



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 492 OF 2014

PETER MICHIRA

CLAIMANT

v

NATIONAL CEREALS & PRODUCE BOARD

RESPONDENT

JUDGMENT

1. Peter Michira (Claimant), in a Memorandum of Claim filed in Court on 13 October 2014 contended that his dismissal by the National Cereals and Produce Board (Respondent) through a letter dated 6 May 2014 was unfair.
2. The Respondent, in a Memorandum of Reply filed on 24 November 2014 asserted on the other hand that the dismissal was lawful.
3. The Cause was heard on 24 November 2016, when the Claimant testified, and 20 February 2017 when the Respondent's Internal Auditor, Assistant Operations Manager, Human Resource Officer and a Produce Inspector testified.
4. The Claimant's submissions which should have been filed by or on before 20 March 2017 were not on file by this morning, while the Respondent filed its submissions on 20 April 2017 (Respondent asserted in the submissions that the Claimant did not serve it with his submissions).
5. The Court has considered all the material placed before it, and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and if so appropriate remedies, which include contractual entitlements.*

Unfairness of dismissal

Procedural fairness

6. The statutory framework governing termination of employment on account of *misconduct, poor performance and or physical incapacity* is primarily found in sections 35, 36 and 41 of the Employment Act, 2007.
7. The essential ingredients are that the employee should be informed of the allegations to confront, be afforded an opportunity to make representations, and if an oral hearing is held, to be allowed to be accompanied by a colleague or union representative, if a member of a Union.
8. The Claimant was suspended through a letter dated 8 October 2013 and the allegations set out there in briefly were, *creating an excess of 76 bags of maize, bringing in a fictitious farmer to claim ownership of*

the 76 bags of maize, coercing Produce Inspectors to raise Grading Sheet for the 76 bags of maize and failing to forward to the Regional Manager a Stock Adjustment Form for authorisation.

9. The suspension letter also requested the Claimant to answer to the allegations within 2 weeks.

10. The Claimant responded through a letter dated 21 October 2013.

11. Prior to the suspension/show cause letter, the Respondent's Regional Advisory Committee had met on 15 July 2013 and 19 August 2013, where the allegations against the Claimant were deliberated on.

12. A meeting of the Respondent's Central Staff Advisory Committee also met on 18 March 2014 and considered the record concerning the allegations against the Claimant and recommended that he be surcharged for loss of 76 bags of maize and to be dismissed for not following laid down procedures.

13. In so far as the Claimant was informed of the allegations to confront through the suspension letter and he made written representations, the Court is of the view that the process undertaken by the Respondent was substantially in compliance with the statutory minimum requirements, despite no face to face hearing being conducted after the suspension.

14. If the Respondent's Internal Disciplinary Procedures required a mandatory oral hearing, the same was not proved.

Substantive fairness

15. An employer has the statutory burden of proving the reasons for terminating the contract of an employee pursuant to section 43 of the Employment Act, 2007, and further that the reasons are valid and fair in terms of section 45 of the Act.

16. The reasons given for the dismissal of the Claimant were *creating an excess of 76 bags of maize, bringing in a fictitious farmer to claim ownership of the 76 bags of maize, coercing Produce Inspectors to raise Grading Sheet for the 76 bags of maize and failing to forward to the Regional Manager a Stock Adjustment Form for authorisation.*

Forwarding of Stock Adjustment Form for authorisation

17. The Claimant explained the failure to forward the Stock Adjustment Form to the Regional Manager for authorisation by stating that he signed it, but the Stores Clerk failed to forward it to the Regional Manager for authorisation.

18. The Respondent's Assistant Operations Manager who served as the Regional Manager at the material time testified that the Stock Adjustment Form was not brought to him for authorisation and stated that the Procedures required that the Form would be prepared by the Stores Clerk who would in turn forward it to the Depot Manager (Claimant at the time) for recommendation and onward transmission to the Regional Manager.

19. The Produce Inspector who testified as the first witness on behalf of the Respondent, and Internal Audit Manager who was the second witness corroborated the testimony as to the procedures by informing the Court that it was the responsibility of the Claimant as in charge to send the Stock Adjustment Form to the Regional Manager for authorisation.

20. It is unfortunate that the parties did not produce in Court the Procedures Manual, but it is not in dispute that the Claimant was the acting Depot Manager at the time and therefore he had overall responsibility and accountability for the Depot.

21. However, considering the testimony on record that the Stores Clerk plucked off the Stock Adjustment Form from the booklet, the Court would give the Claimant the benefit of doubt on the fairness of this

reason for dismissal.

The 76 bags of maize, fictitious farmer and raising of Grading Sheet

22. According to evidence presented to Court by Respondent's witnesses, an audit concluded on 15 May 2013 established an excess of 76 bags of maize. A Stock Adjustment Form was supposed to be prepared in respect of the maize and forwarded to the Regional Manager for authorisation.

23. The Stock Adjustment Form was not forwarded for authorisation as required.

24. Around the same time, a Stack Card was raised, but according to the Respondent's first witness, it was later altered.

25. Concurrently, the Claimant had approached a Produce Inspector (Respondent's first witness) asking him to issue a Grading Sheet for 76 bags of maize in respect of a farmer who had allegedly delivered maize to the depot but lost his documents. The witness could not find records of the delivery by the farmer and declined to issue a Grading Sheet. The request for grading sheet caused concerns and another audit was done.

26. The audit was carried out on 20 June 2013 and it found alteration of records and the 76 bags of maize excess could now not be accounted for and an audit covering 1 year was then done.

27. The testimonies by the Respondent's 4 witness remained unchallenged by the Claimant in any significant way. The Claimant as the in charge of the depot at the material time appear to have been part of a conspiracy to defraud the Respondent.

28. Putting in perspective the surrounding events at the time which showed an excess of 76 bags of maize in the system which later turned out to a shortage and the eventual audit which revealed a loss, and the attempt by the Claimant to have a Grading Sheet raised in respect of maize not delivered, the Court is satisfied that the Respondent has demonstrated that it had valid and fair reason(s) to dismiss the Claimant.

Appropriate remedies

Pay in lieu of notice

29. The Claimant sought Kshs 139,110/0 being the equivalent of 2 months' salary as pay in lieu of notice.

30. With the conclusion that the dismissal was for valid and fair reasons, this relief does not avail the Claimant.

Compensation

31. Compensation is a discretionary remedy and with the findings on fairness of dismissal, this head of relief is not available to the Claimant.

Staff savings scheme

32. Under this head, the Claimant sought Kshs 1,599,441/- being his and the Respondent's contributions towards the Staff Savings Scheme.

33. The Respondent's Human Resource Officer testified that the Claimant was entitled to the savings but the same were offset against the liabilities owing from the Claimant. However, the witness did not disclose during testimony whether the Claimant was entitled to the employers contributions as well considering the nature of separation.

34. In the submissions, the Respondent appeared to suggest that the Claimant was entitled only to his

portion of the contributions, but produced no evidence or appropriate rules to that effect.

35. The Court would therefore conclude that the Claimant was entitled to both his and the Respondent's contributions.

36. In terms of the audit report dated 4 September 2013, the Claimant was found culpable for loss totalling Kshs 257,260/- while the Central Staff Advisory Committee recommended surcharge of a total of Kshs 207,613/30.

37. Accepting the recommendation of the Central Staff Advisory Committee, the Court finds that the Claimant should be paid Kshs 1,391,827/70.

Conclusion and Orders

38. The upshot of the above is that the Court dismisses the Claim herein save for an award of Kshs 1,391,827/70 being contributions to the Staff Savings Scheme.

39. The Claimant having failed to serve submissions as directed is denied costs.

Delivered, dated and signed in Nakuru on this 28th day of April 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Murimi instructed by J.K. Kimani & Co. Advocates

For Respondent Ms. Kavangi instructed by Lutta & Co. Advocates

Court Assistants Nixon/Daisy