She further contended that there was discrimination in regard to remuneration.

31. However, the Claimant did not disclose the details or names of these other employees who had been given preferential treatment or disclose the wage differentials.

32. The Court therefore finds this cause of action based on discrimination as not proved.

Whether Collective Bargaining Agreement applied to Claimant

33. The Respondent and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) signed a collective bargaining agreement on 20 June 2012. The agreement covered the period 1 July 2010 to 30 June 2012.

34. In terms of section 59(1)(b) and (3) of the Labour Relations Act, a *collective bargaining agreement* applies to all unionisable employees employed by the employer whether members of the Union or not.

35. It was incumbent upon the Claimant to prove that she was a unionisable employee but she did not so prove. However, given the nature of her duties and designation (Copy Typist), the Court can assume that she was unionisable.

36. But that is not all, the Claimant and indeed the Respondent did not demonstrate that the collective bargaining agreement had been registered to be legally enforceable. In any case, the Claimant testified

that she joined the Union in 2013 after the lapse of the agreement.

37. The Court therefore in this case would not be able to determine whether the Claimant can maintain a successful cause of action anchored on the collective bargaining agreement.

Counterclaim

38. The Respondent counterclaimed against the Claimant but the said counterclaim was so poorly drafted that it is not clear what the elements of the counterclaim was.

39. The Respondent's witness did also not lay any evidential foundation to the counterclaim and it is dismissed.

Appropriate remedies/Entitlements

Pay in lieu of Notice

40. Pay in lieu of notice cannot be payable with the conclusion that there was no unfair termination of employment. Essentially, the contract expired and there was no provision to notify the Claimant in advance of the expiry.

Gratuity

41. No evidential, contractual or legal foundation for gratuity was disclosed.

Salary arrears/underpayments

42. This head of claim was predicated on the remuneration rates outlined in the collective bargaining agreement.

43. In view of the observations in paragraphs 33 to 37 above, this head of relief is declined.

Annual leave

44. No evidential, contractual or legal foundation was demonstrated in respect of this relief and it is declined.

Maternity leave

45. The Claimant sought Kshs 57,042/- for the period she was on maternity leave in 2007.

46. Apart from the testimony, the Claimant did not produce any documentation to show she went on maternity leave despite saying she had documents.

47. The Respondent's witness denied that it was aware informed by the Claimant of the maternity.

48. Weighing the two versions and without any documentation/records, the Court would decline to make any award under this head.

Compensation

49. Because of the finding that there was no unfair termination of employment, compensation does not arise.

Conclusion and Orders

50. Arising from the above, the Court orders that the Cause herein be dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 27th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant	Mrs. Ndeda instructed by Ndeda & Associates
For Respondent	Mr. Mwangi instructed by Mwangi Mukira & Co. Advocates
Court Assistant	Nixon/Daisy