



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

CAUSE NO. 242 OF 2016

**KENYA UNION OF DOMESTIC, HOTELS,
EDUCATIONAL INSTITUTIONS AND HOSPITAL**

WORKERS

CLAIMANT

v

BOM CHEPTUECH SECONDARY SCHOOL

RESPONDENT

JUDGMENT

1. Solomon Cheriro (Grievant) was employed by the Board of Management, Cheptuech Secondary School (Respondent) on 19 March 2010 as an Accounts Clerk.

2. On 20 January 2014, the Respondent suspended the Grievant pending deliberations on complaints received against him and on 7 April 2014, the Respondent informed the Grievant of the termination of his employment.

3. The termination of employment prompted the Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA) to commence legal proceedings against the Respondent and the issue in dispute was stated as

Unlawful/wrongful termination of Mr. Solomon Cheriro.

4. The Respondent filed a Memorandum of Response on 10 August 2016 and the Cause was heard on 24 January 2017. KUDHEIHA filed its submissions on 21 February 2017 while the Respondent submissions were filed on 22 March 2017 but under wrong Cause number.

5. The Court has considered the evidence and submissions on file and identified the issues for determination as, *whether the parties had a collective bargaining agreement, whether the termination of the Grievant's employment was unfair, whether the Grievant was underpaid and appropriate remedies.*

Valid Collective Bargaining Agreement

6. KUDHEIHA entered into a collective bargaining agreement with the Ministry of Education, Science and Technology on 18 March 1986. According to the agreement, the Ministry was acting on behalf of the numerous Boards of Management pursuant to statutory power granted to it by the relevant Regulations.

7. The collective bargaining agreement had been preceded by a recognition agreement.

8. The Respondent therefore cannot run away from the terms and conditions of employment agreed under the collective bargaining agreement(s) until such a time as the Boards of Managements of schools are given the legal capacity to enter into individual recognition agreements and collective bargaining agreements.

Fairness of termination

Procedural fairness

9. The law on fairness of termination of employment on account of *misconduct, poor performance and physical incapacity* is primarily anchored on sections 35 and 41 of the Employment Act, 2007. Contractual provisions if any are also material.

10. The Grievant's case is that he was not accorded a fair hearing in terms of section 41 of the Employment Act, 2007 and clause 6(i) and 8 of the collective bargaining agreement entered into between KUDHEIHA and the Ministry of Education.

11. The Respondent's case on the other hand is that the Grievant was requested to explain the allegations made against him and was also invited to appear before the Board of Management for a face to face hearing.

12. The letter dated 20 January 2014 suspending the Grievant made reference to 2 previous letters which the Grievant had failed to respond to and also informed the Grievant of allegations concerning complaints on fees balances from parents.

13. The Grievant denied receiving the 2 letters prior to suspension but acknowledged receipt of the suspension letter.

14. The 2 letters were sent to the Grievant's postal address and appear to have been returned to sender by the postal corporation.

15. As to the invitation to appear before the Respondent, the Grievant stated that he received an invitation through sms on 4 April 2014 and that he honoured the invitation but was not invited to appear before the Board and was instructed to return on 8 April 2014 when he was given the dismissal letter.

16. It is not in dispute that the Respondent made attempts to inform the Grievant of the allegations to confront through the post office as evidenced by copies of *receipts of posting* from the Postal Corporation and through *sms* and the invitation letter.

17. On that score, it cannot be concluded that the Respondent did not intend to afford the Grievant an opportunity to be heard. What can be concluded is that due to circumstances beyond the control of the parties, the written notices were not received by the Grievant.

18. However, the Grievant was aware at the material time of the allegations he was to confront and appeared before the Board.

19. The Court therefore cannot in the circumstances find fault with the Respondent.

Substantive fairness

20. The reasons for the termination of the Grievant's employment were in brief *failure to account for monies received on account of fees for students and failing to issue official receipts*. The monies were received from around May 2012 to November 2013.

21. The Respondent's witness testified without being controverted that the school policy was that all fees would be paid into a bank and the bank paying in slip would be furnished to the school for official

receipting.

22. The Court is satisfied on the evidence on record that the Grievant received monies on account of fees under an arrangement with a parent and that he did not deposit the monies into the school bank account within a reasonable time and also that after depositing part of the monies into the bank, he failed to issue requisite receipts.

23. While the Court may not fault the arrangement the Grievant had with the parent, he was being dishonest when he did not deposit the money soon thereafter into the bank account and for failing to issue formal receipts for the amounts banked.

24. In fact, the Respondent was magnanimous when it gave the Grievant the opportunity to reconcile/account for the monies instead of taking disciplinary action *pronto*.

25. The Court therefore finds that the Respondent had and has proved as valid and fair the reasons to terminate the employment of the Grievant.

Underpayments

26. KUDHEIHA anchored the claim for underpayments on a Circular issued by the Permanent Secretary, Ministry of State for Public Service on 25 June 2012 (*reference was made in the submissions to Legal Notice No. 262 of 1993 but this was not pleaded*).

27. The Circular on the body thereof refers to *Alignment of the Salary Structure for Civil Servants*.

28. In the instant case, KUDHEIHA did not demonstrate that the Grievant was a *civil servant* or that broadly, employees of Boards of Management of schools qualify as *civil servants*.

29. On that score, this head of claim therefore fails.

Appropriate remedies/Orders

Reinstatement

30. Reinstatement would not be an appropriate remedy in light of the conclusion that the termination of employment was based on valid and fair reasons.

Compensation

31. This remedy is equally unavailable in light of the findings by the Court on fairness of termination of employment.

Terminal benefits

32. The Grievant sought terminal benefits which he quantified as Kshs 63,912/- being pay in lieu of notice for 3 months.

33. As the Respondent went or attempted to go through the requisite process, the Court declines to award pay in lieu of notice.

Underpayments

34. As already alluded to, this head of relief fails.

Conclusion and Orders

35. The upshot of the above is that the Court dismisses the present Cause with an order that each party bears its own costs.

Delivered, dated and signed in Nakuru on this 31st day of March 2017.

Radido Stephen

Judge

Appearances

For Grievant Mr. Onuonga, Industrial Relations Officer, KUDHEIHA

For Respondent Mr. Orege instructed by Rodi Orege & Co. Advocates

Court Assistants Nixon/Daisy