



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 224 OF 2014**

**NEBERT MANDALA OMBAJO.....CLAIMANT**

**v**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS**

**OF KENYA (ICPAK).....RESPONDENT**

**JUDGMENT**

1. Nebert Mandala Ombajo (Claimant) was offered employment by the Institute of Certified Public Accountants of Kenya (ICPAK), (Respondent) as Chief Officer, Corporate Support Services through a letter dated 1 April 2009.
2. On 28 April 2010, the Respondent wrote to the Claimant to inform him that following a job evaluation, the Council had approved a new title and grade for him (Director, Strategy and Shared Services).
3. On or around 11 December 2013, the Respondent's Human Resource and Administration Manager wrote to the Chief Executive recommending the promotions of several employees including the Claimant. The Claimant's position was designated as *Director, Finance, Administration and Strategy*.
4. On 12 February 2014, the Respondent issued to the Claimant a show cause letter alleging that
  1. On 10<sup>th</sup> April 2012 you traded with the Institute under the trade name Tritex Consulting limited for the provision of two Ipads and accessories worth Kes 563,000 which were paid for vide cheque numbers 107739,107740, 107869 and posted as raffle prizes in the Navision system without following the due procurement process and contrary to your appointment letter clause 12.
  2. On the 15<sup>th</sup> May 2012 you authorized an advance payment of Kes 45,086,800.90 to China Jiangxi for the construction of ICPAK complex. The advance payment was not provided for in the contract and had no authorization from the Project Manager and Council.
  3. On 24<sup>th</sup> December 2012 you failed to disclose an amount of Kes 4,513,120.67 in the accounts as an accrual or provision for the bill incurred on your telephone line for the period 21<sup>st</sup> to 26<sup>th</sup> November 2012 which has not been settled to date. The cost incurred has not been justified and there is no evidence of mitigation of risk and exposure to the Institute.
5. The show cause notice asked the Claimant to explain within 7 days while disciplinary action should not be taken against him for gross negligence contrary to section 44(4)(c) and (g) of the Employment Act, 2007.

6. The Claimant received the show cause on 17 February 2014 after returning from an official trip to South Africa, and he responded on 18 February 2014.
7. Despite complaining of the short time, the Claimant gave elaborate responses to each of the allegations.
8. Following upon the Claimant's response, the Respondent wrote to the Claimant on 3 March 2014 informing him of the formation of a *Disciplinary Committee* and requesting him to appear before the Committee on 4 March 2014 at 9.30 am.
9. It is not in dispute that the Claimant received the invitation letter at 3.00pm on 3 March 2014, while the hearing was scheduled for the morning of 4 March 2014.
10. The Claimant appeared before the *Disciplinary Committee* which was in fact a subcommittee of the Respondent and made representations.
11. The Committee recommended that the Claimant's contract be terminated and the Respondent's acting Chief Executive wrote to the Claimant informing him of the termination of his services citing section 44(4)(c) of the Employment Act, 2007.
12. The termination of contract led to the Claimant moving Court on 18 June 2014 alleging or stating the issue in dispute as *wrongful/unfair termination of employment*.
13. Upon service, the Respondent filed a *Reply to the Memorandum of Claim* on 10 July 2014 and a *Supplementary Memorandum of Reply* on 15 August 2014.
14. On 26 January 2015 the Respondent applied to the Court to be allowed to amend its Response to among others include a *Counterclaim*.
15. The application for amendment was allowed on 2 February 2015 and the Respondent filed an *Amended Memorandum of Reply and Counterclaim* on 11 February 2015.
16. The Claimant on his part filed a *Reply to Amended Memorandum of Reply and Counterclaim* on 7 December 2015.
17. In the course of time, the parties filed list of witnesses and voluminous documents to be relied on during the hearing (the Court must note at this juncture that this is one of those cases where documents, some not relevant at all, were thrown at it, needlessly prolonging the hearing. The costs order will consider this factor).
18. The Claimant and his witnesses testified on 14 December 2015, 24 April 2016, 7 November 2016 and 1 March 2017 when he closed his case.
19. The Respondent's case was taken on 9 October 2017 when it also closed its case.
20. The Claimant filed his submissions on 7 November 2017, while the Respondent filed its submissions on 27 November 2017.
21. The Court has given due consideration to the pleadings, evidence and submissions, and although the parties did not frame the Questions for determination, has identified the following *Issues* as arising for determination, *whether the termination of the Claimant's employment was fair, whether the Claimant owes the Respondent unrecovered salary advances, laptop, mobile phone, Kshs 85,000/- irregularly paid and appropriate remedies*.

## **Whether the termination was unfair**

### ***Procedural fairness***

22. It is not in dispute that the Respondent issued to the Claimant a show cause notice dated 12 February 2014 and that the notice set out the allegations that the Claimant was meant to confront.

23. It is also not in dispute that the notice requested the Claimant to make any representations within 7 days.

24. It is further not disputed that the Claimant only received the notice on 17 February 2014, a day to lapse of the 7 days, after arriving from duty in South Africa, and that he made an elaborate response.

25. It is equally not disputed that the Claimant received the invitation to appear before the Disciplinary Committee on the afternoon of 3 March 2014, only hours before the hearing at 9.30am on 4 March 2014.

26. What the Claimant contests is the length of time he had to respond to the show cause notice (a day or two) which he contends disenfranchised his right of reply, and the unreasonable notice to attend the oral hearing on 4 March 2014.

27. Determination of whether an employee has been afforded sufficient or adequate time to respond to allegations in the course of disciplinary proceedings can only be made on a case by case basis, putting into consideration the unique circumstances obtaining.

28. However, in my view, at the core of that determination should be the consideration whether the time granted to respond led to prejudice or injustice to the employee.

29. In the instant case, although the Claimant complained of inadequate time, he did not ask for more time but he gave a substantive response to the show cause. He also did not demonstrate in Court that there were documents or information he required to access in order to make the response within the limited time.

30. And if any prejudice was occasioned to the Claimant, he had the time between the response and the oral hearing to request for and/or access any documents or information he would have needed.

31. On the question of the *Disciplinary Committee* serving as *complainant, prosecutor and jury*, the view of the Court is that generally the nature of the employment relationship demands that the employer can raise a complaint against the employee and hear the responses to the allegations and make a decision.

32. Unless there are express contractual provisions to the contrary, such a hearing while strictly against the classic theory of *natural justice*, is still lawful under the doctrine of *procedural fairness*.

33. In fact, in employment law the focus is on *procedural fairness* which does not always equate to *natural justice*.

34. On the allegations of bias against the Chair, the Claimant did not lay any evidential foundation to the allegations.

35. The Court can therefore conclude that because no prejudice or injustice was visited upon the Claimant because of the short notice he had to respond to the show cause and appear before the *Disciplinary Committee*, the Respondent substantially complied with the statutory essentials of procedural fairness.

### **Substantive fairness**

36. In terms of sections 43 and 45 of the Employment Act, 2007, an employer has the onerous burden of not only proving the reasons for terminating the contract of an employee, but that the reasons were valid and fair.

37. With that legal background, the Court can turn to the question whether the Respondent discharged the evidential burden in regard to the 3 allegations which were raised against the Claimant

*Trading with Tritek Consulting Ltd/conflict of interest*

38. The Claimant did not dispute the contention that he and his wife were directors of *Tritek Consulting Ltd* at some point in time or that the Respondent traded with *Tritek Consulting Ltd* around 10 April 2012.

39. His contention was that together with his wife they had been directors of the *Tritek Consulting Ltd* but had ceased the directorship around December 2011, before the trading in question. Towards this end, an affidavit from one Aggrey Angano deposing that he bought *Tritek Consulting Ltd* in December 2011 was filed in Court.

40. An *Agreement for Sale of Shares* between the said Aggrey Angano on the one side and the Claimant and wife on the other side was also filed in Court, indicating the completion date as 19 December 2011.

41. The *Agreement for Sale of Shares* is embossed with a stamp from the Lands Department with a date of 30 December 2011.

42. The Claimant also filed a certificate from the Registrar of Companies indicating the directors of *Tritek Consulting Ltd* as of 13 March 2014.

43. The Respondent filed Form 203A (*Notification of Change of Directors*) showing that the Claimant resigned from *Tritek Consulting Ltd* with effect from 4 February 2014. *Particulars of Directors* dated 13 March 2014 were also filed.

44. According to the Respondent, the particulars of directors dated 13 March 2014 was an indication that that was the date of transfer, and therefore the Claimant had an interest in *Tritek Consulting Ltd* as of 10 April 2012.

45. It was incumbent upon the Respondent to demonstrate the Claimant's interest in *Tritek Consulting Ltd* as of 10 April 2012, and it did that by producing records from the Registrar of Companies showing that directorship changes were only registered in 2014.

46. The *Notification of Change of Directors* being the official record, in the view of the Court have more evidential weight than the *Agreement for Sale of Shares*.

47. The Respondent, therefore in the view of the Court discharged the burden of proving that there was an undeclared conflict of interest in a company the Claimant had not only a legal but beneficial interest, contrary to the Respondent's Policies.

48. The Court therefore concludes that the Respondent did not only prove this allegation, but that it was a valid and fair reason to dismiss the Claimant.

49. For purposes of the record, the Court notes that the Respondent did not lead any evidence on the allegation that some cheques were posted as raffle prizes in the Navision system (the Claimant had laid responsibility for the same on the Finance Manager, one Susan Mungai).

*Advance payment of Kshs 45,086,800.90 without authorisation/approval*

50. The Respondent was in the process of constructing an office complex and among the team members was a Project Manager.

51. It is not disputed that the Project Manager had an advisory role towards the Respondent in terms of section 3.1 of the contract.

52. A meeting held on 26 March 2012 involving the Project Manager recommended to the Respondent that an advance payment of 5% to 10% be made to the contractor against a bank guarantee.

53. The Claimant contended that the recommendation constituted an approval to make the advance payment.

54. In the view of the Court, a recommendation cannot be an approval as was suggested/contended by the Claimant in his written response to the show cause and Court.

55. The Claimant further contended that the Respondent's Chief Executive approved the advance payment to the contractor as he was mandated in terms of clause 3.2.3 of the *Finance Policies*, and that the Council approved the payment in its 314<sup>th</sup> meeting.

56. The advance payment to contractor was made in May 2012 while the Council met on 29 April 2013.

57. In the Court's view, the contention by the Claimant on *post payment validation* of the advance payment could not substitute the need and requirement to obtain approval of the Council before payment.

58. In its 314<sup>th</sup> meeting, the Respondent could simply have been accepting a *fait accompli* that payment had been made to the contractor.

59. On the mandate given by clause 3.2.3 of the *Finance Policies*, it is true that the Chief Executive had unlimited level of authority in payments, but that, in the Court's view was in making payments where the Respondent's Council had already given approval. The role of the Chief Executive was more of signing of cheques but not committing the Respondent financially.

60. Despite the Respondent not suggesting that it made a loss out of the advance payment to the contractor, the fact of making a payment without compliance with the policies in place suggested an element of dishonesty on the part of the Claimant.

61. The employment relationship is one of confidence and trust. The Claimant was high up the management chain and the level of confidence and trust expected of him was much higher considering the amounts of monies involved.

62. The Court is satisfied that the Respondent has demonstrated that the Claimant made the advance payments to the contractor contrary to the Respondent's policies on finances and procurement and that this was a valid and fair reason to terminate his contract

*Mobile phone bill of Kes 4,513,120.67*

63. The third allegation against the Claimant was that he failed to disclose in the accounts as an accrual, a phone bill of Kshs 4,513,120.67 or make provision for the same.

64. According to the Claimant, the bill had been incurred when he lost his mobile phone in South Africa and he requested the Respondent's Human Resources Manager to write to the provider Telkom Kenya Ltd to block the line.

65. The Human Resources Manager wrote to Telkom Kenya Ltd on 23 November 2012, and some time in December 2012, a Telkom Kenya Ltd Investigator called the Claimant to inform him of the bill for the period 23 November 2012 to 26 November 2012.

66. As far the bill was concerned, the Claimant stated that the bill was only delivered on 3 January 2013 (confirmed by his third witness who was Respondent's Legal Manager at the material time) and therefore it was not possible to approve/enter it into the books by 24 December 2012 (Christmas break) as it was after the reporting period which had ended on 31 December 2012.

67. The Claimant further stated that because the bill had been contested/was not valid, there was no requirement to record/accrue it.

68. Eventually the bill was adjusted by Telkom Kenya Ltd giving the Respondent a credit.

69. The Claimant's second witness (Investigator with Telkom Kenya Ltd at material time) confirmed that the bill of Kshs 4, 513,120.67 was accumulated after the phone had been reported stolen.

70. The Respondent's witness did not make any reference to the telephone bill allegation in his testimony.

71. In consideration of the Claimant's testimony, and that of his witnesses, and the failure by the Respondent to lead any evidence in respect of the third allegation against the Claimant, the Court finds that the Respondent did not prove, or prove that the failure to accrue the phone invoice amount was a valid and fair reason to terminate his employment.

## **Counterclaim**

### *Salary advance*

72. The Claimant did not challenge or controvert the Respondent's witness testimony that he had taken salary advance of Kshs 1,200,000/- and that by the time of separation, there was an outstanding Kshs 1,080,000/-.

73. The Respondent is entitled to the same from the Claimant.

### *Laptop and mobile phone*

74. Although making much of the fact that the Claimant did not return a *laptop* and *mobile phone* issued to him for purposes of work, and that the same were still as good as new, the Respondent's *Telephony Policy*, provided that staff in a category such as the Claimant was not required to return the items on separation.

75. This head of claim therefore has no merit.

### *Irregularly paid Kshs 85,000/-*

76. The Claimant offered consultancy services to the *Institute of Human Resources Management* and approved payment of Kshs 85,000/- to himself and other team members who were involved.

77. According to the Respondent, the payment required the approval of the Chief Executive, but the same was not sought, hence the claim for refund from the Claimant.

78. The Claimant did not attempt to rebut the testimony on the issue during cross examination and the Court will find for the Respondent.

## **Appropriate remedies**

### *Income up to retirement at 60 years*

79. The Claimant sought Kshs 178,312,500/- under this head, but he did not lay any contractual, evidential or legal basis for payment of remuneration up to the time he would have retired. The relief is not legally tenable.

### *Terminal benefits*

80. Under this head, the Claimant sought Kshs 2,971,531/- calculated at the rate of one month salary for every year served, and he anchored his claim on the assumption that a former Chief Executive had been paid.

81. The Respondent's explanation that the Chief Executive was paid terminal benefits on change of contract from fixed to permanent was not challenged/controverted.

82. This relief is also legally untenable.

#### *Unpaid leave*

83. The Respondent's witness admitted that the Claimant had outstanding leave at time of separation, but maintained that he could not be paid because he had not cleared and had other liabilities.

#### *Salary for March 2014*

84. The Respondent admitted this as well but gave similar reasons for non-payment as set out in the preceding paragraph.

#### *Pay in lieu of notice*

85. Considering the conclusion on the question of fairness of termination, pay in lieu of notice is not available to the Claimant.

#### *Compensation*

86. Compensation is a discretionary remedy where the Court makes a finding that a termination of employment was unfair. In this case, it is not available.

### **Conclusion and Orders**

87. Considering the foregoing, the Court orders that the Cause herein be dismissed and judgment is entered for the Respondent on the counterclaim in the sum of Kshs 1,165,000/-.

88. The Respondent has succeeded on the Counterclaim, but it filed so many documents which were not relevant to the resolution of the dispute.

89. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 8<sup>th</sup> day of December 2017.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Claimant            Ms. Mukururi instructed by Njeri Mukururi & Co. Advocates

For Respondent        Ms. Kashindi/Mr. Makori instructed by Hamilton Harrison & Mathews, Advocates

Court Assistants        Mr. Mwangi/Nixon/Martin