



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1273 OF 2016

JAMES ANDAKO.....CLAIMANT

VERSUS

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....RESPONDENT

RULING

1. By this application the Claimant seeks orders restraining the Respondent from filling the position of Manager, Internal Audit previously held by the Claimant pending determination of his claim for unlawful termination.

2. The application which is supported by the Claimant's affidavit and supplementary affidavit sworn on 1st February 2017 and 2nd March 2017 respectively is based on the following grounds:

- a) That the Claimant was dismissed in April 2016 following a process he terms unlawful and unprocedural;
- b) That the reasons cited for the summary dismissal were factually false and did not take into account how internal audit departments operate;
- c) That the process leading to the dismissal grossly violated the Claimant's rights as an employee. The outcome was predetermined and the Claimant's representations were not taken into account;
- d) That the Claimant's case seeking reinstatement has high chances of success and he stands to suffer prejudice, irreparable loss and damage if the orders sought are not granted;

3. In a replying affidavit sworn by the Respondent's Director General, Paul K. Kosgei it is deponed that sometime in the month of February 2016, the Respondent's Board received confidential information from undisclosed sources on serious anomalies in the operations of the Internal Audit Department, which was manned by the Claimant.

4. In its meeting held on 19th February 2016, the Board resolved that the matter be investigated. The Claimant was sent on compulsory leave to pave way for investigations.

5. Kosgei states that the investigations revealed that the Claimant had failed to carry out his duties with due care and skill as required. On 16th March 2016 the Claimant was issued with a notice to show cause why disciplinary action should not be taken against him to which he responded on 24th March 2016.

The Claimant was invited to make oral representations on 12th April 2016 which were found

unacceptable and on 27th April 2016 he was dismissed. On appeal, the dismissal was upheld.

6. It is the Respondent's case that the Claimant's dismissal was lawful and fair. The Respondent further states that the orders sought are not due as the Claimant has not satisfied the conditions set out in ***Giella v Cassman Brown & Company Limited [1973] EA***.

7. The Respondent further states that it is a state corporation for the benefit of the public and its operations should not be curtailed by the injunctive orders sought.

8. The issue for determination in this application is whether the Claimant has made out a case for grant of the orders sought at the interlocutory stage. The Claimant seeks an order restraining the Respondent from recruiting for the position of Manager, Internal Audit.

9. This prayer falls within the province of interlocutory injunctions and the conditions for granting of such orders were stated in ***Giella v Cassman Brown*** (supra) as follows:

a) An applicant must show a *prima facie* case with a probability of success;

b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;

c) If the Court is in doubt, it will decide the application on the balance of convenience.

10. Regarding applications for orders barring employers from filling positions falling vacant pursuant to termination of employment, jurisprudence emerging from this Court is to the effect that institutions should be allowed to run as the parties litigate.

11. While declining to grant an order such as the one sought by the Claimant, the Court in ***Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security & Services & National Social Security Fund Board of Trustees (Cause No 1174 of 2013)*** held that it would not be in the public interest to halt the recruitment process as the National Social Security Fund was expected to continue running efficiently even as the Claimant's case against it progressed.

12. I agree with the holding in the ***Tom Otieno Odongo Case*** (supra) and add that the right of an employee in the public service must always be balanced against the public interest. In this regard and applying the final test in ***Giella v Cassman Brown*** (supra), the Court finds that the balance of convenience tilts in favour of the Respondent.

13. Ultimately, the Claimant's application is declined. The costs of the application will be in the cause.

14. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 31ST DAY OF MARCH 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Njomo for the Claimant

Mr. Sigei for the Respondent

