



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

CAUSE NO. 1022 OF 2014

TAILORS & TEXTILE WORKERS UNION CLAIMANT

V

RITZ ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. In a Memorandum of Claim lodged in Court on 19 June 2014, the Tailors & Textile Workers Union (Union) stated the issue in dispute as

Wrongful dismissal of an employee:- namely Patricia Awuor Uhuru (Grievant).

2. Filed together with the Memorandum of Claim was a motion under certificate of urgency seeking primarily the setting aside of the dismissal of the Grievant.

3. On the same day, the Court issued an order restraining the Respondent from replacing the Grievant.

4. Ritz Enterprises Ltd (Respondent) filed a replying affidavit opposing the motion on 15 July 2014 and on 28 July 2014, the Court dismissed the motion because the Union was not in Court to prosecute it. The application was reinstated on 31 July 2014 on the application of the Union and on 9 October 2014, the Court declared the application as spent.

5. When the Cause eventually came up for hearing on 21 July 2015, the Respondent proposed that it be determined based on the record and written submissions to be filed and exchanged (Courts should be cautious when agreeing to take this route to resolution of disputes, unless of course there are facts which do not require proof through evidence).

6. The Court directed the parties to file and exchange submissions within 14 days and scheduled a mention for 8 October 2015, but it appears the file was not placed before Court on that day.

7. The next time the Cause was placed before Court was on 24 November 2015, but because none of the parties were in Court, it was stood over generally.

8. On 8 March 2017, the Deputy Registrar issued a hearing notice to the parties (part of *service week*) and when the Cause was placed before Court, the parties informed the Court that they had agreed that the Union amend and serve an amended Memorandum of Claim together with submissions (Court conceded to the proposal).

9. The Court consequently directed the Union to file and serve an amended Memorandum of Claim together with submissions before end of 4 April 2017, while the Respondent was granted leave file to an

amended Response if necessary and submissions before end of 5 April 2017.

10. The Union filed an amended Memorandum of Claim and submissions on 4 April 2017 and the substance of the amendment was to provide particulars of reliefs sought (pay in lieu of notice, house allowance, accrued leave days and compensation).

11. The amendments, in the view of the Court do not change the substance of the Union's claim because the relief had been pleaded without providing the specifics.

12. The Respondent filed its submissions on 6 April 2017.

13. The Court has considered the record and the written submissions, and although the parties did not settle or agree *Issues for Determination*, identified the *Issues for Determination* as, *whether the Cause was filed prematurely (incompetent), whether the summary dismissal of the Grievant was unfair, whether the Grievant was paid house allowance, whether Grievant had outstanding leave at point of separation and appropriate remedies.*

Prematurity of Cause/Incompetence

14. The Respondent, though taking issue at the interlocutory stage with whether the Cause was filed prematurely before conclusion of conciliation, did not plead this issue in any substantial way in the Response so as to make it an *Issue in Dispute*.

15. However, what is material and is not disputed is that a trade dispute was reported to the Cabinet Secretary by the Union through a letter dated 8 April 2014 and that by the time the Union moved Court on 19 June 2014, some 2 months later, the Cabinet Secretary had not accepted the dispute nor appointed a Conciliator.

16. In terms of section 65 of the Labour Relations Act, the Cabinet Secretary had 21 days to appoint a Conciliator.

17. With no demonstration from the Respondent that the Cabinet Secretary appointed a Conciliator within the statutory timelines, the Court is of the opinion that the Cause herein cannot be defeated on account of prematurity or incompetence due to failure to exhaust the dispute resolution mechanisms outlined in the Labour Relations Act.

Whether dismissal was unfair

Burden on Grievant

18. The statutory framework for termination is found in sections 35, 40, 41, 43, 45 and 47 of the Employment Act, 2007.

19. The point to start the discourse is section 47(5) of the Employment Act, 2007 which provide that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

20. The above statutory provision lays a very low threshold of proof on an employee, but in any case a threshold which an employee must meet in the first instance when complaining of unfair termination or wrongful dismissal, before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the Employment Act, 2007.

21. To meet the test, a Claimant need only show for instance that the notice required by section 35 of the

Employment Act, 2007 was not given.

22. The Union pleaded that the Grievant was entitled to reasonable notice of termination but no notice was given in writing and that she was not granted a fair hearing.

23. The Respondent in its Response did not suggest that a written notice was issued or that a disciplinary hearing was held.

24. The Court can therefore conclude on the basis of the record that no written notice of termination was issued and therefore the Union has passed the section 47(5) of the Employment Act, 2007 test.

Procedural fairness

25. Section 41 of the Employment Act, 2007 has now made the right to a hearing before termination of employment a mandatory requirement if the reason for the termination is based on *misconduct, poor performance or physical incapacity*.

26. The section affords employees certain procedural protections and the employer is expected to observe the statutory requirements.

27. In effect what section 41 of the Employment Act, 2007 has done is to impose certain duties upon employers (employer becomes duty bearer) and the concomitantly, the employee becomes a rights holder.

28. Going further, section 41(2) of the Act envisages a mandatory hearing in cases of summary dismissal anchored on fundamental breach of an obligation arising out of the contract of service, or use of abusive language against a supervisor.

29. Nowhere in its pleadings did the Respondent suggest that a hearing as contemplated by section 41 of the Act was conducted.

30. The Court concludes therefore that the summary dismissal of the Grievant was procedurally unfair.

Substantive fairness

31. With the conclusion on procedural fairness, it would not be necessary for the Court to examine whether the Respondent has met the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007.

House allowance

32. It is the responsibility of an employer to draw up a written contract providing for certain particulars prescribed by statute.

33. In terms of section 31 of the Employment Act, 2007, the employer should provide accommodation to its employees or in lieu thereof provide an allowance towards housing accommodation, unless the salary is consolidated.

34. The Union pleaded that the employment contract was oral, and without any further evidence as to what was agreed on account of housing or what the salary covered, the Court is unable to determine whether the head of claim for house allowance has merit. This head of claim required proof through evidence and the Court cannot just take the sum of Kshs 90,000/- as pleaded without an evidential foundation).

Leave

35. The Union did not disclose the aggregate number of leave days and/or the leave period in respect of

which the accrued leave related (it attempted to sneak in the details in the submissions, an issue of evidence which cannot be proved through submissions, as such practice is unknown in law or procedure).

36. In the Court's view, it was necessary for the same to be proved by way of evidence or by way of pleading precise details.

37. But because the summary dismissal letter outlined that the Grievant had accrued leave computed as equivalent to Kshs 1,100/-, that is the amount which the Court can allow.

Appropriate remedies

Reinstatement

38. In the view of the Court this is not a suitable case to order reinstatement of the Grievant because the practicality of reinstatement was not interrogated in evidence.

1 month pay in lieu of notice

39. Because the Grievant was paid by the month and on account of the finding that the dismissal was unfair, the Grievant is entitled to 1 month pay in lieu of notice in terms of section 35 of the Employment Act, 2007.

House allowance

40. For the reasons set out in the body of the judgment, this head of relief is declined.

Accrued leave days

41. This head of relief is allowed in the sum of Kshs 1,100/- as set out in the dismissal letter.

Earned Wages

42. The Respondent had indicated in the dismissal letter that the Grievant was due Kshs 3,850/- as wages for March 2014.

43. Although the Union did not plead the wages, the Court would allow the head of claim on the basis of the dismissal letter.

Overtime

44. Similarly, the Union did not plead overtime but the dismissal letter showed due overtime pay of Kshs 1,650/- which the Court allows.

Compensation

45. The Grievant served the Respondent for about 3 years and in consideration of the length of service, the Court is of the view that the equivalent of 4 months gross wages would be appropriate and fair as compensation.

46. Before concluding, the Court wishes to observe that though the parties made reference to a collective bargaining agreement, the same was not filed in Court.

Conclusion and Orders

47. The Court finds and holds that the summary dismissal of the Grievant was procedurally unfair and awards her and orders the Respondent to pay her

(a) 1 month pay in lieu of notice Kshs 12,000/-

(b) Accrued leave Kshs 1,100/-

(c) Earned wages Kshs 3,850/-

(d) Overtime Kshs 1,650/-

(e) Compensation Kshs 48,000/-

TOTAL Kshs 66,600/-

48. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 7th day of April 2017.

Radido Stephen

Judge

Appearances

For Union Mr. Achiando instructed by Okweh Achiando & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon