



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndungu v Kenol Kobil Limited (Cause 534 of 2014)**  
**[2017] KEELRC 1039 (KLR) (31 May 2017) (Judgment)**  
*Ephantus Githuku Ndungu v Kenol Kobil Limited [2017] eKLR*  
Neutral citation: [2017] KEELRC 1039 (KLR)

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

**CAUSE 534 OF 2014**

**HS WASILWA, J**

**MAY 31, 2017**

**BETWEEN**

**EPHANTUS GITHUKU NDUNGU ..... CLAIMANT**

**AND**

**KENOL KOBIL LIMITED ..... RESPONDENT**

**Indemnities should be precisely defined, clearly stating the specific claims they protect against.**

*The main issues before the court were whether termination of an employee that followed an accident and the performance was put to question when previously, it had been assessed as very good was discriminatory; and whether one could be deemed to be estopped from filing a claim having signed an indemnity and discharge voucher where the indemnity discharge voucher was not specific to the parameters that the claimant would not pursue. On discrimination and unfair termination, the court held that the claimant's termination followed the accident. His performance of employee was not put to question when previously, it had been assessed as very good. As such his termination was discriminatory. The claimant was awarded 12 months' salary as unfair termination (65,000 x 12 = 780,000). On indemnity the court held that paragraph 2 of the indemnity form in which they were to tick what the indemnity was for was not ticked off. The court held that the indemnity signed by the claimant was not clear as it did not state parameters that the claimant would not pursue.*

Reported by John Ribia

**Constitutional Law** – fundamental rights and freedoms – freedom against discrimination - where an employee's Performance was merit worthy before an accident that obligated the employee to use a wheel chair – where the employee was fired shortly after - whether termination of an employee that followed an accident and the performance of employee was put to question when previously, it had been assessed as very good was discriminatory.

**Employment Law** – discrimination – discrimination of persons with disability – where an employee's performance was merit worthy before an accident that obligated the employee to use a wheel chair – where the employee was fired shortly after - whether termination of an employee that followed an accident and the



*performance of employee was put to question when previously, it had been assessed as very good was discriminatory - Constitution of Kenya article 27(4), and (5); Employment Act, 2007 (Cap 226) section 30(1), 43(1), and 47(5)*

**Law of Contract** – indemnity – general indemnity that did not specify the parameters that a claimant would not pursue - whether one could be deemed to be estopped from filing a claim having signed an indemnity and discharge voucher where the indemnity discharge voucher was not specific to the parameters that the claimant would not pursue.

### **Brief facts**

The claimant was employed by the respondent. He was doing well, to a point that he was awarded a merit due to his exemplary performance. However, 3 months after being awarded a merit, the claimant had a car accident that left him obligated to use a wheelchair for the rest of his life. He proceeded on sick leave to attend to rehab sessions, but almost a year later, he was terminated from employment. The claimant sued for 12 months' pay for unfair termination on grounds that he had been discriminated against because of his disability.

The respondent denied the allegation of unfair termination. They claimed that they followed the Human Resource Policies, they awarded the claimant sick leave with full pay for two and a half months and allowed him to extend his sick leave for several months without pay. They stated that the letter of termination did not in any way refer to the claimant's incapacitation or disability as the ground for termination, but instead refers to the claimant's performance and contribution to the process as the reason for the termination of the claimant's employment. Lastly the respondent stated that it was indemnified by the claimant from legal action because before the claimant was paid his one-month salary in lieu of termination, he signed an indemnity form.

### **Issues**

- i. Whether termination from employment that followed an accident and the performance of employee was put to question when previously, it had been assessed as very good, was discriminatory.
- ii. Whether one could be deemed to be estopped from filing a claim having signed an indemnity and discharge voucher where the indemnity discharge voucher was not specific to the parameters that the claimant would not pursue.

### **Held**

1. By virtue of the appointment letter issued to claimant by the respondent on July 4, 2011 and which was later confirmed on April 24, 2012, the contract was subject to respondents' staff rules, regulations and practices as amended from time to time. The contract could only be terminated by giving one months' notice or one month's pay in lieu of notice except in cases of summary dismissal.
2. The claimant's performance was considered very good in the merit of 2012 as per the letter of July 17, 2012 and he was given a pay rise. It was apparent that thereafter the claimant was involved in an accident and had to be away from duty for some time. Vide a letter dated November 8, 2012 he was informed that he was going to be on unpaid leave with effect from November 1, 2012 as per company policy. That was in accordance to the respondents' human resource policy.
3. Section 30(1) of the Employment Act provided that after two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre. The claimant was informed that as per the Company Policy, he was entitled to 30 days sick off on full pay and 15 days on half pay every calendar year but that in his case, he had been on full pay for 2 ½ months and that was why he was being considered for leave without pay. The position taken by the respondent was in good light and over and above the minimum provided for in the Employment Act.
4. The respondent via a letter queried the claimant's inability to perform which was not based on any particular data given that in July 2012, he had been assessed and his performance found to be very good



- which fact earned him a merit pay rise. The termination letter of the claimant had no mention of the sickness or the incapacity of the claimant to perform his duties due to the illness if at all.
5. The claimant was awarded merit for good performance and no other reason. It was unfortunate that a month later the claimant was involved in an accident which resulted in the permanent injuries confining him to a wheelchair. The assessment then of May 2013 that on his performance that called for immediate action when he was still unwell was not due to none performance but due to his disability condition. That was compounded by the fact that there was no other assessment he underwent between July 2012 to May 2013 which had been exhibited to court to warrant any other explanation. By deciding to terminate the claimant due to the disability, the respondents directly discriminated against the claimant.
  6. The respondent treated claimant in a discriminatory manner even in disregard to their own human resources manual which stated that no employee should be discriminated against by way of race, religion, colour, sex or physical disability.
  7. The claimant signed an indemnity and discharge voucher upon being issued with a cheque for Kshs 27,744.35 as being part payment of two-thirds sum of monies due to him by the company. The indemnity and discharge voucher however did not state in respect of what the money was being paid. It was not clear whether it was due to the termination or for what reason.
  8. The indemnity and discharge voucher as drafted showed that there were some moneys owing to the claimant from respondent which were being paid out. Paragraphs 2 of the indemnity which gave options as to why the indemnity was made was not ticked or crossed out as the case may be as to whether it was due to termination of contract for service with the company or as a result of recognition. The court was not sure what it really applied to.
  9. The indemnity signed by the claimant was not clear as it did not state parameters that the claimant would not pursue. The respondents could not rely on the doctrine of estoppel.

*Claim allowed.*

#### **Orders**

- i. *The claimant was awarded 12 months' salary as unfair termination (65,000 x 12 = 780,000).*
- ii. *The claimant was awarded exemplary damages for discrimination on account of disability equivalent to Kshs 5 million.*
- iii. *The claim of Group Life Insurance is not established.*
- iv. *The respondent would pay costs of the suit.*

#### **Citations**

##### **Cases**

1. Abiero, Augustine Odhiambo v K.K. Security Ltd (Cause 296 of 2013; [2014] KEELRC 427 (KLR)) — Explained
2. Anupa & another v Attorney General & another (Petition 93 of 2011; [2012] KEHC 1081 (KLR)) — Explained
3. Osir, Beatrice Achieng v Board of Trustees Teleposta Pension Scheme (Cause 665 of 2011; [2012] KEELRC 187 (KLR)) — Explained
4. Republic v Kenya Railways & another Ex-Parte Inviolatte Wacike Siboe (Miscellaneous Application 10 of 2009; [2014] KEHC 7186 (KLR)) — Explained
5. Sang v Attorney General (Cause 2408 of 2012; [2014] KEELRC 752 (KLR)) — Explained
6. Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others ((JR 662/06) [2007] ZALC 98; [2008] 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC)) — Explained
7. Wilson v. Solis Mexican Foods Inc. (2013 ONSC 5799 (CanLII)) — Applied
8. Mulji Jetha Ltd v Commissioner of Income Tax ([1966] 1 EA 259) — Explained

##### **Statutes**



1. Constitution of Kenya, 2010 — article 27 (4), (5) — Interpreted
2. Employment Act, 2007 (Act No 11 of 2007) — section 30 (1); 43 (1); 47 (5) — Interpreted
3. Evidence Act (cap 80) — section 120 — Interpreted

#### **International Instruments**

1. Convention on the Rights of Persons with Disabilities (CRPD), 2006 — article 5, 27
2. Managing Disability in the Workplace : ILO Code of Practice, 2002 — In general

#### **Advocates**

*Wilson* for the Respondent

*Maina holding brief for Thurairra* for the Claimant

### **JUDGMENT**

1. Before the court is a statement of claim for unlawful termination dated March 28, 2014 where the claimant claims for:
  - a. Kshs 780,000.00 being 12 month's pay for unfair termination;
  - b. Compensation under the Group Life Insurance Cover (to be quantified at the hearing);
  - c. Exemplary damages to be assessed by the honourable court for discrimination against the claimant on the basis of his disability;
  - d. Interest on (a)(b) and (c) at court rates till payment in full.
  - e. Costs of this cause;
  - f. Such other relief as the honourable court may deem fit to grant.
2. The claimant was appointed via letter dated July 4, 2011 as a Sales Representative Trainee for an initial contract period of six months commencing July 18, 2011 at a gross salary of Kshs 55,000.00. The contract was confirmed on the April 24, 2012 making him permanent and pensionable with a review of salary to Kshs 60,588.00. He performed his duties diligently meriting an increase of his salary by 65,000.00 effective July 1, 2012.
3. Unfortunately, the claimant was involved in an accident on the 18<sup>th</sup> of August 2012 in the course of his duty, confining him to a wheelchair for the rest of his life. He proceeded on sick leave to enable him attend rehabilitation session at the National Spinal Injury Hospital. His employment was terminated via a letter dated May 7, 2013 with reasons stated as

”...his positions’ performance and contribution to the whole process called for immediate action in order to meet company business expectation....” .

He was given a month's salary in lieu of notice.
4. The claimant further claims that a Group Life Insurance Cover provided by the respondent to all its employees as per the staff manual entitled him to compensation from the insurer which compensation was unavailable to him upon discovery of the fact that the respondent was not paying insurance premiums.
5. The claimant states that the court ought to award as claimed.
6. The respondent has filed a memorandum of response dated July 30, 2014 where they deny the allegation of unfair termination. They admit that the claimant was in their employment as a Sales



Representative from the 18<sup>th</sup> of July 2011 until his termination after an evaluation that found that he was incapable of discharging his duties or perform his obligations under the employment contract.

7. They state that his sick leave had lapsed by the 1<sup>st</sup> of November 2012 under the respondents' policy and was since then on unpaid sick leave, and further that the respondent carried out continuous performance reviews during that quarter of 2012.
8. The respondent states that his termination of employment was in compliance with the *Employment Act* and respondent Human Resource Policy. The respondent paid one month's salary in lieu of notice and settled the claimant's Group Personal Accident by paying the claimant's Kshs 3,120,000.00.
9. They state that the letter of termination dated May 7, 2013 did not in any way refer to the claimant's incapacitation or disability as the ground for termination or otherwise but instead refers to the claimant's performance and contribution to the process as the reason for the termination of the claimant's employment.
10. In Section 43(1) of the *Employment Act 2007*, provides that:

“the reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which cause the employer to terminate the service of the employee..”

and the letter written July 17, 2012 could not form a basis for determining the performance of the claimant at the time of termination of his employment.

11. They state that the burden of proving unfair termination of contract of employment is with the claimant thereafter the duty shifts to the respondent to prove that the termination was fair. They rely on section 47(5) which provides 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.”
12. They submit that the claimant has not provided any evidence to demonstrate that the termination was unfair. They state that in paying one months' salary in lieu of notice, they were complying with the terms of the contract between the parties which provided that the parties ought to give notice salary in lieu unless it is a case of summary dismissal.
13. The respondents submit that the claimant signed an indemnity and discharge voucher on the 29<sup>th</sup> of July 2013, which stated that:

“the above settlement has been made to me on understanding that no further claim or claims will be made to the company by me and/or my personal representatives, agents and or creditors and that i undertake to indemnify the company, its directors, shareholders, managers, agents and/or servants from any or all claims that may arise as a result of termination of my contract service with the company and/or as a result of my resignation.

I shall have no further claim or claims whatsoever, against the company, its directors, shareholder, managers, agents and or servants including but not limited to reinstatement to my former employment.”



14. They state that the claimant was then with the knowledge that no further claim against the respondent was valid and pleads the doctrine of estoppel. To this end they rely on section 120 of the Evidence Act cap 80 of the Laws of Kenya states:
- “when one person by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing”.
15. They also rely on Augustine Odhiambo Abiero v KK Security Ltd [2014] eKLR where the court stated the following on estoppel:
- “It is trite that estoppel refers to a bar that prevents one from asserting a claim or a right that contradicts what he has said or done before. Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when through a false representation of facts or conduct, the person to be estopped has induced another person to act in certain way that resulted to substantial prejudice. Promissory estoppel on other hand does not deal with representation of facts as in equitable estoppel but only on a promise which the promisor reasonably expected the promisee to act on it. If the promisee acts on promise even if it was not supported by any consideration”.
16. They therefore state that the claim herein has been brought in bad faith. They were at all material times in compliance with the term of Group Life Insurance Cover and the claimant was paid all his dues. The reliefs claimed have no merit and to that end they must fail.
17. They pray the court dismisses the claim with costs to the respondent.
18. Having considered the evidence and submissions of both parties, the issues for determination are as follows:-
1. Whether the claimant’s termination was in accordance with the respondents’ HR Manual and Labour Laws.
  2. If not whether the claimant suffered any discrimination.
  3. Where the claimant by virtue of an indemnity and discharge voucher signed on July 29, 2013 exonerated the respondent from any liability.
  4. What remedies to grant in the circumstances.
19. By virtue of the appointment letter issued to claimant by respondent on July 4, 2011 and which was later confirmed on April 24, 2012, the contract was subject to respondents’ staff rules and regulations and practices as amended from time to time.
20. The contract could only be terminated by giving one months’ notice or one month’s pay in lieu of notice except in cases of summary dismissal.
21. It is also noted that the claimant’s performance was considered very good in the merit of 2012 as per the letter of July 17, 2012 and he was given a pay rise.
22. It is apparent that thereafter the claimant was involved in an accident and had to be away from duty for some time. Vide a letter dated November 8, 2012 he was informed that he was going to be on



unpaid leave with effect from November 1, 2012 as per Company Policy. This was in accordance to the respondents' HR Policy on sick leave which provides that:-

“(c) Sick Leave

The provisions of the Employment Act 226 shall apply. However, in cases of prolonged sick leave, management will consider each case on its own merit.

All sick leave cases are subject to production by the employee of a certificate of incapacity to work, signed by a duly qualified medical practitioner”.

23. Under the *Employment Act* stated above at section 30(1):

“After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre”.

24. From the letter of November 8, 2012, the claimant was informed that as per the Company Policy, he was entitled to 30 days sick off on full pay and 15 days on ½ pay every calendar year but that in his case, he had been on full pay for 2 ½ months and that is why he was now being considered for leave without pay.

25. The position taken by respondent was in good light and over and above the minimum provided for in the *Employment Act 2007*.

26. In regard to discrimination, from the termination letter of the claimant, however there is no mention of the sickness or the incapacity of the claimant to perform his duties due to the illness if at all.

27. The letter read as follows:

“Following review of all business processes across the group particularly the marketing department's performance and in consultation with your immediate supervisor, we note that your position's performance and contribution to the whole process calls for immediate action in order to meet company business expectation.

In light of the above and in line with your appointment letter dated 4/7/2011, we hereby give you one months' notice to terminate your services effective May 16, 2013 however, you will be exempted from serving the one months' notice and will be paid in lieu of notice.

Your final dues will be calculated and communicated to you and we will keep you updated on the insurance claim we had lodged on your behalf.

On behalf of the organization, I take this opportunity to thank you for the services rendered during the period you have worked with us, and wish you and your family success in your future endeavors.

Yours faithfully,

David Ohana

General Manager “



28. This letter refers to review of business process across the group and in particular to the claimant's performance and contribution to the whole process. The respondent seems to be querying the claimant's inability to perform which is not based on any particular data given that in July 2012, he had been assessed and his performance found to be very good which fact earned him a merit pay rise.
29. Infact under the respondent's own HR Policy at article 5, it is stated as follows:
- “Definition of merit and promotional increase:-
- Merit
- a. A merit increase is one which is granted as a result of good performance on the job. No increase should be granted to an employee whose performance is rated unsatisfactory.
  - b. Percentage increases shall be based on established annual Economic Factors.
30. It is apparent therefore that the claimant was awarded this merit for good performance and no other reason.
31. It is unfortunate that a month later on 18/8/2012, the claimant was involved in an accident which resulted in the permanent injuries confining him to a wheelchair. The assessment then of May 2013 that on his performance that called for immediate action when he was still unwell was not due to none performance but in my view due to his disability condition. This fact is compounded by the fact that there is no other assessment he underwent between July 2012 to May 2013 which has been exhibited to court to warrant any other explanation.
32. The claimant has stated that he was dismissed on account of disability which is discrimination. Article 27(4) and (5) of the Kenyan *Constitution* provides that:
4. “The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
  5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)”.
33. By deciding to terminate the claimant due to the disability, the respondents directly discriminated against the claimant.
34. Kenya has ratified The *United Nations Convention on the Rights of Persons with Disability* and the said Convention clearly outlaws discrimination on grounds of disability.
35. Under article 5 of *Convention* states that:
1. “Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
  2. Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”.
36. Article 27 of the *United Nations Convention on Rights of Persons with Disability* also provides as follows:



1. “States parties recognize the right of persons with disabilities to work, on an equal basis of others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a Labour Market and work environment that is open, inclusive and accessible to persons with disabilities. And that states parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to inter alia:
  - a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, continuance of employment, career advancement and safe and healthy working conditions;
  - b. Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
  - c. Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
  - d. Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
  - e. Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
  - f. Promote opportunities for self-employment, entrepreneurship, the development of cooperative and starting one's own business.
  - g. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.
  - h. Promote the acquisition by persons with disabilities of work experience in the open labour market.
  - i. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
2. States parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forces or compulsory labour.

The principles of equal treatment and equal opportunities became the underlying principles in the *ILO Code of practice for managing disability in the workplace* (2002), a voluntary code for employers “.

37. In Labour Court of South African in *Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and others* (JR 662/06) (2007) ZALC 98; (2008); 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC) (25 December 2007), Ferreira worked for the Bank for 17 years. After 15 years of a very successful career, tragedy struck as she was involved in a motor vehicle accident on February 2, 2002 which caused her severe injuries. She then developed severe back pain which was later diagnosed as fibromyalgia. She could no longer do the work she did before. The bank doctor recommended she be put on light duty. The work assigned to her didn't inspire her and she requested for a more challenging job that she could do. She was given a more challenging job. On 12.10.2004 she was terminated for incapacity which had resulted as high absenteeism and low productivity.



38. In finding for the petitioner, the court observed as follows:

“The origin of the test for fairness of the dismissal of an employee with disabilities is the *Constitution*. Various foreign and international human rights and labour instruments seek to re-enforce the protection of people with disabilities and prevent discrimination against them. The overarching policy underpinning the protection of disabled people is to give effect to human rights. In a claim based on an incapacity dismissal, the intersecting constitutional rights are rights to equality, human dignity, the right to choose a trade, occupation or profession freely and to fair labour practices”.

39. The court also found as follows:

“An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee’s recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to “investigate the extent of the incapacity or the injury... (and) ... all the possible alternatives short of dismissal.”

Stage One: The employer must enquire into whether or not the employee with a disability is able to perform her work. If the employee is able to work, that is end of the enquiry; the employer must restore her to her former position or one substantially similar to it. Where possible, the job should correspond to the employee’s own choice and take account of her individual suitability for it. If the employee is unable to perform her work and her injuries are long term or permanent, then the next three stages follow.

Stage Two: The employer must enquire into extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question.

Stage Three: The employer must enquire into the extent to which it can adapt the employee’s work circumstances to accommodate the disability. If it is not possible to adapt the employee’s work circumstances, the employer must enquire into the extent to which it can adapt the employee’s duties. Adapting the employee’s work circumstances takes preference over adapting the employee’s duties because the employer should, as far as possible, reinstate the employee.

During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including “the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement” for the employee.

Stage Four: If no adaptation is possible, the employer must enquire if any suitable work is available.

An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee’s recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to “investigate the extent of the incapacity or the injury... (and) ... all the possible alternatives short of dismissal.”



40. The above principles have also been applied in other cases. See *Paul Anup & another v AG & another* 2012 eKLR, *Antony Kipkorir Sang vs AG* (2041) eKLR, *Beatrice Achieng Osir & Board of Trustees Teleposta Pension Scheme*.

41. In another case from the Supreme Court of Justice in Ontario in *Wilson v Solis Mexican Foods Inc.* 2013 ONSC 5799 (CanLII) the court made the following observation:

“(56) Nevertheless, I accept the proposition that a decision to terminate an employee based in whole or in part – on the fact that employee has a disability is discriminatory and contrary to the code. If an employer regards disability as a factor justifying termination (or other negative treatment), the employee in question is not receiving “equal treatment...without discrimination” as s 5(1) of the code requires.

(57) In my view, the evidence leads to the conclusion that the plaintiff’s ongoing back issue was a significant factor in the decision to terminate. I reach that conclusion based on the totality of the evidence. The evidence I rely upon is as follows.

(58) First, the defendant’s regard for the plaintiff changed in December, 2010. I will repeat some of the evidence here. A formal attendance and performance review had been conducted in November, 2010. The plaintiff was performing at an acceptable level.

(59) A few weeks later (December 16, 2010), the plaintiff met with Allan Roberts, the defendant’s Human Resources Manager. She raised a number of issues including a sore back and feeling physically unwell.

(60) Five days later Mr Roberts met with Mr Vivian (the defendant’s COO) and Ms Seabourne (the defendant’s Controller). They concluded “time to consider that [the plaintiff] may not be suited to Solis”.

(61) The matter drifted but clearly the plaintiff’s back issues were ongoing. By early March, 2011, the plaintiff was off work.

(62) On March 7, 2011, Dr Belyea wrote her first cryptic and unsatisfying note simply saying that the plaintiff was to be “off work until further notice due to medical reasons”.

(63) The defendant understandably wanted information concerning the plaintiff’s “recovery status, a return to work date and/or a date when you have been scheduled to be medically reassessed.”

(64) After several e-mails from the plaintiff, the defendant wrote again by letter dated 24, 2011. As noted previously, it asked for a progress note from Dr Belyea by mid-day on March 29, 2011.

(65) The plaintiff did exactly as she was asked. Both her March 28, 2011 e-mail and Dr Belyea’s note bearing that same date indicated that the plaintiff could return within days and gradually increase her daily hours. By week three it was proposed that she would

(66) Did the defendant allow the “valued member of our company”? No.



- (67) The defendant insisted that there be a “complete recovery” before the plaintiff’s return. On March 31, 2011, the defendant asked that Dr Belyea complete and return the Functional Abilities Form by April 18, 2011 “in order to review and discuss any limitations you may still have at that time.”
- (68) The plaintiff did so. On its face, the plaintiff could return to work full time though she would have to alternate between sitting, standing and walking on some basis. Did the defendant “discuss any limitations” with the plaintiff? No. It wrote again, on April 14, 2011 and insisted on a second time on a “complete recovery to a safe and healthy state” as a pre-condition to the plaintiff’s return. No accommodation was offered or seemingly, even considered.
- (69) The same form had to be completed again and submitted by May 10, 2011 “or sooner if a complete recovery is imminent prior to this date”.
- (70) To say that an impression emerges that the defendant was disingenuous is an understatement. Ms Wilson was given the run around. The defendant does not want her to return. How, with respect, does one know there has been a “complete recovery” from a bad back?
- (71) Although not mentioned in a single letter, the impending divestiture is hovering in the background. While I was not shown a single transaction document or agreement of purchase and sale, it is inconceivable that the sale of the New Orleans Pizza decision occurred overnight.
- (72) Indeed, at paragraph 33 of his affidavit, Mr Vivian deposed:  
While the plaintiff was out leave (*sic*) Solis Mexican Foods Inc. was in the process of corporate restructuring.  
That “restructuring” was the sale of a division.
- (73) As noted, on May 19, 2011, the plaintiff was terminated. The divestiture or “corporate restructuring” had been completed. That letter was dated eight (8) days after the deadline for delivery of the Second Functional Abilities Form.
- (74) With respect, from my chair it is clear that the employer no longer felt the need to prolong things. It had the excuse it needed to rid itself of the plaintiff once and for all. If things were otherwise why did silence reign after the defendant received Dr Belyea’s April 28, 2011 note advising that the plaintiff would be off work until June 15, 2011?
- (75) If the divestiture was the real reason for the plaintiff’s termination, why did that transaction not feature, at all, in a single communication with the plaintiff before May 19, 2011? Did it truly only realize the plaintiff was not needed post-closing? Was the author of the letters – the Human Resources Manager – caught so unprepared? No. The defendant’s position is contrary to the evidence and defies common sense.
- (76) Without hesitation, I conclude that the decision to terminate the plaintiff started with her complaints on December 16, 2010. Those were largely based on the condition of her back and the long hours”.



42. The above case presents a replica of the scenario in the current case where the termination follows after the accident and the performance of claimant is put to question when previously, it had been assessed as very good.
43. My finding is that indeed the respondent treated claimant in a discriminatory manner even in disregard to their own HR Manual as article (V) which states:-
- “No employee should be discriminated against by way of race, religion, colour, sex or physical disability”.
44. I therefore make a finding that the respondent discriminated against the claimant on account of disability.
45. The next question is whether the claimant is estopped from any claim having signed an indemnity and discharge voucher on July 29, 2013 exonerating the respondent from any liability.
46. It is true that on 29-7-2013 the claimant signed an indemnity and discharge voucher upon being issued with a cheque No 027555 for Kshs 27,744.35 as being part payment of 2/3rds sum of monies due to him by the company.
47. The indemnity and discharge voucher however did not state in respect of what the money was being paid. It is not clear whether it was due to the termination or for what reason.
48. My understanding of the indemnity and discharge voucher as drafted shows that there were some moneys owing to the claimant from respondent which were being paid out. Infact paragraphs 2 which gives options as to why the indemnity was made was not ticked or crossed out as the case may be as to whether it was due to termination of contract for service with the company or as a result of recognition. The court is not sure what it really applies to.
49. The respondents have submitted that the claimant is estopped from making any claim against the respondent having signed the stated indemnity. They cited *Republic v Kenya Airways & another ex parte Inviolatte Wasike Siboe*. The cited case however supports the claimant’s position as in the Kenya Railways case Hon J Oduga expounded on this principle whist citing *Mulji Jetba Limited v Commissioner of Income Tax* Nairobi HCCC No 594 of 1996 (1967) EA 50: where the court found as follows:-
- “Equitable estoppel is not a principle to be applied by the court in an arbitrary or mechanical way without regard to the factors which normally influence the exercise of its inherent discretion in the granting of equitable relief, and even if there were no other relevant consideration, the company has been guilty of laches to such an extent as would render it inequitable to grant the relief which it seeks.....Although it is said that to succeed in the defence of equitable estoppel, the promisee must satisfy the court that it is inequitable to allow the promissor to sue on the original contract, extension of the principle to matters not connected with the contract has been recognized. If a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it is given, once it is acted upon, he is bound by it.....”.
50. Looking at the instant case, I would say that the indemnity signed by the claimant is not clear as it does not state parameters that the claimant would not pursue.
51. The respondents cannot therefore rely on the doctrine of estoppel.



52. Having found as above, I now move on to remedies that can be granted in the circumstances. I find the claimant was terminated unfairly and I award him:

1. 12 months salary as unfair termination = 65,000 x 12 = 780,000/= .
2. Exemplary damages for discrimination on account of disability equivalent to Kshs 5 million.
3. The claim of Group Life Insurance is not established.
4. The respondent will pay costs of this suit.

**READ IN OPEN COURT THIS 31<sup>ST</sup> DAY OF MAY, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wilson for Respondent – Present

Maina holding brief for Thurania for Claimant – Present

