



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2162 OF 2015

MARGARET MUMBI MWAGOCLAIMANT

VERSUS

INTRAHEALTH INTERNATIONAL.....RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 24th November 2015 and filed in court on 7th December 2015, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Response on 12th February 2016.

2. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Jackline Moraa Oeri. Both parties also filed written submission.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 15th February 2013, in the position of Senior Manager, Public Sector. On 27th August 2015, she was issued with a notice of termination of her employment, effective 1st October 2015. The reason given for the termination was reduction in the scope of work.

4. The Claimant states that the termination of her employment was unjustifiable, because soon after her termination, the Respondent advertised for the position of Senior Technical Advisor-Resource Mobilisation, whose duties were similar to those previously undertaken by her. She also claims that the termination was unprocedural. She therefore claims the following:

- a) Salary for 14 years.....Kshs. 70,896,000
- b) Service/gratuity.....2,954,000
- c) 12 months’ salary in compensation.....5,064,000
- d) Leave pay.....141,792,200
- e) General damages for unlawful termination of employment
- f) Certificate of service
- g) Costs plus interest

5. The Claimant seeks reinstatement as an alternative remedy.

The Respondent's Case

6. In its Statement of Response dated 12th February 2016 and filed in court on even date, the Respondent admits the Claimant's employment history as pleaded in the Memorandum of Claim. The Respondent however denies the allegations that due process was not followed in the Claimant's termination of employment. The Respondent states that the reason for the termination was duly communicated in the notice of termination dated 27th August 2015.

7. The Respondent denies that the duties for the position of Senior Technical Advisor-Resource Mobilization, advertised on 2nd October 2015, were the same as those previously performed by the Claimant. The Respondent further denies that the termination of the Claimant's employment was unlawful or unprocedural. According to the Respondent, it was not reasonably foreseeable that the Claimant would have remained in its employment for another 14 years.

8. The Respondent adds that according to clause 3 of the Claimant's employment contract, the continuity of her employment was subject to availability of funds. Additionally, under clause 15, either party could terminate the contract by giving one month's written notice or paying one month's salary in lieu.

9. The Respondent states that on 15th July 2015, it called a meeting of all *Funzo Kenya* project staff members and informed them that they had received official communication from its donors that there would be a reduction of scope of work for some projects, including the one in which the Claimant was engaged. Another staff meeting was held on 24th September 2015.

10. The Respondent goes on to state that in line with its organizational policies and the Claimant's employment contract, the Claimant was issued with a one month's termination notice vide letter dated 27th August 2015. The Respondent gives the following steps in effecting the termination:

- a) Informed the Labour Office about the impending termination of employment of some members of staff;
- b) Gave one month's notice;
- c) Paid the Claimant leave days earned but not utilized;
- d) Paid the Claimant severance pay calculated at 15 days for every year of service as prescribed by law;
- e) Took the Claimant through professional transition training;
- f) Provided professional counselling services/sessions.

11. In denying the Claimant's claim, the Respondent states that she was paid her total dues amounting to Kshs. 809,970.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

13. The Claimant's employment was terminated by letter dated 27th August 2015, stating as follows:

"Dear Margaret

Re: Notice of end of Employment Contract

Reference is made to the reduction in scope of work for the project, following communication from the donor, which conveyed the decision to de-emphasize specific result areas, leading to re-alignment in budget allocation and hence a proportional reduction of staff.

This is a follow-up to our various staff communication on the same subject and consultative meeting held with you, in which we regrettably informed you that your position was affected by the above reduction in force. As per your contract letter clause 2, the continuity of your services is subject to availability of funds to Intrahealth International and continuity of funding for the project that you were hired for. This letter therefore serves to provide one month's notification of termination of your employment contract as per our Human Resource Policies and also in line with the local labour laws. Your last day of service will be September 30, 2015.

You will receive the following benefits:

Severance pay (15) days for every completed year of service

Any leave days earned but not utilized

Salary up to September 30, 2015 this being your last day of employment

I take this opportunity, on behalf of the organization, to express deep appreciation for the important role you played in contributing to the success of FUNZO Kenya Project. You have been a great asset to the organization and have contributed immensely to project's successes, giving us a strong reputation.

I want you to feel supported in making the transition forward, and if you have any questions, please do not hesitate to contact the undersigned or Human Resources office.

Please arrange to surrender any Company property in your possession before or by September 30, 2015.

Sincerely

(Signed)

Meshack Ndolo Country Director"

14. From this letter, it is evident that the Claimant's employment was terminated on account of redundancy. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define redundancy as:

"the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

15. While the law recognizes redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be met by the employer. In this regard, Section 40 of the Employment Act states as follows:

40 (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-

(a) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

16. The law is now settled that in declaring redundancy, an employer is required to issue two separate notices of at least one month each. The first is a general communication to employees generally notifying them of the impending redundancy. The second is a specific notice to the affected employees. The employer is further required to issue a one month notice to the local Labour Officer (see **Thomas De La Rue v David Omutelema [2013] eKLR**).

17. Addressing the issue of redundancy notice in **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR Maraga JA** (as he then was) stated as follows:

“...when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties”

“.....the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and other labour laws. The notices under this provision are not merely for information.....The purpose of the notice under section 40(1)(a) and (b) of the Employment Act, as is also provided for in the....ILO Convention No 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

18. My understanding of the sequence in the issuance of notices under Section 40 (a) and (b) is that the first, which is the redundancy notice, goes out simultaneously to the employee or their trade union and to the Labour Officer and the second which is the termination notice, goes out to the employee in accordance with the subsisting employment contract.

19. In the instant case, a notice went out to the Labour Officer on 20th August 2015 and 7 days later on 27th August 2015, the Claimant was issued with a termination notice. In **Bernard Misawo Obora v Coca**

Cola Juices Kenya Limited [2015] eKLR, it was held that the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. This is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb against unlawful termination clothed as redundancy.

20. From the evidence on record, it would appear that by the time the notice to the Labour Officer was issued, the decision to terminate the Claimant's employment had already been made. The Court therefore finds that in effecting the termination of the Claimant's employment, the Respondent failed to fully comply with the procedure set out under Section 40 of the Employment Act.

21. Regarding the selection criteria, the Claimant pursued the argument that her functions continued to be performed even after her exit. She therefore submitted that she was unfairly targeted in the redundancy. The Court did not however find any evidence to prove that the functions previously performed by the Claimant survived beyond the redundancy. The Claimant's argument in this regard, is therefore rejected.

Remedies

22. In light of the foregoing, the only finding I will make is that the redundancy process under which the Claimant's employment was terminated was flawed. I therefore award her three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process.

23. No basis was laid for the claims for salary for 14 years, service/gratuity, leave pay and general damages which therefore fail and are dismissed.

24. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 1,266,000 being 3 months' salary in compensation. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant is also entitled to a certificate of service and the costs of the case.

26. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 17TH DAY OF NOVEMBER 2017

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JUDGE

Appearance:

Mr. Nyangito for the Claimant

Miss Nyika for the Respondent