



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

AT NAIROBI

CAUSE NO. 862 OF 2014

GRACE OTIENO.....CLAIMANT

VERSUS

SALARIES AND REMUNERATION COMMISSION.....RESPONDENT

JUDGMENT

1. The Claimant averred that she was appointed the acting Secretary of the respondent on 18th January, 2012 and later on 23rd March 2012 appointed as substantive secretary of the Respondent. According to her, prior to her appointment she had exemplary record of service in public service which earned her several recognitions.

2. On 7th November 2013 the Respondent sent her a letter accusing her of casual and unprofessional attitude in handling commission's issues in relation to the preparation and presentation of a particular report which was to be presented to our senate by 4th November 2013. She responded to the issues raised by the respondent via her letter dated 8th November, 203 in which she highlighted the challenges she faced in preparing the report whose formatting and contents kept changing on direction of the Commissioners.

3. Further the Claimant received yet another letter dated 2nd November 2013 accusing her of failure to effectively execute the Commissions' functions and directing her to address the issues within a month. There was no feedback thereafter after she responded on the issues raised. The respondent however summarily and unfairly terminated her services through letter dated 19th March 2014 and was asked to immediately leave office. The Claimant averred that the decision to dismiss her was based with haste and without any prior notice and or justification and was based on malice. As a result of these actions the Claimant averred that she suffered damage to her professional career and standing.

4. The respondent on their part pleaded that the respondent had on various occasions expressed dissatisfaction with the performance of the Claimant and brought this to her attention both verbally and in writing. The respondent conceded writing to the Claimant as averred and that the Claimant responded to the issues raised but according to the respondent, the responses were found unsatisfactorily. According to the respondent, the termination of the Claimant's service was procedural and was in accordance with section 17(1) (C) of the SRC Act.

6. In her oral testimony in court, the Claimant reiterated most of the averments in her pleading and added that at the time of the trial she was working as Principal Administrative Secretary at Public Service Commission. It was further evidence that she worked for the respondent from January, 2012 to March

2014. This was a period of two years and three months. According to her she was on secondment from PSC and that the respondent was aware of this fact.

7. Regarding the report to the Senate, it was her evidence that she prepared the report and that the report was for the commissioner's use. The Chair was to use it to answer questions that could be passed by the Senate. Concerning her removal it was her evidence that section 17 of the SRC Act required that the Secretary be given an opportunity to defend herself. According to her she was never called to defend herself. In cross-examination she stated that she did not tell the respondent about the secondment but assumed they were aware.

7. She further testified that there was no provision for notice of termination in her contract but this was found in Public Service Code of Regulation. Concerning leave, it was her evidence that she had leave balance of thirty eight days by the time of her termination and on gratuity she stated that this was payable when one was on a fixed term contract. The Claimant further stated in re-examination that she initiated her secondment to protect her pension.

8. The respondent's witness Mr. Kubai informed the Court that during the interviews the Claimant emerged third overall but was hired due to her experience. Her role was to guide the Commissioners since they were part-time. According to Mr. Kubai, with time the respondent discovered that things were not going on right. The respondent had difficulty meeting its mandate. It was his evidence that the Claimant was to be a full time employee of the respondent and that the respondent never knew she was on secondment. The secondment according to Mr. Kubai, gave the Claimant divided loyalty.

9. In cross-examination, Mr Kubai stated that he knew the Claimant from Ministry of Labour. He knew her as being in mainstream civil service. It was further his evidence that the Claimant had been seconded to the respondent but upon appointment the respondent did not expect her to continue with the secondment. He however admitted that the respondent never wrote to the Claimant to stop her secondment status.

10. Regarding gratuity, it was his evidence that the Claimant had a five year contract and would have been entitled to gratuity upon expiry of her contract. Regarding termination of the Claimant's services, Mr. Kubai stated that a meeting was called to discuss the Claimant's performance however she was not called to the meeting but a letter was written to her asking her to respond to the allegations against her which she did. It was further Mr. Kubai's evidence that the termination letter did not disclose the nature of the dissatisfaction and incompetence of the Claimant. The witness further stated that the Claimant had not been paid her terminal dues because the matter was still pending in court.

11. In her closing submissions Ms Guserwa for the Claimant submitted in essence that the Claimant was appointed Acting Secretary of the respondent and later Substantive Secretary. Prior to working for the respondent the Claimant had an exemplary record of service in Public Service. On 7th November, 2013 the respondent sent her a letter accusing her of having a casual and unprofessional attitude in handling the Commission more particularly the presentation to the Senate.

12. The Claimant responded to these accusations yet the respondent through another letter on the same date accused the Claimant of failing to effectively execute the Commission's functions and sought her to address the issues raised within a month. No feedback was given to the Claimant on her response. She was however summarily dismissed by a letter dated 19th March, 2014. According to counsel, the decision was laced with haste, without prior notice or justification but based on malice. The Claimant as a consequence suffered damage to her professional career and standing.

13. The respondent on its part submitted that the procedure adopted by the respondent in the disciplinary process was statutory ordained. The termination was therefore not unfair and unlawful as alleged. In this regard Counsel relied on the case of **JSC v. Gladys Boss Shollei & Anor 2014 Eklr**. According to Mr. Rono the letters issued to the Claimant gave the Claimant one month period within which to respond to the accusations landed against her. According to counsel, this was sufficient time. Further the Claimant responded to the allegations and based on the responses the respondent made a decision to terminate the

Claimant's services. Mr. Rono further submitted that the accusations against the Claimant were serious and the response by the Claimant was in the view of the respondent insufficient.

14. Section 17 of the SRC Act provides for reasons and procedure for removal of the Commissions Secretary from office. It provides as follows:

(1) The secretary may be removed from office by the Commission, in accordance with the terms and conditions of service, for—

(a) inability to perform the functions of the office arising out of physical or mental incapacity;

(b) gross misconduct or misbehaviour;

(c) incompetence or negligence of duty; or

(d) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given an opportunity to defend himself or herself against any allegations against him or her.

15. The respondent in its letter dated 7th November 2013 called upon the Claimant to answer to a raft of accusations against her. The accusation revolved round the Claimant's performance. She elaborately responded to the accusations through the letter dated 8th November, 2013 and 5th December, 2015. By a letter dated 19th March, 2014 the respondent terminated the Claimant's services and informed the Claimant therein that her responses were found unsatisfactory and that the respondent remained dissatisfied by the Claimant's performance.

16. Section 17(2) of the SRC Act cited earlier in the judgment requires that before the Secretary is removed from office he or she must be given an opportunity to so defend themselves against any allegations against them. The Act does not make provision on the format the opportunity to defend should take. That is to say, there is no provisions as to whether the defence should be done at oral hearsay or in writing as the case here.

17. The Claimant responded to the accusations against her without demanding an oral hearing. She must have been comfortable with that process. Where parties adopt without any pressure or undue influence, a particular mode of interaction, it must be presumed that they were comfortable interacting that way. One of them cannot therefore after the conclusion of this process turn round and question the mode of interaction. My understanding of opportunity to defend as stipulated under section 17(2) of the SRC Act does not preclude opportunity to respond in writing the accusations levied against the Secretary. Opportunity to be heard means giving an employee accused of any wrong doing a chance to respond to the accusations and this can be done in writing or orally.

18. The Court has reviewed and considered the correspondence exchanged between the Claimant and the Respondent and is persuaded that the Claimant was given an opportunity to defend herself and did so in writing. Her claim of not being given an opportunity to be heard is therefore rejected. The respondent terminated Claimant's services on grounds of dissatisfaction with performance and unprofessional and casual attitude towards her work. The respondent further accused the Claimant of withholding information about her secondment to the Commission from Public Service Commission.

19. By a letter dated 7th November, 2013 the respondent cautioned the Claimant to take the core functions of the Commission seriously, failure to which the Commission would take further action. By another letter of the same day the respondent wrote to the Claimant calling upon her to address the issues raised in the letter within a period of one month and give a written report to the respondent within one month that

is to say by 8th December 2013.

20. The second letter appears to have been an elaboration of the 1st letter. The sixteen issues raised in it could easily be collapsed to accusation of unprofessional and casual attitude in handling of the Commission's work which was the subject matter of the first letter. The first letter cautioned the Claimant to take her work seriously while the second letter elaborated on the accusations against the Claimant and called upon her to address the issues raised in the letter within a period of one month. This second letter neither cautioned nor informed the Claimant that failure to respond or satisfactorily respond to the issues raised, her services could be terminated. She was merely asked to address the issues and make a report within a month.

21. Section 41(1) of the Employment Act obliges an employer before terminating an employee's contract on grounds of misconduct, poor performance or physical incapacity to explain to the employee the reason for which the employer is considering termination. That is to say, the letter to show cause must be unequivocal about the employer's intention to terminate such employee's contract and the reasons therefore. No such intention was made in the two letters issued to the Claimant dated 7th November, 2013.

22. In the circumstances the Court finds that the respondent acted contrary to section 41(1) of the Employment Act with the consequence that the termination of the Claimant's services was carried out through unfair procedure.

23. Concerning the Claimant's claim for the month's salary in lieu of notice of termination, the Claimant did not produce any contract that showed she was entitled to three months' notice or pay in lieu thereof. The Court will therefore have recourse to section 35(1)(c) and award the Claimant one month's pay in lieu of notice. The same case applies to gratuity. The Court did not have the benefit of seeing any contract where it was provided that the Claimant was entitled to gratuity. The Claimant's letter of appointment makes reference to an attached schedule which purportedly detailed her remuneration package yet no such schedule was filed with her pleadings. This claim is therefore disallowed for lack of proof.

24. Regarding claim for salary for the remainder of the period the Claimant would have otherwise served but for termination, the court would disallow this claim for two reasons. First, the Claimant had no guarantee that she would work till the end of her contract. The contract had provision for termination and could be invoked by either party as has happened here. Second, the Claimant returned to Public Service Commission from where she was seconded and still working by the time this matter came for hearing.

25. In conclusion the Court enters judgment against the respondent as follows:

	Kshs.
(a) One month's salary in lieu of notice	715,600
(b) 38 days of leave	906,414
(c) Six months salary as compensation for unfair termination of services.	<u>4,293,600</u>
Total	<u>5,099,841</u>
(d) Costs of the suits	
(e) The above shall be subject to taxes and statutory deductions.	

It is so ordered.

Dated at Nairobi this 17th day of February, 2017

Abuodha J. N.

Judge

Delivered this 17th day of February, 2017

In the presence of:-

Ashubwe for Guserwa for the Claimant and

Mutai for Rono for the Respondent.

Abuodha J. N.

Judge