

Whether Claimant was employed by the Respondent

8. Although presented as an *Issue* for determination, this was not a real issue in dispute because the Respondent admitted in paragraph 2 of the Memorandum of Response that the Claimant was an employee from 7 February 2015 to 1 May 2015.

9. Similar admissions were made in the other Causes.

Whether the Claimant's employment by dint of the letter of appointment contractual

10. The Court does not understand the basis for this *Issue* for all employment relationships whatever the nature/defined are contractual. Whether of an indefinite character or for a definite term, employment relationships are contractual.

Was the Claimant terminated from employment?

11. The Court equally does not understand the foundational basis for this *Issue*, for logic leads to the inference from the undisputed facts presented that there was a termination of employment.

Was the Claimant paid 1 month salary in lieu of notice?

12. The Claimant's employment contract provided for termination by notice of 1 month or pay in lieu of notice.

13. Section 35(1)(c) of the Employment Act, 2007 also envisages written notice of termination of employment while section 36 contemplates pay in lieu of notice.

14. In the instant case, the Respondent contended that it issued notices dated 1 April 2015 to all the employees who were affected (including the Claimant), and therefore pay in lieu of notice should not arise unless there is a finding that there was unfair termination of employment.

15. On the basis of the material on record, the Court can logically/factually conclude that 1 month pay in lieu of notice was not paid.

Was the Claimant given notice of termination of employment?

16. The Respondent's witness testified that notices dated 1 April 2015 were issued to the Claimant (and the other affected employees - it appears there was a misfiling for the notice addressed to the Claimant was filed in Cause No. 336 of 2015, *Teresia Wanjiru Mwaniki v Mara Farming Ltd*).

17. The witness also testified that a meeting had been held with the affected 110 employees on 31 March 2015 and that a list of the employees was also posted in a notice board.

18. The Claimant denied being present in the meeting of 31 March 2015, but conceded that she heard there was a meeting where the terminations were discussed.

19. She also admitted that a list of affected employees was put up in the notice board.

20. The Court in this regard notes that none of the affected employees who attended the meeting of 31 March 2015 was called to testify as to what transpired.

21. From the material placed before it, the Court finds that it is more probable that the Claimant and other affected employees were issued with the individual notices as contended by the Respondent, for it would be illogical to post names of the employees in a notice board but fail to serve them with individual notices.

Whether the termination of employment was unfair

22. The determination of this *Issue* will be key to the outcome of all the related Causes.

23. In terms of sections 43 and 45 of the Employment Act, 2007, an employer has a burden of not only proving the reasons for terminating an employment contract, but that the reasons are valid and fair.

24. The notices issued to the employees did not give any reason(s) but cited section 36 of the Employment Act, 2007. It would therefore be in order to outline the applicable provisions.

25. Section 36 of the Act is in the following terms Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

26. Section 35(5) of the Employment Act, 2007 on its part provides An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

27. Section 35(1)(c) on the other hand provides that

A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

28. In my view, for an employer to take umbrage under section 36 of the Employment Act, 2007, logic would demand that it must demonstrate that the contract in question was one in respect of which *performance of specific work had not been agreed*. The contract should be one in which no specific duties have been agreed.

29. The contract(s) in question here related to the *performance of specific work* in described departments, and therefore the Respondent could not rely on section 36 of the Employment Act, 2007 as read with section 35(1)(c).

30. Equally, in my view, looking at the general context of the right to fair labour practices in Article 41 of the Constitution and the amplification of the right in sections 41 and 45 of the Employment Act, 2007, it would not be open to an employer to terminate the contract of an employee without due process and without valid and fair reasons.

31. I say so because, in my view, the era of *termination of employment without cause but on notice* is no longer available to the employer under the current legal regime which require valid and fair reasons.

32. In other words, there is a statutory requirement for an employer to have valid and fair reasons to bring an employment contract to an end without cause, whether there is a contractual provision allowing termination on notice or pay in lieu of notice.

33. Having said a few words on the legal framework, it would be appropriate to examine the factual circumstances presented by the Respondent.

34. The testimony by the Respondent's Human Resources Officer was that the terminations were because of drought.

35. That evidence was not controverted and therefore it can be assumed that the termination was not on

account of any *misconduct, performance or physical incapacity* on the part of the employees.

36. What the Respondent was doing was to terminate the contracts on the ground of *operational requirements*. It was a case of redundancy, and therefore the requirements of sections 40, 43 and 45(2)(a), (b)(ii) of the Employment Act, 2007 should have been complied with.

37. There was no suggestion that the conditions were complied with, may be, save for the notices.

38. The Court therefore concludes that the termination(s) were unfair in terms of sections 40, 41, 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Pay in lieu of notice

39. With the finding that notices were issued, pay in lieu of notice does not lie.

Leave

40. The Respondent indicated an intention to pay outstanding pro rata leave and the Claimant(s) are entitled to the commuted leave pay.

Compensation

41. The Claimant(s) had 9 months to lapse of contract and in the view of the Court that would be appropriate measure for award of compensation in terms of section 49(1)(c) of the Employment Act, 2007.

Salary for breach of contract

42. The Claimant(s) did not provide any legal basis for this head of relief. Even no attempt was made to distinguish this head of relief from the compensation contemplated by section 49(1)(c) of the Employment Act, 2007.

Other dues

43. The notices issued to the Claimant(s) mentioned entitlement to other dues which were not pleaded. Such dues are, in the view of the Court payable as well.

Conclusion and Orders

44. This was a test suit.

45. The Court has found and held that the termination(s) of the contract(s) were unfair.

46. The Court therefore orders that each of the Claimants be awarded and paid

- i. Compensation equivalent to 9 months gross wages
- ii. Outstanding leave
- iii. Dues indicated in the termination notices.

47. To ensure that the litigation is brought to an end, the Respondent is directed to file an affidavit with a schedule showing the payments to be made to each Claimant within the next 21 days.

48. In default of the Respondent complying, the Claimant(s) are free to file schedules of payments for confirmation and adoption by the Court.

49. Further, in default by the Respondent to comply with the order in paragraph 47 above, it shall pay the Claimant(s) costs and interest on the amounts awarded from the date of this judgment.

Delivered, dated and signed in Nakuru on this 31st day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maragia instructed by Maragia Ogaro & Co. Advocates

For Respondent Mr. Kairaria instructed by Gitonga Kamiti, Kairaria & Co. Advocates

Court Assistant Nixon