



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 341 OF 2013

KENYA BUILDING, CONSTRUCTION,

TIMBER AND FURNITURE INDUSTRIES EMPLOYEES UNION...CLAIMANT

VERSUS

RAI PLYWOODS (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Kenya Building Construction Timber Furniture Industries Employees Union (Union) commenced legal proceedings against Rai Plywoods (K) Ltd (Respondent) on 11 October 2013 alleging unlawful dismissal(s) of

Charles Otieno Ogada (1st Grievant),

Caleb A. Isichi (withdrew from Cause as he filed a separate Cause N. 331 of 2013),

Jared Analo Wetende (2nd Grievant),

Mark Imbuka (3rd Grievant),

Hudson Wakori (4th Grievant),

Jiseph Njehia Kariuki (5th Grievant) and

Christopher Onditi (6th Grievant).

2. The Union sought 3 main reliefs, a declaration that the dismissals were unfair and unlawful, terminal dues and compensation.

3. The Respondent filed its Reply to Memorandum of Claim on 11 November 2013. The Respondent's Personnel Manager also filed bulky affidavits detailing each Grievants disciplinary history.

4. On 17 October 2014, the Court directed that subfolders be opened for each of the Grievants (cause(s) of action accrued on different days and therefore subfolders A to F were opened and some of the Grievants testified on different days).

5. The Respondent's Supervisor and Personnel Manager also testified.

6. After close of hearing, the Court directed that judgment would await conclusion of hearing of a related Cause but that was not to be and the Court directed on 27 January 2017 that judgment would be delivered on today.

7. None of the parties filed submissions within the set timelines (Claimants submissions were filed on 6 March 2017 instead of before 30 December 2016).

8. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissals of the Grievants were unfair* and appropriate remedies.

Fairness of Dismissals

The law

9. The law on the process to be undertaken by an employer before terminating the employment of an employee on account of *misconduct, poor performance or physical incapacity* is primarily found in section 35 of the Employment Act, 2007 which contemplate written notice; section 41 which envisage a notification of allegations and a hearing (procedural fairness).

10. On the substantive fairness, sections 43 and 45 of the Act place a burden upon the employer to prove the reasons for termination and that the reasons are valid and fair.

11. The reasons for the dismissal of the Grievants were mainly absenteeism and careless performance of duties which fall under the rubric of *gross misconduct* warranting summary dismissal in terms of section 44(4) of the Employment Act, 2007.

Procedural fairness

1st Grievant

12. The 1st Grievant had a history of absenteeism for which he was asked to show cause, got suspended and warnings severally including 20 May 2010, 25 May 2010, 24 December 2010, 22 July 2011, 25 July 2011 and 27 September 2011.

13. Ultimately, the 1st Grievant was dismissed through a letter dated 11 October 2011 for yet another absenteeism on 8 and 9 October 2011 after a show cause notice dated 10 October 2011.

14. The Grievant responded to the show cause on 11 October 2011 and asked for forgiveness.

15. In so far as the Grievant was informed of the allegations to confront in the show cause and that he responded seeking for forgiveness and also made oral representations in the presence of a fellow employee, the Court is satisfied that the process taken by the Respondent met the requirements of section 41 of the Act.

2nd Grievant

16. The 2nd Grievant, Jared Analo Wetende was dismissed on 13 January 2011 for careless performance of duties at the Respondent's gate.

17. The dismissal was preceded with a show cause notice dated 11 January 2011 to which the Grievant responded to on the same day.

18. The Respondent therefore, in the view of the Court, cannot be faulted for the procedures prior to dismissal.

3rd Grievant

19. The 3rd Grievant Mark Imbuka also got several show cause notices, suspension and warnings for habitual lateness and absenteeism before dismissal on 16 December 2010. The dismissal came after a show cause notice dated 9 December 2010.

20. The Court is of the considered view that the dismissal was procedurally fair.

4th Grievant

21. According to the records filed in Court, Hudson Makori equally had a chequered disciplinary history before dismissal on 3 December 2010.

22. The Court reaches a conclusion the requirements of procedural fairness were met.

5th Grievant

23. Joseph Njehia Kariuki was dismissed on 26 January 2012 for absenteeism. He also had a notorious disciplinary history as demonstrated by the records filed by the Respondent.

24. The dismissal was preceded by *show causes* dated 18 January 2012 and 25 January 2012 to which he responded to on 26 January 2012. He also attended a face to face hearing while accompanied with a colleague.

25. The Court finds the dismissal was procedurally fair.

6th Grievant

26. The 6th Grievant Christopher Onditi equally had a history of absenteeism and was issued with show cause notices, warnings and suspension(s). He was dismissed on 9 August 2011 after issuance of a show cause dated 6 August 2011.

27. In the Court's view, the process taken by the Respondent passed legal muster as required by section 41 of the Act.

Substantive fairness

28. The Respondent filed numerous employment records including attendance records, show cause notices, suspension letters and in certain cases responses to show cause letters.

29. The Union, nay, the Grievants did not challenge the allegations on absenteeism or careless performance, and because absenteeism and careless performance are among the grounds for summary dismissal listed in the statute, the Court will therefore find that the Respondent had and has proved as valid and fair the reasons for dismissing the Grievants.

Appropriate remedies

Terminal benefits

30. The terminal benefits sought by the Grievants basically comprised *pay in lieu of notice, outstanding leave, service benefits and earned wages* but they did not lay any evidential, contractual or legal foundation for the same.

31. In any case with the finding on fairness of dismissal(s), pay in lieu of notice would not arise.

Compensation

32. It must be obvious now that compensation is not applicable.

33. Before concluding the Court wishes to observe that the Union mixed causes of action which should not have been lumped together as the dismissals were at different times,

Conclusion and Orders

34. The upshot of the foregoing is that the claims advanced by the Union on behalf of the Grievants are dismissed with no orders as to costs.

Delivered, dated and signed in Nakuru on this 24th day of March 2017.

Radido Stephen

Judge

Appearances

For Grievants Ms. Chege, Legal Officer, Kenya Buiding, Construction, Timber and Furniture Industries Employees Union

For Respondent Ms. Adisa/Ms. Nasiloli instructed by Kalya & Co. Advocates

Court Assistant Kosgei/Mwangi