



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 496 OF 2014

BETWEEN

KYALO ALEX DAVID CLAIMANT

VERSUS

SERENA BEACH RESORT & SPA RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Company Advocates for the Claimant

Munyithya, Mutugi, Umara & Muzna Advocates for the Respondent

JUDGMENT

1. The Claimant filed this Claim on 13th October 2014. He states he was employed by the Respondent Hotel as a Cashier, on 1st July 2007. His contract was terminated by the Respondent on 30th June 2014, on the ground of redundancy. He earned a consolidated monthly salary of Kshs. 31,436. The Claimant served under different fixed term contracts, the last which was to run up to 31st August 2014. He states redundancy did not conform with Section 40 of the Employment Act 2007. He was not paid his rightful redundancy dues, in accordance with this law and the applicable CBA.

2. He states he is entitled to: *notice of 3 months under the CBA; 16 days' wages for each of the 8 years completed in service; termination gratuity under the CBA; salary for the 2 months left in the last contract; equivalent of 12 months' salary for unfair termination; certificate of service; costs; and interest.* The total monetary claim is quoted at Kshs. 752,367. The Claimant prays the Claim is allowed.

3. The Respondent filed its Response on the 18th November 2014. It admits the Claimant was its Employee for the period, and in the capacity, stated in the Claim. Termination was necessitated by economic factors. The Respondent experienced significant reduction in business, making it impossible for the Respondent to deliver its contractual obligations. The Claimant was paid part of his terminal dues. The exercise was carried out fairly, in accordance with the law and the applicable CBA. The Claimant is not entitled to prayers sought. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.

4. The Claimant gave evidence, and closed his case on the 7th September 2016. Tom Mboya Lelo, Respondent's Human Resource Officer gave evidence on the same date, bringing proceedings to a close. The dispute was last mentioned on 7th November 2016, when Parties confirmed the filing of their Closing Submissions, and Judgment reserved for 16th June 2017, or by notice, if ready before then.

Claimant's evidence:-

5. The Claimant restated the contents of his Pleadings in his evidence. He gave a history of the various fixed term contracts under which he served. The last was to expire on 31st August 2014. He testified the Respondent did not follow the CBA in carrying out redundancy. He never attended any meeting between the Respondent and the Union.

6. Cross-examined, he told the Court he served under various contracts. His pay slips were issued by an entity described as Tourism Promotion Services. He sued Serena. Employer was indicated as Tourism Promotion Services [Kenya] Limited in the letters of employment. He was covered under KUDHEIHA CBA. He was not issued notice before redundancy. He did not approach the Employer for the Certificate of Service. Redirected, the Claimant stated Respondent's letterheads showed Serena was managed by a Company called Tourism Promotion Services Limited. No one questioned Claimant's membership of KUDHEIHA. Union dues were deducted by the Respondent and remitted to the Union as shown in the pay slips. CBA provided for termination gratuity, based on the consolidated salary.

Respondent's evidence: -

7. Lelo testified he has worked for the Respondent for 22 years. His duties include staff relations. The Claimant was initially employed as a Waiter on 1st December 2007. There were 107 Employees affected by redundancy. The Respondent discussed with Claimant's Union at length, and agreed on payable dues. Redundancy dues were paid. The Respondent indicated to the Union Employees would be recalled if and when business improved. Some of the Claimant's former Colleagues have since been recalled.

8. Questioned by Counsel for the Claimant, Lelo testified he had worked for 4 years as a Human Resource Assistant, and 6 years as Human Resource Officer. He was a Time-Keeper for the balance of his years in service. The Respondent gave notice with regard to termination, not redundancy. There were no notices issued to the Labour Office. There was a collective consultative meeting between the Respondent and the Union. Redirected, the Witness testified the consultative meeting was collective, rather than individualized exercise. Lastly, questioned by the Court, Lelo testified Serena Hotel is a Unit of TPS group.

9. The issues, as understood by the Court, are whether redundancy was carried out in accordance with the prevailing CBA and Section 40 of the Employment Act; and whether the Claimant merits the prayers sought.

The Court Finds:-

10. Kyalo Alex David was employed by the Respondent hotel, under various fixed term contracts. The last was to lapse 31st August 2014. It was terminated prematurely on 30th May 2014, on the ground of redundancy.

11. There is no dispute about the genuineness of redundancy. The Respondent and the Claimant's Union held consultative meetings as shown in the minutes attached to the Response. The genuineness of redundancy was never in doubt in those meetings.

12. The dispute appears to revolve around execution of the process, and payment of terminal dues.

13. The consultative meetings between the Respondent and the Union took place on 29th May 2014 and 30th May 2014. The Respondent wrote to the Claimant on 30th May 2014, informing him that his contract

would expire on 30th June 2014. The contract was to ordinarily, expire on 31st August 2014 as stated above.

14. There was no notice of the intended redundancy issued upon the Claimant, his Union and the Labour Office as contemplated under the CBA and Section 40 of the Employment Act. The Claimant was simply issued with a notice of termination on the date Parties were engaging in consultation. It was effectively an ordinary 30- day notice of termination, rather than a notice of the intended redundancy. The Labour Office was not involved at all. Indeed the General Manager confirmed in the meeting of 30th May 2014 that the Respondent would issue Employees 1 month notice as per contract requirement.

15. Termination notice informed the Claimant he would be paid salary up to and including 30th June 2014; service charge plus beverage bonus up to and including 30th June 2014; and leave earned and not taken at 8.5 days as of 30th June 2014.

16. Clause 11 of the CBA governing the Parties regulated redundancy. Sub-clause [a] entitled an Employee with less than 5 years' continuous service to 2 months' notice or 2 months' salary in lieu of notice. Sub-clause [b] gave Employees with 5 years or more, but less than 10 years' service, notice of 3 months' or 3 months' salary in lieu of notice. The Claimant fell under sub-clause [b]. He was entitled to 3 months' notice or 3 months' salary in lieu of notice. He received 1 month notice which was the minimal notice under the individual contract of employment. He went on earning his monthly salary up to 30th June 2014. He does not merit the whole 3 months' notice, as he was on the pay roll up to 30th June 2014. **He is granted 2 months' salary in lieu of notice at Kshs. 62,872 under clause 11 [iv] [b] of the CBA.**

17. Clause 11 [v] provided for severance pay at the rate of 16 days' salary for each completed year of service. This was omitted completely in the offer made to the Claimant by the Respondent, in the Notice dated 30th May 2014. There can be no fair redundancy, without severance pay. **The Claimant is granted severance pay at the rate of 16 days' salary for each of the 7 complete years of service, at Kshs. 135,416.**

18. Clause 27 of the CBA made provision for retirement gratuity under sub-clause [a] and termination gratuity under sub-clause [b]. The clause states termination gratuity is paid where an Employee terminates, or has his/her contract terminated by the Employer. The clause, as interpreted by the Court in other disputes involving the particular CBA, is not mutually exclusive with the redundancy clause. Redundancy is a form of involuntary termination of the contract of employment. It is a form of termination, and would fall under clause 27 as well as under clause 11. The Court normally enforces the interpretation which favours the Employee, in case of ambiguity in contracts of employment. In this CBA, the clauses are not expressed to be mutually exclusive. Clause [b] [i] grants Employees who have served between 5 and 10 years, termination gratuity based on one-third of one's basic monthly salary and one-third of monthly house allowance, at the rate applicable at the time of termination, for every completed year of service. Under Section 26 of the Employment Act, the Court has an obligation to uphold terms and conditions which are more favourable to the Employee than those minimum terms and conditions stated under the law. It is not unusual to find Parties agreeing on forms of service pay beyond the minimal forms stated under Section 35 of the Employment Act. The CBA regulating the Parties gave Employees terms of disengagement above the statutory minimum standards. Parties had a duty to go by what they had agreed. **The Claimant is granted termination gratuity under clause 27 [b] [i] of the CBA, at one-third of the consolidated salary for each of the 7 completed years of service, at Kshs. 73,350.**

19. The question whether redundancy was unfair has in part been answered in the preceding paragraphs in this Judgment. Although there was a genuine economic reason necessitating declaration of redundancy, requisite notices of intended redundancy did not issue. The selection criterion was not made clear by the Respondent to its Employees. Consultations between the Respondent and the Union were brief and quite friendly, where the Respondent merely informed the acquiescent Union of a decision already made, to declare redundancies. There was no redundancy package negotiated by the Union on behalf of the Employees. There was nothing that came out of the meetings between the Respondent and the Union.

20. Redundancy procedure was not fair. It did not meet the standards of fairness under the Employment Act 2007. ***The Claimant is granted the equivalent of 5 months' salary in compensation for unfair termination, at Kshs. 157,180.***

21. Clause 20 of the CBA, in keeping with Section 51 of the Employment Act 2007, requires the Employer to issue the Employee with the Certificate of Service, so long as the Employee has served for a period a consecutive period of 4 or more weeks. The Employee is not required to approach the Employer for this document. It is the responsibility of the Employer, to supply the document to the Employee, without being requested to do so. ***The Respondent shall release to the Claimant his Certificate of Service forthwith.***

22. No order on the costs.

23. ***Interest granted to the Claimant at 14% per annum.***

IN SUM, IT IS ORDERED:-

a. Redundancy was based on genuine economic ground, but was unfair on procedure.

b. The Respondent shall pay to the Claimant: 2 months' salary in lieu of notice at Kshs. 62,872; severance pay at 16 days' salary for each completed year of service at Kshs. 135,416; termination gratuity at Kshs. 73,350; and compensation the equivalent of 5 months' gross salary at Kshs. 157,180- total Kshs. 428,818.

c. Certificate of Service to issue.

d. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

e. No order on the costs.

Dated and delivered at Mombasa this 16th day of June 2017

James Rika

Judge