



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.92 OF 2014

TABITHA MUMBUA KIMONGO.....CLAIMANT

VERSUS

SHRINK PACK LIMITEDRESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a Graphics Designer in August, 2012 at a monthly salary of kshs.49,133.00, on 27th September, 2013 the claimant reported to work but was informed to go back home and that her employment had been terminated. These were verbal instructions.

The claim is that the termination of employment was unlawful and illegal and contrary to the law. The claimant is seeking;

- a) Notice pay of one month at kshs. 49,133.00.00;
- b) Leave pay Kshs. 49,133.00.00;
- c) Salary for September, 2013 kshs. 49,133.00.00;
- d) Damages for unfair termination at Kshs.589,596.00.

The claimant testified in support of her claim. The claimant was not issued with a written contract for the duration of her tenure with the respondent. on 27th September, 2013 she reported to work a few minutes late. She had called her supervisor with information that she was running late for work but when she arrived she found the managing director at the gate and was told to go back home. The claimant was also directed to collect her personal effects and her terminal dues. The claimant did not report back to work.

The claimant also testified that the defence that she absconded duty is not true. That when she was told to collect her personal effects she knew she was not expected to go back to work. It was verbal termination. There is a record that she had been late for work on several occasions. She was not at work due to illness, she had a sick child and on another occasion she had to attend a case in court. the claimant sent an email to the respondent but there was no reply.

The claimant also admitted that she had several warning letters. These related to absence from work and other misconduct.

Defence

In defence, the respondent admit they employed the claimant on 16th August, 2012, placed her on probation and confirmed her into full employment on 16th November, 2012. The claimant took the habit of reporting to work late and was issued with verbal warnings. Thereafter she was issued with written warnings on 11th June, 2013 but failed to take heed and another warning on 21st June, 2013 was issued. The claimant failed to heed and a third warning was issued on 11th July 2013. The claimant was warned that repeated late reporting to work would lead to termination of her employment with the respondent.

Despite several warnings both verbal and in writing, on 17th August, 2013 the claimant reported to work late. This was repeated on 24th August, 2013. On both occasions the claimant apologised and offered not to repeated the same misconduct.

On 28th September, 2013 the claimant did not report to work and has since not reported to work.

The claimant by her conduct of failing to attend work terminated her own employment with the respondent. she did not give notice or reasons for the same. The claims made should be dismissed with costs and the claimant ordered to pay notice to the respondent for one month.

In evidence, the respondent's witness was Hilesh Shah who testified that he worked with the claimant closely on the shop floor where they have an open work space. The claimant was of the habit of reporting to work late and was issued with verbal and written warnings. She would be late for 2 hours, half a day and this became a habit. The claimant was issued with several written warnings, she acknowledged and even offered an apology.

On 27th September, 2013 the claimant was not at work. She did not call or send an email. On 5th October, 2013 she wrote an apology. The claimant deserted work without notice and thus not entitled to notice pay.

The claimant had not earned leave as she had not completed a full year. In the period of service, the claimant had taken in total 13 days off.

The claimant demanded for her terminal dues. She was offered Kshs.49,133.00 for her September, 2013 pay. This was less 4 days she was absent from work. Prorate leave of 9 days at kshs.17,008.00.

Total dues to the claimant were computed at kshs.59,676.00. Such pay was less taxation; NSSF dues; and NHIF dues. Total payable at Kshs.47,108.00.

The terminal dues were offered on humanitarian grounds on condition the claimant was to attend and clear with the respondent so as to receive her dues. The respondent is thus willing to pay the sum of Kshs.47,108.00.

At the close of hearing both parties filed their written submissions.

Determination

It is trite that every employee should be issued with a written contract of employment. Such an employment contract should spell out the terms and conditions of employment. The duty is vested on an employer to write and issue the written contract of employment. Where no contract is issued, it is the word of the employee against that of the employer and the court must believe the employee.

It is therefore important that every employer should ensure each employee is governed by a written contract of employment. Where it is not possible to issue the written contract immediately, section 10(1) of the Employment Act, 2007 requires that two (2) should not lapse before the same is issued.

The respondent has not submitted any written contract issued to the claimant.

The respondent's witness testified that he had a staff of 40 employees. Even where section 12 (3) of the Employment Act, 2007 does not apply, good labour practice requires that every employee be issued with rules and regulations governing her employment and the sanctions that go with misconduct. Where the claimant is alleged to have been a perpetual late work attendant, such work regulations would have spelt out the mechanisms to address such misconduct.

The claimant admitted in her evidence that on 27th September, 2013 she reported to work late. That previously she had been issued with warnings for reporting late to work. The claimant did not challenge the fact that on several occasions she was not at work. That she sent an email and there was no reply and thus took it the respondent was not keen on her absence. The claimant sought to explain her absence from work due to illness, that her child was sick and that she had to attend a matter in court.

There is however no evidence of the claimant being ill or sick as required under section 30 and 34 of the Employment Act, 2007. An employee who is absent from work due to illness should submit a certificate to this effect as held in **Dorothy Ndungu versus Machakos University & Others [2016] eKLR**. Where the claimant required to attend to her sick child or attend court for a personal matter, such absence from work should have been approved and or authorised by the employer before taking such leave of absence.

I find not good cause for the claimant's various absence from work. This is coupled with the apology made by the claimant on 5th October, 2013 where the claimant takes responsibility for her misconduct. On 24th August, 2013 the claimant admitted to being absent from work. On 17th August, 2013 a similar matter arose and the claimant sent an apology. There are several instances of similar occurrences where the claimant was issued with warning letters.

At the end of it, when the claimant failed to attend work from 27th September, 2013 the duty was on the respondent to issue a letter of summary dismissal, notice to show cause or a warning as appropriate. To go silent on an employee who absconds duty or is in desertion of work is not the solution. Such only negates the right on the employer to dismiss such an employee.

Section 35 of the Employment Act, 2007 requires the employer to issue a written notice of termination of employment. It is not sufficient that the claimant wrote an apology admitting to her misconduct on 5th October, 2013. Far from it, immediately the claimant failed to attend duty on 27th September, 2013 prior had a series of warning notices, the respondent should have issued a letter terminating the employment relationship. Such was not done. The desertion of duty by the claimant was not regularised with a termination notice. Such is an unfair labour practice.

Remedies

On the finding that the claimant was not issued with a termination letter and the same ended in an unfair labour practice, compensation is due. In assessing the compensation payable to the claimant, the court is required to put into account the provisions of section 45(5) of the Employment Act, 2007 which provides as follows;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural

requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee

Taking into account the conduct of the claimant, the gross misconduct of failure to report to work on various occasions in good time; the admission by the claimant that indeed she was reporting to work late and thus apologised; and fundamentally that the claimant had been issued with several warning letters but failed to take heed, the compensation due being discretionary, to award would be to sanction gross misconduct.

I find the offer made by the respondent for September, 2013 salary, leave days due and the deductions made being a reasonable and generous offer to the claimant.

In the circumstances, the claim is hereby dismissed. Each party shall bear own costs.

Dated and delivered in open court at Nairobi this 10th day of August, 2017.

M. MBARU

JUDGE

in the presence of:

Court Assistant: David Muturi

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