



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

CAUSE NO 1587 OF 2015

EUNICE KAMAU.....CLAIMANT

VERSUS

AAR INSURANCE (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Eunice Kamau against her former employer, AAR Insurance (K) Limited. The claim is contained in a Memorandum of Claim dated 1st September 2015 and filed in Court on 9th September 2015. The Respondent filed a Memorandum of Reply on 8th October 2015.

2. At the hearing the Claimant testified on her own behalf and the Respondent called its Human Resource Business Partner, Peter Gakinya. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent in the position of Sales Manager, Brokers and Agents at a net salary of Kshs. 380,000 effective 18th June 2012. Her salary was progressively increased to Kshs. 443,194 as at the time of termination of her employment on 21st July 2015.

4. The Claimant states that the termination of her employment was in breach of the law and the express terms of her employment contract. Specifically, the Respondent failed to inform her of the charges against her and to give her an opportunity to defend herself. The Respondent also failed to pay the Claimant her terminal dues.

5. The Claimant claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 443,194.00
- b) Leave days earned and not taken.....189,096.10
- c) 21 days worked in the month of July 2015.....318,985.80
- d) Damages for unlawful termination.....5,318,328.00
- e) Benefits due from the Staff Pension Scheme.....2,015,792.14

f) Certificate of service

g) Costs plus interest

The Respondent's Case

6. In its Memorandum of Reply dated 7th October 2015 and filed in Court on 8th October 2015, the Respondent admits having employed the Claimant but adds that effective 1st July 2014, the Claimant's designation changed from Sales Manager-Brokers & Agents to Head of Agencies.

7. The Respondent denies the Claimant's claim for unlawful termination and states that the termination was effected in accordance with Clause 11(i) of the contract of employment dated 29th June 2012.

8. The Respondent further states that the termination letter dated 21st July 2015 stipulated the reason for termination as poor performance and attitude as well as insubordination.

9. Regarding performance, the Respondent states that an evaluation covering the period from 2014 to 2015 revealed that the Claimant had not met her targets. The Claimant's poor performance was discussed with her and she was given an opportunity to improve.

10. Further, the Claimant is accused of disobeying proper instructions given to her by the Respondent's Managing Director. In particular;

i) The Claimant refused to re-locate to alternative location after being instructed to do so by the Managing Director;

ii) The Claimant refused to hand over documentation relating to Laikipia County account to her immediate supervisor as instructed by the Managing Director.

11. The Respondent avers that these acts of insubordination amounted to gross misconduct which entitled the Respondent to summarily dismiss the Claimant under Clause 11(iii)(b) and (d) of the contract of employment.

12. On termination, the Claimant was informed that she was entitled to one month's salary in lieu of notice, salary for days worked up to 21st July 2015 and annual leave earned and unutilised. The Respondent processed the Claimant's final dues but she declined to collect them.

13. The Respondent states that it does not hold and is not liable to pay the Claimant's pension which is held by the AAR Holdings Pension Scheme and is administered by Octagon Limited. The Claimant was duly informed by letter dated 23rd August 2015 that her pension contributions are payable by Octagon Limited.

Findings and Determination

14. There are two (2) issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

15. The termination of the Claimant's employment was documented by letter dated 21st July 2015 stating as follows:

“Dear Eunice,

Re: TERMINATION OF SERVICE

Reference is made to the above subject matter.

Following various discussions and correspondence, it is clear that your performance remains below the acceptable threshold by the Company and your employment contract.

Period of poor performance	Date of issue of letter
Show cause letter for declining to conduct performance evaluation	20 th January 2015; by Human Resources
2014 poor performance	22 nd January 2015; by Human Resources
January 2015 poor performance	3 rd February 2016; by immediate supervisor
April performance (43%)	14 th May 2015; by Managing Director
Quarter 1 2015 (46%)	29 th May 2015; by Human Resources
Performance to May	12 th June 2015; by immediate supervisor and Human Resources

In addition to the above, you have displayed a high level of poor attitude leading to several instances of insubordination such as:-

1. You have refused to follow instructions given directly by the Managing Director to re-locate to alternative location. This is a clear case of insubordination.
2. You were requested to hand over documentation of Laikipia account to your immediate supervisor.

After due considerations and reviewing the circumstances and your conduct, it has been found that you have not measured upto your contractual obligation and also committed gross misconduct and the company has no option but to terminate your services with immediate effect. Your last working day shall be today 21st July 2015. You will however not be expected to serve your notice.

On termination, you will be entitled to the following;

- i. One month's salary in lieu of notice.
- ii. Salary for the days worked up to 21st July 2015.
- iii. Annual leave earned and unutilised as at the date of your termination.

Your final dues shall be processed upon your undertaking the necessary clearance from the company and shall be paid less the statutory deductions and any deductions that may be lawfully effected and any liability you may have with the company.

You are expected to hand over any Company property in your possession to your immediate supervisor and the Company's Identification Card and the Medical Insurance Cards for yourself and your family

members (if any) to the respective Departments.

-With regards.--

-Yours Faithfully--

-AAR Insurance Kenya Limited--

-(signed)-(signed)

-Peter Gakinya-Caroline Munene

-Human Resources Manager-Managing Director”

16. From correspondence produced before the Court, it would appear that the Claimant’s performance had been the subject of discussion over a period of time. In this regard, concern had been raised on her failure to submit evaluation reports on time as well as missed targets on new business. In her responses to letters issued to her by management, the Claimant cited specific challenges she had faced.

17. Regarding the accusation of disobedience of a lawful instruction, the Claimant told the Court that the directive to relocate from the Head Office had a negative impact on her performance. She explained that at the time she was working on a tender for Laikipia County Government for which she needed the input of other departments based at the Head Office.

18. Through an exchange of electronic mail, the Claimant raised her concerns with the Managing Director who reiterated her instructions that the Claimant relocates from the Head Office. The Claimant also wrote to the Group Chief Executive Officer 17th July 2015 but she got no response.

19. The question before the Court is whether in light of the foregoing circumstances, the Respondent had a valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act, 2007.

20. Jurisprudence emerging from this Court is to the effect that the burden placed on an employer by Section 43 of the Act is to establish a reason that would cause a reasonable employer to terminate employment (see *Jessy Olukutukei v Feed the Children Kenya & another [2014] eKLR*). In this regard, the Court is guided by a range of reasonable responses that may arise from the particular circumstances of the case.

21. I have looked at the events leading to the termination of the Claimant’s employment and find that there were indeed concerns regarding the Claimant’s performance. Further, the Claimant failed to relocate as instructed by the Managing Director. In the totality of the circumstances the Court finds that the Respondent had a valid reason for terminating the Claimant’s employment.

22. The next logical question is whether in effecting the termination, the Respondent observed due procedure. First on the issue of poor performance, the law has settled at the point where an employer relying on this ground is required to demonstrate that the employee was made aware of their specific shortcomings and given reasonable time and support to improve. This was the holding in *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR* and *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*.

23. At any rate, poor performance is one of the grounds that must be established pursuant to the mandatory procedure set out under Section 41 of the Act. In *Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR* this Court went further to hold that disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41.

24. Granted that concerns had been raised on the Claimant's performance, the Court did not find any evidence of a performance improvement plan nor was there a capability hearing prior to termination.

25. Regarding the accusation of insubordination, the Respondent did not adhere to the procedural fairness requirements set out under Section 41 of the Employment Act.

26. Overall, the Court finds that in effecting the Claimant's termination, the Respondent failed the procedural fairness test thus rendering the termination procedurally unfair.

Remedies

27. Before determining the remedies available to the Claimant I need to dispense with the question of the effective date of her employment with the Respondent. In the certificate of service issued by the Respondent which the Claimant has rejected, the Respondent reckons the effective date of the Claimant's employment as 18th June 2012 being the date when the Claimant took up the position of Sales Manager-Brokers and Agents.

28. On her part the Claimant states that her employment with the Respondent commenced on 1st November 2008 when she took up the position of Business Development Consultant. The question remains whether the letter dated 15th October 2008 which the Claimant produced in evidence created an employment relationship between the Claimant and the Respondent. Section 2 of the Employment Act defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner”

29. A perusal of the letter dated 15th October 2008 together with the accompanying agreement reveals that the Claimant was engaged as a Business Development Consultant at Voyager Agency on an override commission of 1.350% for total business from the Agency.

30. From these documents it seems clear to me that during the period between 1st November 2008 and 17th June 2012, the Claimant was an agent and not an employee of the Respondent. That said, the Court settles at 18th June 2012 as the effective date of the Claimant's employment with the Respondent.

31. I will now deal with the notice period which was also in dispute. Although the Claimant had pleaded one (1) month's salary in lieu of notice, she appears to have changed her mind midstream to claim three (3) months. This shift seems to have been motivated by Clause 1.1 (i) of the Claimant's contract of employment which provides for three months and one month in the same breath (in words and figures). Counsel for the Claimant invited the Court to apply the *contra proferentem* rule and thus construe the notice pay period against the Respondent.

32. As held by **Radido J** in ***Mwangi Ngumo v Kenya Institute of Management [2012] eKLR*** the *contra proferentem* rule applies in cases of ambiguity in contracts against the party who drew the contract. I do not think however, that this rule provides an escape from the real intention of the parties. Indeed as held in ***The National Bank of Commerce Ltd v Nabro Ltd & Anor [2008] 1 EA 432***, the *contra proferentem* rule is only applicable in cases of ambiguity or where other rules of construction have failed.

33. The intention of the parties in the instant case is not hard to establish. In her Memorandum of Claim dated 1st September 2015, the Claimant pleaded one (1) month's salary in notice pay. That parties are bound by their pleadings is a principle of law that has stood the test of time and must be upheld if only to guard against trial by ambush and opportunism (see ***Puspa v Fleet Transport Company [1960] EA 1025***).

34. The Court found no reason to discharge the Claimant from this responsibility and holds her to the one (1) month notice period pleaded in her Memorandum of Claim.

35. The Court found no basis for the dispute raised by the Claimant on the tabulation of her due salary for

the month of July 2015 which was correctly paid at Kshs. 310,235.80. In similar vein, the Court found no justification for the Claimant's denial of her liability to the Respondent on account of outstanding advances, Zain bills and car insurance which she had duly acknowledged in the employee clearance form.

36. The Claim for pension was abandoned in the course of the trial.

37. Finally, the only award I will make in favour of the Claimant is in the sum of Kshs. 1,329,582 being three (3) months' salary in compensation for a procedurally unfair termination. In making this award I have taken into account the Claimant's length of service but also the finding that there was a valid reason for the termination.

38. This amount which is subject to statutory deductions will attract interest at court rates from the date of judgment until payment in full.

39. The Claimant will have the costs of this case.

40. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF MARCH 2017

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JUDGE

Appearance:

Mr. Akelo for the Claimant

Mr. Mwaniki for the Respondent