



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 106 OF 2015

PAULINE NYOKABI MWANGI

CLAIMANT

v

VALLEY HOSPITAL LIMITED

RESPONDENT

JUDGMENT

1. In a Statement of Claim lodged in Court on 16 April 2015, Pauline Nyokabi Mwangi (Claimant) contended that she was employed by Valley Hospital Ltd (Respondent) on 23 September 2013 as a *Lab Technologist* and that on 2 January 2015, her employment was unfairly terminated.
2. The Claimant also alleged that she was underpaid and sought compensation for unfair termination of employment and the underpayments.
3. The Respondent, in a Reply filed in Court on 13 May 2015 asserted that the Claimant was offered an attachment and was only employed on 1 September 2014 (subject to 6 months' probation) during which period she was offered a consolidated salary.
4. According to the Respondent, the Claimant did not perform satisfactorily and therefore she was not confirmed after end of probation period in terms of the contract.
5. The parties filed separate Issues on 3 March 2016 and 9 March 2016 but save for language, the issues are substantially similar.
6. The Cause was heard 30 November 2016 and the Claimant filed his submissions on 28 December 2016 while the Respondent filed its submissions on 18 January 2017.
7. The Court has considered the pleadings, evidence and submissions and will address the Issues as framed by the parties.

Whether Claimant was an employee and from when

8. The Claimant's case on this issue is that she was offered employment as a *Lab Technologist* on 23 September 2013, while the Respondent contended that the Claimant was taken as an *Intern* and was only employed with effect from 1 September 2014 after completion of her studies and certification by the Board responsible for *Lab Technologists* (letter of appointment was produced).
9. It is not in dispute that the Claimant was in some sort of contractual relationship with the Respondent from 2013. The letter of appointment given to the Claimant acknowledges this for in the first paragraph there is a proviso

This contract supersedes the previous contract issued to you and come into effect from the date of signing.

10. The dispute is as to the nature of the relationship prior to 1 September 2014.

11. An employee is defined in section 2 of the Employment Act, 2007 as means a person employed for wages or a salary and includes an *apprentice* and *indentured learner*.

12. Supposing that the Claimant was on attachment or internship, would she qualify as an employee in the legal sense?

13. In an attempt answer the question, the Court turns to the Industrial Training Act.

14. In the Act an "*apprentice*" is defined as means a person who is bound by a written contract to serve an employer for a determined period of not less than four years, or such lesser period as the Council shall determine under subsection (2) of section 20, with a view to acquiring knowledge, including theory and practice, of a trade in which the employer is reciprocally bound to instruct that person

15. Nothing was presented to Court to suggest that the relationship between the parties herein was one of *apprenticeship*.

16. "*Indentured learner*" on the other hand is defined as Means a person, other than an apprentice, who is bound by a written contract to serve an employer for a determined period of less than four years with a view to acquiring knowledge of a trade in which the employer is reciprocally bound to instruct that person;

17. Although none of the parties addressed the Court on whether the trade of *Lab Technologists* is subject to the Industrial Training Act, the relationship between the Claimant and Respondent may fit within the parameters of the definition of *indentured learner*.

18. And considering that the letter of appointment produced by the Respondent referred to a previous contract and further considering the obligation placed upon employers by sections 9 and 10 of the Employment Act, 2007, the Court reaches a conclusion that the Claimant as an *Intern* was in a legal sense, an employee of the Respondent from September 2013.

19. Further, in the Court's view, the contention by the Respondent that the Claimant had not obtained the relevant certification by the Board responsible for *Lab Technologists* and therefore could not have been an employee for legal purposes holds no water as the implication from the definition of *employee* in the Employment Act encompasses *apprentices* and *indentured learners*.

Unfair termination of employment

20. The Claimant testified that on 31 December 2014 she felt sick and secured 2 days off (produced) from one of the Respondent's directors (doctor) who treated her and that when she reported to the work place on 2 January 2015 she was called to the Accounts Office and informed that her services had been terminated. The reason was that the matron was not happy for having not been consulted when she secured the sick off.

21. The Respondent on the other hand contended that it relied on a contractual provision to terminate the services of the Claimant during the currency of the probationary period. The ground given in the letter was *non-performance*.

22. It is correct that the contract provided for termination during the probationary period after a *performance evaluation* but after giving one weeks' notice.

23. Performance looks at whether the job has been done correctly (ability and quality) but not the

behaviour of the employee. Problems to do with behaviour are dealt with under misconduct.

24. In my view, performance concerns in the workplace should result in investigation, counselling, meeting and discussion with the employee, training and so on, before dismissal is even contemplated.

25. The contractual provision as to performance evaluation supports that view.

26. The non-performance of the Claimant, according to the Respondent's witness was that lab results were often delayed and that the Claimant was not cooperative. He also accused the Claimant of insubordination

27. Performance evaluation connotes a formal process. The Respondent did not demonstrate that any formal process to evaluate the performance of the Claimant was undertaken.

28. For that reason and despite the proviso in the contract to terminate the contract on weeks' notice during probation, the Court reaches the conclusion that an unfair termination of employment occurred.

Underpayments

29. Underpayments ordinarily arise in two different type of scenarios.

30. The first scenario is when an employer pays remuneration below the contractually agreed rates. That is contractual underpayment.

31. The second scenario occurs where an employer pays remuneration below the prescribed minimum wages within the sector in which the employer operates or in respect of the occupation of the employee. These prescriptions are found in various Regulation of Wages (Amendments) Orders issued from time to time.

32. The Claimant did not prove that she was paid below the contractually agreed remuneration rate or that the remuneration was below the prescribed minimum rates or that any particular Regulation of Wages Order applied to her.

Appropriate remedies

33. The Claimant sought 2 substantive reliefs being underpayments and compensation for unfair termination of employment.

34. The Court has found that there was no underpayment and therefore this head of relief stands to be dismissed.

35. As regards compensation, this is a discretionary remedy in terms of section 49 of the Employment Act, 2007.

36. It is not disputed that the Claimant was paid salary in lieu of notice, *pro rata* leave and other dues amounting in total to Kshs 80,694/-.

37. In the Court's view, this is not an appropriate case to award compensation despite the Claimant succeeding on the question of unfairness of termination of employment.

Conclusion and Orders

38. The Court finds and holds that the employment of the Claimant was unfairly terminated but declines to award compensation.

39. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 3rd day of March 2017.

Radido Stephen

Judge

Appearances

For Claimant

Ms. Tana instructed by Munene Chege & Co. Advocates

For Respondent
Advocates

Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co.

Court Assistant

Daisy