



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1045 OF 2012

CAROLINE WANJIRU LUZZE.....CLAIMANT

VS

NESTLE EQUATORIAL AFRICAN REGION LIMITED.....RESPONDENT

AWARD

Introduction

1. Caroline Wanjiru Luzzi, the Claimant in this case, worked for Nestle Equatorial African Region Limited in the position of Human Resource Administration Executive, EAR Grade 1 from 6th July 2009 until 4th January 2012 when her employment was terminated. She brought this action seeking compensation for unlawful termination of employment.

The Claimant's case

2. In her Statement of Claim dated 18th June 2012, amended on 20th December 2012 and further amended on 29th October 2014, the Claimant states that following satisfactory completion of her probation period, she was confirmed in her appointment on 27th January 2010.

3. In September 2010, the Respondent, through its then Human Resource Business Partner informed the Claimant that there were some gaps in her performance. The Claimant agreed to be put on a Performance Improvement Plan (PIP) for the period between October and December 2010. The Claimant discussed a draft PIP with the Respondent's HR Business Partner and agreed on specific areas for improvement.

4. The Claimant however states that the Respondent altered the PIP and presented to her a substantially different plan. The Claimant was especially concerned about allegations of unsatisfactory performance from the time of her joining the Respondent Company and failure to meet set targets for the year 2010 which were included in the revised PIP. Upon receipt of the revised plan, the Claimant wrote to the Respondent on 28th September 2010 seeking an opportunity to discuss the new issues raised, which opportunity was not granted. Instead the Respondent withdrew the PIP and issued the Claimant with a warning letter.

5. The Claimant goes on to state that on 25th May 2011, she wrote to the Respondent seeking substantiation of allegations of poor performance made by the Respondent in a letter dated 16th May 2011. She received no response and on 4th January 2012, the Respondent wrote to her terminating her employment effective 10th February 2012 on account of redundancy based on reorganisation of the Company.

6. It is the Claimant's case that the functions she was performing as Human Resource Administration Executive were not abolished but were assigned to other staff in the Human Resource Department and other departments of the Company. The Claimant avers that the termination of her employment by declaration of redundancy was not *bona fide*.

7. The Claimant claims the following:

- a. One month's salary in lieu of notice.....Kshs. 207,895.00
- b. 12 months' salary in compensation for unfair termination... ..2,494,740.00
- c. Costs and interest.

The Respondent's Case

8. In its Reply to the amended Statement of Claim filed in Court on 28th January 2013, the Respondent admits having employed the Claimant as a Human Resource Administration Executive from 15th August 2009 a position to which she was confirmed on 27th January 2010.

9. The Respondent states that in the course of the Claimant's employment, there were certain concerns relating to her performance. This notwithstanding, the Claimant was declared redundant and her contract of employment was not terminated. On the PIP, the Respondent states that it was withdrawn after the Claimant refused to participate in the plan and thus she was served with a warning letter. According to the Respondent, the Claimant's redundancy was not based on performance issues but on a reorganisation of the Respondent's structure.

10. The Respondent states that it issued redundancy notices on 4th January 2012 in accordance with the applicable law. In justifying the redundancy, the Respondent avers that in December 2011, the Human Resource Department underwent a major restructuring which led to creation of new offices alongside transfer of key responsibilities from the position held by the Claimant to the Procurement Department.

11. The restructuring rendered the position of Human Resource Administration Executive superfluous and the position was abolished. Following the abolition of her office, the Claimant was offered an opportunity for redeployment but she declined.

Findings and Determination

12. The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment by declaration of redundancy was lawful;
- b. Whether the Claimant is entitled to the reliefs sought.

The Redundancy

13. The Claimant states that the redundancy leading to the termination of her employment was unlawful on two scores: first, there was no justifiable reason for the redundancy and second, the Respondent did not observe the procedural requirements set out in law. It was the Claimant's case that her woes began in September 2010, well before the declaration of redundancy.

14. She told the Court and the Respondent concurred that following identification of some gaps in her performance, she agreed to be put on a PIP between October and December 2010. The PIP did not however materialise owing to disagreement on negative comments introduced by the Respondent regarding the Claimant's performance. As it turned out, the PIP was withdrawn by letter dated 11th October 2010, which also served as a written warning to the Claimant.

15. The Claimant's termination letter dated 4th January 2014 states in part:

“Re: Caroline Luzze - Termination of Employment-Redundancy

Further to our meeting earlier in December, the following will confirm that we are undertaking a restructuring of the Human Resources department and, as a result, your role will no longer exist after full implementation.

As we have discussed, the creation of a Facilities Manager position along with the movement of key activities in your area of responsibility to Procurement leads us to the conclusion that there is insufficient work to justify keeping the role and it is accordingly declared redundant. We have taken this decision after full review of your skill, ability and reliability as expressed in the Employment Act, 2007.

We refer to our initial discussion about the possibility of you moving to another area within the company and we continue to explore this option. At this point in time, however, we have been unable to identify a suitable permanent position but we will continue in our efforts to do so. You have expressed your interest to stay with the company and we are therefore exploring other potential opportunities but there are no guarantees. Between now and February 10, 2012, I will be relying on you to provide ongoing support to the Human Resources team in both knowledge transfer and status updates on all outstanding files.

Should we be unable to find suitable alternative work commensurate with your experience and skills, this letter serves as formal notice that your employment with Nestle Equatorial African Region will officially terminate effective **February 10, 2012** which constitutes more than one month's notice provided for under the Employment Act 2007.

Yours very truly,

(Signed)

Alastair Mcdonald

Head, Human Resources

Nestle Equatorial African Region”

16. Section 2 of the Labour Relations Act, 2007 defines 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.”

17. By definition, redundancy has nothing to do with either the performance or conduct of an employee. The Respondent's Head of Human Resources, Alastair Mcdonald testified that in fact the termination of the Claimant's employment was a pure case of declaration of redundancy and had nothing to do with either her performance or conduct.

18. It is settled that redundancy is a perfectly lawful means of employee separation but it must always pass the test of *bona fides* and fairness. When a redundancy is challenged, the Court will examine the entire process to see whether it is free of negative colour. The Respondent strenuously tried to draw a distinction between the Claimant's performance issues and the stillborn PIP on the one hand and the restructuring that led to the termination of her employment by declaration of redundancy on the other hand.

19. The Respondent gave the reason for withdrawal of the PIP as lack of total buy-in by the Claimant.

The Court found this explanation wanting. An employer who begins a PIP cannot legitimately abandon it midstream just because an employee objects to certain segments of it. Even worse, by issuing a warning alongside the withdrawal of the PIP, the employer effectively replaced a performance improvement process with disciplinary action without due process. The employer's action in this regard was not only irregular and unlawful but also an unfair labour practice.

20. That said, the question remains whether there was a nexus between this occurrence and the Claimant's eventual exit from the Respondent's employment. I think there was. In my view, the withdrawal of the PIP accompanied by a written warning and the subsequent declaration of redundancy were connected and the time lag between the two occurrences did not create the necessary remoteness. The result is that the redundancy was coloured to the extent that it was preceded by an unjustified withdrawal of a PIP and an illegal disciplinary action.

21. I will now examine the procedure adopted by the Respondent in effecting the redundancy. Section 40 of the Employment Act, 2007 sets out the following conditions precedent to be met by an employer before terminating employment on account of redundancy:

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.

22. The first question on the redundancy procedure is whether the Respondent gave adequate notice as required by law. The letter dated 4th January 2012 notifying the Claimant of her impending exit from the Respondent Company, which I have substantially reproduced in this Award, appears to have been both a termination notice and a declaration of redundancy.

23. A notice of the redundancy to the Ministry of Labour was also dated 4th January 2012 and a staff announcement sent out on the same day communicated a restructuring of the Human Resources Department and in particular, redundancy of the position held by the Claimant effective 10th January 2012. Then there was a follow up letter dated 24th January 2012 which served as a 'formal notification of termination of [the Claimant's] services on account of redundancy.' According to this letter, the Claimant's last working day would be 10th February 2012.

24. In addressing itself to the issue of redundancy notice, the Court of Appeal in *Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR* rendered itself as follows:

“It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer.”

25. In similar fashion, **Article 13 of Recommendation No. 166 of ILO (Termination of Employment) Convention No. 158 of 1982** provides as follows:

1. *When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:*

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on 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.

26. I do not need to say more. It is required by law that an employer seeking to terminate employment on account of redundancy is required to give two distinct notices of not less than one month each. I disagree with the argument advanced on behalf of the Respondent that the redundancy notice need not be written. In my view, a matter as serious as redundancy leading to loss of employment cannot be communicated in any other way other than by a formal written notice. From the record, the Respondent failed to comply with the mandatory notice requirements and the redundancy was therefore unprocedural and unlawful.

27. With regard to the other conditions set under Section 40 of the Employment Act, 2007 the only thing I will say is that there appears to have been no criteria in the redundancy program and as held by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR* where a redundancy selection criteria is non-existent or opaque, the statutory threshold cannot be said to have been met.

28. In *Francis Maina Kamau Vs Lee Construction [2014] eKLR* this Court held that where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination of employment within the meaning of Section 45 of the Act.

Remedies

29. In the instant case the Respondent failed the test set by Section 40 and the redundancy was therefore unlawful and unfair. Consequently, I award the Claimant four (4) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service, her employment record as well as the Respondent's conduct in the termination process.

30. In the final submissions filed on behalf of the Respondent, the issue of the figure to be applied in computing an award in favour of the Claimant was raised. According to Counsel for the Respondent, only the basic salary figure should apply. I take a different view on this matter. In calculating an award under Section 49 of the Employment Act the Court is required to use the Claimant's monthly salary as the

tabulation factor.

31. In my view, salary would include allowances that are paid as remuneration on a monthly basis. Intermittent payments that are made to employees either as a one off allowance or as facilitative payments in the course of duty would however be excluded. Applying this principle, the Court adopts the figure of Kshs.206,895.00 as the Claimant's salary for purposes of this claim. From the documents filed in Court, the Claimant was paid notice pay based on the figure for basic pay only. The Court therefore awards her the difference.

32. Finally I make an Award in favour of the Claimant in the following terms:

a)	4 months' salary in compensation for unlawful redundancy.....	Ksh.827,580.00
b)	Difference in notice pay.....	47,500.00
Total	875,080.00

33. The Claimant will have the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

34. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JANUARY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Malonza for the Claimant

Mrs. Kimani for the Respondent