



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1739 OF 2014

BERNARD BUSHURU LUTUBULA CLAIMANT

VERSUS

METAL CROWN LIMITED RESPONDENT

JUDGEMENT

Issue in dispute – unlawful and wrongful termination of employment.

1. On 10th September, 2008 the Claimant was employed by the Respondent as a Cyclone operator at a monthly salary of Kshs.12, 128.00 which was increased to Kshs.67, 704.00. The Claimant was diligent in his duties until he was falsely accused of running a machine with main shutter door open, an allegation which the Claimant denied as this was not true. As a result, the Claimant was instantly dismissed from his employment. He reported the matter to the labour officer but the Respondent ignored the summons,

2. The claim is that the Respondent acted in violation of the claimant's rights at work and failed to pay terminal dues owing. In computation of the claimant's terminal dues, some dues were withheld on the grounds that the Respondent had guaranteed the Claimant a loan which was in contravention of section 19 of the Employment Act.

3. The Claimant was terminated without being accorded justice as he was never warned for poor performance or given an opportunity to know or correct any noted mistakes at work as there were none and as such, the termination was unfair and unprocedural. Section 41 of the Employment Act was not followed and the resulting termination was unfair. There was no notice or written reasons given before termination.

4. The Claimant is seeking;

12 months' salary in lieu of notice at kshs.812,4448.00;

12 months compensation for unlawful termination;

5 years severance pay Kshs.169,260.00;

Salary arrears from 24th august, 2013 to date;

Accumulated leave;

Full settlement of Barclays Bank loan at kshs.409,738.00

Interests due on the bank loan;

Damages for wrongful termination; and

Costs and interests.

5. In evidence to support his case, the Claimant testified that on 24th July, 2013 while at work, he was maintaining a machine and had with him a team of 18 employees for the purposes. While at work, the director, Mr Rajiv Shah came and demanded to know why the door had been left open and when the Claimant sought to give an explanation that there were on-going repairs and that the general manager had the door keys which he used to open the door for the repairs to be undertaken, he started shouting at the Claimant and sent him out. Despite efforts to give an explanation, the director would not listen and instantly terminated the claimant. That the Claimant was never paid for time worked and thus reiterated his claims as set out in the Memorandum of Claim.

Defence

6. In response, the Respondent denies the entire claim set out by the Claimant and that there was no wrongful termination of the claimant. The Respondent also denies the allegations that owing dues to the Claimant were calculated and held to pay for a loan that the Respondent had guaranteed him.

7. Upon termination, the Claimant was paid for days worked; outstanding leave days; 70 days in lieu of notice which was far and above the 30 days provided for under the Employment Act; service pay was paid at the rate of 25 days for every year worked; and the Claimant signed a Discharge Certificate signifying his acceptance of the terms of termination.

8. The Claimant had been warned about his wanting work performance but failed to improve forcing the Respondent to terminate his employment. The termination was therefore justified.

9. The Respondent did not call any evidence. The hearing date was taken by consent but the Respondent opted not to attend.

Determination

10. Termination letter issued to the Claimant and dated 24th August, 2013 is on the reasons that on equal date, 24th August, 2013 the Claimant was found to be *negligence of duty whereby you were found running crowns in line 4 with the main shutter door open leading to compromise of quality of the final product*. The Respondent also reasoned that the conduct of the Claimant was against instructions issued to him by management and all staff working in the Fabrication and Printing departments.

11. The Claimant was therefore terminated from his employment due to alleged negligence of duty and alleged failure to follow instructions issued to him. The alleged misconduct is stated to have arisen on 24th August, 2013 and on the same date, the Claimant was terminated from his employment with the respondent.

12. The instances where an employer is allowed to summarily terminate an employee are set out under section 44 of the Employment Act. Under section 44(4)(c) the law provides;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

13. However, even where such a right exists, the employer must ensure both procedural and substantive

justice is secured for the employee to be taken through the mandatory provisions of section 41(2) of the Employment Act and that the employee is given notice and reasons for the termination of his employment. Section 41 requires that;

(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.

14. Where the Claimant is said to have failed to undertake his duties as directed and that he was negligent in the performance of his duties, on such findings, the law required that the Respondent before terminating him to *hear and consider any representations which the employee may on the grounds of misconduct or poor performance* have. The claimant's case was that he was required to make repairs to the door of the machine and the general manager of the Respondent who held the key opened the door for this purpose. When Mr Shah found him doing the repairs he started quarrelling him and could not take any explanation that the Claimant tried to make. That the Claimant was not given a chance to explain his circumstance. He was instantly dismissed without hearing or being given the reasons or notice.

15. I take the evidence of the Claimant as credible and believable as there is no evidence of the Respondent to controvert his testimony. Also, the fact that the Respondent found the Claimant negligent in his duties on 24th august, 2013 and proceeded to terminate the Claimant on the same day raises questions of the time span within which the Claimant was notified of his misconduct; given notice and a chance to be heard in terms of the applicable law. It is highly not possible that within the realisation of a serious matter such as being negligent and failing to follow instructions the Respondent was able to hear the Claimant in his defence.

16. On the evidence that Mr Shah found the machine door opened and since he had not been aware that the general manager had opened the door for the Claimant to make repairs that the he did not want to listen to the explanations given by the claimant, he got angry to an extent of quarrelling the Claimant and terminating him instantly. On the records submitted by the Respondent as the employer, the terminating taking effect on the same day when the Claimant was found with the machine open support the claim that there was no time given to him to give his defence.

17. The warning letter dated 17th june, 2013 and submitted by the Respondent is not acknowledged by the Claimant and the Respondent does not show how the issue set out in the warning letter formed part of the termination that followed soon thereafter on 24th august, 2013.

18. Even where the Claimant had a series of warning letters on his work record, the mandatory provisions of section 41 of the Employment Act required that before his dismissal on a matter relating to his misconduct, a notice and hearing be undertaken.

19. Section 45(2) of the Employment Act outlines what constitutes unfair termination. According to the section;

(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

20. The Court of Appeal in *Kenafric Industries Limited v John Gitonga Njeru* [2016] eKRL held;

*It should be remembered that **Section 43** of the Act makes it mandatory that where such termination is contested, the employer must prove that valid reason(s) in support of the termination exists; a position reiterated under **Section 45(2)**. In addition, even where the termination is on account of misconduct, **Section 41** requires the communication of these reasons to the worker, coupled with giving him an opportunity to be heard in response thereto prior to termination of his engagement.*

21. In this case I find that the Respondent did not comply with fair procedure in terminating the Claimant from its employment. The Claimant was not given time to defend himself and even where there may have been a reason leading to his termination, had the Claimant been given time to state his case in defence, the sanction of a termination was most severe in the context that account was not given as to why the Claimant had the machine door open. There was unfair termination.

Remedies

22. The Claimant is seeking payment of notice pay; compensation; severance pay; salary arrears to date; leave due; loan with Barclays bank and interest thereon; damages for suffering due to termination; and costs.

23. In the letter of termination, the Respondent offered the Claimant the following;

Salary up to 24th august, 213;

28 outstanding leave days;

70 days' pay in lieu of notice; and

Gratuity at 25 days for each of the 10 years' service.

24. Of the above dues, the Respondent was to deduct any due liability from the claimant. Annexure No.3 to the respondent's bundle is a cheque dated 22nd january, 215 for the sum of Kshs.296,320.00 to the claimant. The sum of Kshs.296,320.00 is not given a breakdown as to whether it is for the dues set out in the letter of termination or what this comprise of and whether this cheque was issued tot the Claimant for his benefit.

25. Together with the cheque, the defence was that the Claimant owed a loan secured by them to Barclays bank for the benefit of the claimant. The cheque copy submitted therefore is not clarified as to its effect. It is not stated as to what purpose amounts the Respondent was making to the claimant. However, section 45(5)(c) of the Employment Act requires that the court do take into account the compliance of the employer in paying the owing dues in compliance with the law in assessing the remedies due to an employee who has been unfairly terminated. In this regard, I take it, as set out in the termination letter that the salary owing; leave days untaken; 70 days' pay in lieu of notice; gratuity at 25 days for 10 years, were all paid.

26. In the claim, the Claimant is seeking that the Respondent should pay for his outstanding loan with Barclays bank together with interests due as he was unable to pay the same due to the unfair termination. I take it then the Claimant was aware of the loan facility secured by the Respondent at the time of termination. Where the loan remained outstanding and the Respondent made deductions from his salary to meet the same, such having been part of his consent to have paid from his monthly salaries, there is no violation of section 19 of the Employment Act. The lawful deductions approved by the Claimant for a loan facility that he benefited from, upon termination of his employment, the owing balances were subject of his payment.

27. Putting the above into account, the only dues and claims unresolved relate to compensation; damages,

loan facility and interests thereon and costs of the suit. With regard to the loan due, the terms and conditions under which the Claimant obtained the same and the repayment plans for the same, this was not gone into in his evidence. To thus require the Respondent to meet this facility advanced to the Claimant for his benefit and not for the benefit of the Respondent would be to overstretch the claim for unfair termination without evidence in this regard. Therefore, the loan facility owing and the due interests thereof, such are matters that Claimant should address as the beneficiary of the loan facility.

28. On the finding that the Claimant was unfairly terminated, the occur tin putting into account the work record and instances of warning letter on various cases of misconduct, such being a requirement for the court to put into account under section 45(5) of the Employment Act, I find compensation at 3 months gross salary is appropriate in this case. The Claimant is awarded Kshs.203,112.00 in compensation.

29. On the claim for damages for loss of employment where the Claimant expected to work until his retirement. With the award of compensation and the Respondent having largely complied and paid terminal dues soon after termination, such claim for damages shall not be awarded.

30. The Claimant also set out a claim for severance pay for 5 years. Even though the Respondent put into account payment of a gratuity in the letter of termination, the claim for severance pay relates to payments due in a case of redundancy under section 40 of the Employment Act. This case did not stand out as being premised on a redundancy to warrant the remedy of severance pay. Such is declined.

Judgement is hereby entered for the Claimant against the Respondent for compensation at Kshs.203, 112.00 for unfair termination of employment. Costs are also payable to the claimant.

Dated and delivered in open court at Nairobi this 9th day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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