



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1129 OF 2015

BANKING, INSURANCE & FINANCE UNION (KENYA)..... CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

JUDGEMENT

1. The claimant, Banking, Insurance & Finance Union (Kenya) (BIFU) filed Claimant for the unfair/unlawful termination of the grievant, Denis Owour Amolo on 1st July, 2015 against the Respondent bank. The Claimant and the Respondent have a Recognition Agreements signed between the Claimant and the Kenya Bankers Association and have several Collective Agreements (CBA).
2. The Grievant was employed by the Respondent on 15th September, 1993. He worked in various branches of the Respondent with his last being Narok where he was a supervisor.
3. On 18th September, 2014 it was discovered through a report from the branch by Mr Nelson Wainaina the Retail Branch operations & Control Manager, Rift Valley that a cashier, Simon Livoi had a cash shortage of \$610,000. It was also reported that a cashier in collusion with a backstreet dealer were trading with the bank's foreign currencies for own gain.
4. Upon the report, a snap check at the branch revealed several issues that on 18th September, 2014 a customer, Adam Farah made two transactions - a deposit of \$5,000 into account No.2025723840 for Account name of Elmi Dahir Ahmed and there was a withdrawal of Kshs.440, 000.00 from Account No. 0411083691 from account name, Adam Farah. The teller for the transaction was Simon Livoi and the systems authorisation was by the grievant.
5. The check also revealed the anomaly that the teller, Livoi operated over the counter for more than Kshs.500, 000.00 severally on this day and the customer, Adam Farah was paid kshs.440, 000.00 without enough money in the account and he finds were later transferred into the account from Eastleigh branch.
6. A forensic audit of the transactions revealed that the customer had come to the Narok branch at 12.07pm and deposited \$5,000 at 12.09pm. Since here was funds transfer expected from Eastleigh branch, a withdrawal slip was printed at 12.07pm so that when the credit was realised, the account would be debited the payment made. As a result, the customer Adam Farah account was with Kshs.400, 000.00 at 12.25pm and again with Kshs.44, 500.00 at 12,27pm. At 12,36pm the account was debited and authorisation done at 12.36pm by the grievant.
7. The Grievant duties at the branch were that of cash custodian; acting branch operations officer; ATM in charge; retail support; systems authoriser; maintenance of check books, among other duties. Upon the

snap check the Grievant was charged with two counts of neglecting his duty by allowing a cashier to operate above limit and by authorising withdrawal of Kshs.440, 000.00 to Adam Farah when the customer had no funds in the account. The Grievant was invited to a disciplinary hearing on 5th December, 2014 upon which it was established the issue of negligence was not tenable and the authorisation of withdrawal without funds was found not to be true. The disciplinary committee concluded that the Grievant was juggling between several roles which affected efficiency on cash operations. That the employee be given a reprimand. But the Respondent proceeded and terminated the Grievant from his employment on 17th December, 2014 by relying on similar charges as were before the disciplinary committee.

8. The Grievant appeal was heard on 29th January, 2015 and dismissed.

9. The claim is for a finding that the termination of the Grievant was unfair; the Claimant is seeking a reinstatement of the grievant; and in the alternative payment of notice; compensation for unfair termination; and terminal dues from date of termination to the date of judgement herein.

10. In evidence, the Grievant testified in support of his case. The Grievant testified that upon employment by the Respondent he diligently worked in several branches with his last being Narok. A snap check at his branch in Narok on 18th September, 2014 reported several anomalies but he was never issued with the report before being called for disciplinary hearing. That the cashier, Livoi made transactions above his cash limit without authority of the Grievant and the rules did not allow an over till. The Grievant could not collect cash at the till alone as the co-custodian was required and due to huge volumes of work in the branch, the co-custodian was overwhelmed at the bulk till and could not leave to do the role of co-custodian. The collection had to wait. For efficiency and to avoid a client spending the whole day at the branch, an over till was allowed. The Respondent was aware of this challenge on staff deficit but never addressed it. This was an issue that arose during the audit but was never addressed. The Grievant could not evacuate cash alone without the co-custodian which was a valid reason leading to the over till. Whichever way the Grievant acted there was going to be a problem and be forced to break the rules – to evacuate cash alone was more risky than allowing a teller to hold more cash at the till whereas to leave the cash with cashier, this would have led to fraud but this was not the case for the grievant.

11. The Grievant also testified that all cash deposits are done with teller and withdrawals follow a procedure. There must be sufficient funds in the account for a withdrawal. The Grievant authorised a withdrawal when the funds were sufficient into a client account.

Defence

11. In defence, the Respondent admit that they employed the Grievant and while at the Narok branch had duties of cash custody, supervision, retail support authorisation and compliance and had a monthly salary of Kshs.1,212,420.00 and with a house allowance of Kshs.56,400.00. On 18th September, 2014 the Respondent received a tip off about a suspicious teller shortage of \$610 from Narok branch which led to a snap check where certain tellers at the branch in collusion with backstreet dealers were trading with the Respondent foreign currency for their own gain. A teller, Simon Livoi had processed two transactions for customer, Farah Adam a cash deposit of \$5,000 to account No.2025723840 in the name of Elmi Dahir Ahmed and a cash withdrawal of Kshs.440, 000.00 from the account No.0411083691 both of which were conducted while the customer had no funds in the account and which transaction were authorised by the grievant. The teller also operated under the till severally during the day and had processed transaction on an account held by the source without following the laid down cashiering procedures.

12. The snap check also revealed that the customer, Adam had been noted to favour attendance by the teller, Livoi and when confronted about the transaction had claimed to have underpaid the teller in error but had taken \$610 to the bank thereafter in absolute contravention of cash handling procedures.

13. Further investigations at the Narok branch revealed that the tellers operated over till at closure time on 17th September, 2014 and were over the till limit at 9.44am on 18th September, 2014 by Kshs.76,050.60

which was repeated severally at 10.50am with Kshs.783,693.60 and at 12.35pm with Kshs.1,843,250.00. all the cashiers for 3 months operated over the approved cash limit of kshs.500,000.00; there were cash evacuation delays from cashiers over a period of time; and cash evacuation were done once a day at the close of the day. The Claimant as a custodian had the responsibility to ensure that all the cashiers operated within the approved limit of Kshs.500, 000.00 at all-time a responsibility he could ensure by the use of FCR system that enabled him to view cash holding levels and for prompt evacuation. The teller Livoi for 3 months operated over the till and exposed the Respondent bank to theft and misappropriation.

14. The Grievant as the bank supervisor over the cashier failed to carry his duties of oversight and ensure proper cash handling procedures were followed thus exposing the Respondent bank to theft and fraud.

15. Further defence is that following investigations and interviews, the Grievant was invited to a disciplinary hearing on 5th December, 2014 for reasons that he had neglected duty by allowing cashiers to operate above limit and authorising withdrawal of Kshs.440, 000.00 to customer Adam Farah account No.0411083691 whereas there were no funds in the account.

16. The Grievant attended the hearing and was given a chine to state his defence. The disciplinary committee analysed the report on the claims of negligence and cash handling and recommended the Grievant was involved due to negligence of duty as bank and branch custodian. The committee recommended a reprimand of the Grievant but on further assessment it was reduced to a termination putting into account the tainted disciplinary record of the Grievant and the magnitude of the loss that would have resulted had the misconduct not been detected. Termination letter was issued on 17th December, 2014 pursuant to clause A 5(d) of the CBA.

17. The tainted past record of the Grievant is that on20th August, 1999 he was reprimanded for crediting wrong customer with Kshs.18,229.95; 20th May, 2000 a warning for an overdrawn staff account; 3rd October, 2002 a 2nd wrning for inability to clear outstanding overdraft and borrowing from third parties; 18th October, 2005 a reprimand for paying stopped travellers cheques; 27th july, 2006 a warning for financial mismanagement and borrowing from outside lenders; 27th October, 2007 a warning for authorising a debit of Kshs.600,000.00; and 9th August, 2014 a warning for reporting for duty under the influence.

17. The remedies sought are therefore not available to the Claimant as the Grievant was lawfully terminated upon being taken through fair disciplinary procedures and found culpable to the CBA and the law. Section 45(2) (c) of the Employment Act a termination is fair if the employer follows a fair procedure in effecting the same.

18. In evidence, the respondent's witness was Nelson Wainaina and who conducted investigations at Narok branch where the Grievant was working. The Grievant was terminated in December, 2014 for failure to follow procedures in cash evacuation as required. In September, 2014 the witness was called to go to Narok branch of the Respondent on a tip off that thee was trading in foreign currency, which was illegal trading. A teller was Woking with customers to get foreign currency and was repaid back in an illegal transaction as there was no account for such currency.

19. The witness did a snap check at the branch and tills. He found a teller with a cash difference of \$610 and a look at the vouchers revealed the teller had paid a customer without funds in the client's account. An amount of Kshs.440, 000.00 was withdrawn when the account had no cash. He also found a deposit slip in red and when the teller, Simon Livoi was asked he said the deposit was for his wife. The tellers were transacting beyond the allowed limit, tellers had excess cash beyond Kshs.500, 000.00. This had occurred before in this branch. Procedures do not allow cashiers to keep cash beyond a limit. When the supervisor allowed over the till holding it was contrary to policy of the responded. From where the Grievant sat, the system was able to show him how much each cashier was holding and he should have evacuated which he failed to do. The system enabled him to see each teller transactions.

20. The implication of this was to deter fraud or in case of a raid, there was cash security. The witness

shared his findings with head office and the Grievant was called for disciplinary hearing. He was later terminated for failing to follow procedures manual in cash handling and for allowing cash withdrawal of Kshs.440, 000.00 when the account had no such monies. The customer came to the bank at 12.07pm and the account had no cash and cash issued but posted at 12.36pm. The teller gave the cash. The Grievant before authorisation did not ascertain the correctness of the account and paying time. The transaction was therefore authorised at 12.36pm a time when the client account had no cash.

21. The witness also testified that the germinant as cash custodian was not able to evacuate cash alone and required a co-custodian, and Livoi was playing this role. As cash was being evacuated, one counter had to be closed. The Grievant was also allocated other duties in the branch that required his attention. There was a branch Manager undertaking other duties.

Submissions

22. Only the Respondent filed their written submissions.

23. The Respondent submits that following investigation into the Narok branch which commenced after a tip off of illegal trading in foreign currency, there emerged several anomalies which implicated the Grievant as being negligent in his supervisory role. As the custodian at the branch the Grievant had the responsibility to ensure cashiers operated within the approved cash limit of Kshs.500, 000.00 and there was a system to enable him adherence and by prompt evacuation. This was to prevent cashiers from the conduct of fraud with the excess monies for instance Livoi operated over the till limit for over 3 months and which led to suspicious dealings in foreign currency. The Grievant was also found to have authorised Kshs.440, 000.00 to a client, Farah when the account had no money by 12.07pm. The records show a delay by the cashier when authorisation was done at 12.36pm. At this point the Grievant should have questioned the transaction had he been diligent in his duties. As a bank custodian the Grievant had a supervisory role to question the time difference between issuance of cash and the actual withdrawal, half an hour later.

24. The Grievant was taken through a fair hearing when he was invited to a disciplinary hearing, he was able to give his defence, he lodged an appeal and upon recommendation that he be reprimanded, noting his previous record, this was reduced to termination. The Respondent relied on the case of **Agnes Murugi mwangi versus Barclays Bank of Kenya Limited [2013] eKLR**. Section 44 of the Employment Act, the grieving's conduct warranted dismissal and putting into account his work history, a termination was procedural. The remedies sought are therefore not due.

Determination

25. It is not in dispute that the Grievant was terminated viding letter dated 17th December, 2014. The reasons for termination are that;

...you failed to adhere to the bank's laid down regulations the Barclays office Procedures Manual and the terms and conditions of your employment. As set out in the shortage report KE 278.2014 of which you neglected your duty by allowing cashiers to operate above limit and authorising withdrawal of 440,000.00 to Adam Farah a/c no. 0411083691 when the customer had no funds in his account.

26. The Grievant was invited for disciplinary hearing on 5th December, 2014. He was found culpable and termination was recommended.

27. In evidence, the Grievant admitted that he allowed cashiers to operate above limit. He gave his explanations to this that he had shortage of staff and he required a co-custodian to evacuate excess cash but due to contingency of duties this was not done immediately and until end of day. However such practice had been noggin for over 3 months until the snap check by Mr Wainaina on 18th setpember, 2014.

28. On the second count of authorising a withdrawal from account no. 0411083691 when the account had no funds, the defence was that when the Grievant did the authorisation at 12.36pm the account had sufficient funds. However the accusation details are that when the cash slip was issued to the client at 12.07pm, the account had no cash and upon a deposit from Eastleigh branch, such monies became available and by the time the Grievant was doing his authorisation, had he been diligent and checked the transaction slip he would have noticed that the transaction approved by Livoi was at a time that the account for the subject client had no sufficient cash.

29. The Grievant as the supervisor to the cashier, Livoi had the greatest responsibility as a senior officer to oversee all teller transactions at the Narok branch. Did he do so diligently?

30. On 6th December, 2008 the Grievant signed his terms of employment vide letter dated 3rd November, 2008. At clause 12 provides;

12 RULES OF CONDUCT

You will be required to observe and obey all the rules, regulations, policies and procedures, which have been or may be drawn by the bank. You will also be required to abide by the Bank's code of conduct, a copy of which can be obtained from your line manager.

The bank will endeavour to ensure that you are made familiar with such rules, regulations, policies and procedures. The bank reserves the right to change or add any such rules, regulations, policies and procedures at any time without notice to you.

31. By signing in agreement to these terms and conditions, I take it the Grievant was aware at all material time of the import and implications of the policies and regulations relating to cash handling and authorisation of transactions within his branch at Narok. To therefore for any reason allow an above limit for cashier was contrary to policy. To further authorise a transaction that was not above board due to lack of due diligence was equally contrary to the supervisory role allocated to the Grievant.

32. The Grievant as the supervisor in Narok branch was placed as a high responsibility role. He had duties of compliance authoriser, operations; retail support, among others. As such where operations of tellers required his authorisation, he was required to be diligent.

33. In this regard on 18th September, 2014 with regard to this case the following happened;

- Account 2025723840: 12.09pm cash deposit on \$5,000 and total credit Kshs.97,311.00;
- Account 0411083691: 12.25pm funds transfer Kshs.400,000.00 and total credit Kshs.5,767,800.00;
- 12.27pm cash deposit Kshs.44,500.00 and total credit Kshs.5,767,800.00;
- 12.36pm cash withdrawal 440,000.00 and total credit Kshs.5,767,800.00

34. Mr Wainaina for the Respondent testified that;

Once a client comes to the bank, the teller has to confirm the balance and before a withdrawal, confirm the account has cash. Then transaction must follow in accordance with the withdrawal slip. ... The cash was not issued by the Claimant [grievant] but by the teller. The scrutiny was on the Grievant who did not ascertain the correctness of the account and the paying time.

35. From this evidence, I take it when a customer/client walks into the banking hall for a deposit or withdrawal transaction, the first person to attend the client is the teller. The Grievant as the supervisor can only know of the nature of transaction once it is posted on the system and or where immediate authorisation is required. In this case, the authorisation that the Grievant was required to make with regard to the transaction of Farah Ahmed when the teller Livoi attended to him is said to be that funds were advanced to the client when his account had no money. The system enabled the Grievant to see all transactions in the branch by the tellers. There were two such tellers and one was Livoi. When the transaction with Farah was done at 12.07pm, there was an authorisation at 12.36pm. Mr Wainaina testified

that at such time of 12.36pm, the client's account had sufficient funds for his payment. The Grievant therefore from his location made an authorisation when the client account has sufficient funds for the transaction required. Can the Grievant then be faulted?

36. The charge here is lack of due diligence in making a transaction authorisation without looking at the detail(s). The Grievant does not contest these facts. His explanation is that he had a lot of work in his hands due to shortage of staff. However the safeguards at the Respondent branch were to ensure that each employee did their work effectively, a teller was able to receive and issue cash upon set requirements and upon which the Grievant had overall control in terms of authorisation, evacuation of excess cash and other duties. In this case and on the transaction of Kshs.440, 000.00 the Grievant authorised the payment after the account had sufficient funds but upon a crucial delay which enabled the teller to circumvent the procedures by advancing cash to a client when indeed such did not exist only to be made available after the fact. The Grievant has admitted that he allowed cashiers to have an over the till and beyond the set policy requirements. These lapses allowed manipulations by the Cashiers. The Grievant was overall, the person responsible.

37. The above set out, the Grievant was invited to the disciplinary hearing, he was given a hearing and pursuant to clause A5 of the CBA, the procedures applicable were followed. The disciplinary committee made a finding that;

From our discussion, the branch receives high volumes of both local and foreign currency and there is a disconnect between him [grievant], the team (cashiers) and the branch management on branch operations procedures i.e. cash operations.

The staff juggles between several roles within the branch and this may affect efficiency on cash operations.

In view of the above we recommend a written reprimand.

38. Therefore, the disciplinary committee, being the body tasked to hear the Grievant, having the advantage of primary evidence from the shop floor and evaluated all facts, made a finding in this case. Putting all factors and evidence into account, the investigations by Mr Wainaina and noting what the Grievant had erred, his circumstances at work being a factor, a written reprimand would be sufficient. The 3 members of the committee signed the same recommendation in agreement.

39. However, on 17th December, 2014 the branch manager, Narok issued a termination letter to the grievant. The rationale was that upon the disciplinary hearing and its recommendations, the Respondent took into account the work history of the Grievant and noted that he had a series of disciplinary cases against him. Putting these into account, a termination was found as the best remedy.

40. It is not clear as to whom and when the disciplinary committee findings were reviewed to make changes to its findings and recommend a termination in any event, the appeal by the Grievant was made after the termination.

41. As noted above, the parties herein have a CBA. Under such terms and conditions of employees have been agreed upon. When the Respondent applied clause A5 on the grievant, I take it the terms of the CBA were found applicable on him. The warnings and previous records/history of cases of misconduct by the Grievant are regulated under clause A5 (b), a warning or reprimand is valid for 12 months. I take it this is to give an employee a fair chance to mend their ways and continue being productive following a warning and not having the same hanging on their heads over the years.

42. However, even where the employer is not allowed to rely or use the warning letters after 12 months in accordance with the CBA, such are to be filed as they form part of the work records and where there is a dispute such as this one, section 45 (5)(e) of the Employment Act requires that such warning be produced. This is for the court benefit and to take into account the totality of the case and note previous incidents and overall conduct of an employee in arriving at assessing as to whether there was an unfair or

fair termination of employment. For the employer to move against the agreed terms on the shop floor is going contrary to the CBA.

43. I therefore find, in assessing the case on its merits, the verdict arrived at by the disciplinary committee was appropriate and this should have been confirmed. There is no material justification for the finding of a termination of the grievant's employment. The option to terminate the Grievant was too harsh in this case. A reprimand would have given him a fair chance to remedy his challenges as well as give the Respondent as the employer to address the operational issues noted at the disciplinary hearing. To terminate the Grievant and fail to address his circumstances and challenged that he faced on the workplace is to shift blame to the wrong person.

Remedies

44. The Claimant is seeking the reinstatement of the grievant. Termination was on 17th dember, 2014 and at the time the Grievant had served the Respondent business for a period of over 21 years. The Claimant does not state how old he Grievant was at the time of termination or how long he had to go before retirement. In evidence, this issue of reinstatement was not given much attention. There are no submissions as to why this option of a reinstatement should be given more attention than other remedies that are available.

45. Even though the time required for a reinstatement in terms of section 12(3) of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act is available, the remedy of reinstatement should be the last resort where all else in terms of remedies are found not sufficient. Noting these factors and the history of the Grievant now on file, such a remedy will not issue.

46. Notice pay is due in a termination of employment and in terms of the CBA between the parties. The termination letter recommended payment of notice pay if it was applicable. There is no evidence submitted that such notice pay was paid to the Grievant in terms of terminal dues. Such is payable at one month's salary.

47. Noting he above and the remedy of reinstatement declined, compensation is hereby awarded at 6 months' salary. The Grievant earned Kshs.208, 581.00 per month and award due is Kshs.1, 251,486.00.

In conclusion therefore, judgement is hereby entered for the Claimant for notice pay at Kshs.208, 581.00; compensation for Kshs.1, 251,486.00 and costs at 50%.

Dated, delivered in open court at Nairobi this 23rd day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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