



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 543 OF 2013

BANKING, INSURANCE AND FINANCE CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

Mr. Odera for claimant

Mr. Moleje for respondent

JUDGMENT

1. The suit was brought by the Banking, Insurance and Finance Union on behalf of the grievant Ronald Ingala Khaggai.
2. The issue in dispute is the termination of employment of the grievant. The grievant was employed by the respondent on 25th July 2006 as a cashier and a custodian at Hurlingham branch. The grievant was later transferred to JKIA branch where he worked until his termination on 14th December 2011.
3. The grievant was alleged to have failed to follow the bank's laid down regulations with regard to cash advance requests for USD300 (Kshs.29,088) and Kshs.25,650 paid to respective cardholder on 10th August 2011 and 19th February 2011 in that he paid out the money in Kenya shillings equivalent instead of paying in foreign currency.
4. That the grievant was supposed to first inquire if the customers required the money for use in Kenya or otherwise. Furthermore, the Bank's PDQ (a machine which is used to swipe the foreign cards) is configured in Kenya shillings.
5. The grievant was called to a disciplinary hearing on 25th October 2011 and his employment was terminated on 14th December 2011.
6. The claimant states that the report of the disciplinary hearing was not availed to the grievant to see the recommendation by the panel.
7. The grievant reported a dispute to the claimant who in turn reported to the Ministry of Labour. The dispute was not resolved and the matter came to court.
8. The claimant states that the termination was wrongful and unfair in that Clause A5 (a) (iv) of the

parties CBA invoked to terminate the services of the grievant was inapplicable to the case. The Clause only applied where an employee had been convicted of a criminal offence. The offence in this category involves moral turpitude on the part of the employees which should be either dishonest or violent.

9. The grievant was not charged at all with a criminal offence. There were no investigations done on the basis of which the grievant was found guilty.

10. That at the time the two transactions happened in August 2011, there was no laid down procedure in the branch on how to handle such transactions. The cashiers used their own judgment to transact the payments.

11. The grievant did not commit any offence by paying out in Kenya Shillings equivalent. There was no valid reason therefore to terminate the employment of the grievant. The customers did not complain at all after the payment. The bank did not lose any money.

12. The claimant prays for orders;

a. declaring the termination of Mr. Ronald Ingala Khaggai was unlawful and unfair;

b. reinstating the grievant to his job without loss of benefits; and

c. in the alternative the grievant be paid all salaries, allowances and all employment benefits which the grievant has lost as a result of the termination;

Defence and counter claim

13. The respondent states that the grievant with two other colleagues were involved in fraudulent forex transactions at the JKIA branch of the respondent between 8th – 12th August 2011.

14. The employees bought dollars from nearby forex bureaus at a lower rate using cash obtained from the bank and thereafter sold the acquired dollars to customers over official bank counters. This was revealed by a whistle blower. As a result, the respondent lost revenue that would have been earned from forex commission since the grievant together with the other employees were by-passing the respondent's system and earning revenue meant for the Bank.

15. Investigations also revealed that on 19th February 2011 and 10th August 2011, the grievant returned Barclay card cash advance transactions without following the laid down procedure without corresponding forex sale transactions on the system implying that the grievant deliberately circumvented the procedure to avoid detection on the flax system despite the existence of the transaction vouchers.

16. On 23rd August 2011, the grievant wrote a statement giving explanation regarding the transactions. On 14th October 2011, investigations revealed that the grievant and colleagues sold their own dollars to customers over the official bank counters. The explanation was not satisfactory.

17. Investigations revealed that many forex transactions for August 2011 were not reflected in the system and that staff carried their own dollars to sell to customers over the official bank counters causing loss of revenue to the bank.

18. Investigations revealed that transactions done by the grievant and another cashier on 8th, 9th, 10th and 12th August were not done correctly by converting forex transactions to the Kenya shilling equivalent at the prevailing market rates and then do a forex sale to dispense the foreign amount to the customer. The transaction was supposed to be posted into the Barclay card GL and into the system as a forex sale deal.

19. With regard to cash transaction the branch maintained a Barclay card cash advance register where details of all cash advance transaction were logged.

20. The two cash advance transactions done by the grievant on 10th August 2011, did not follow this procedure.

21. Each of the customers made cash advance requests for UDS300 Kshs.29,088.00 on their cards on 10th August 2011. The transactions were completed but no corresponding forex sale transactions were found on the system.

22. The grievant explained that the customers had changed their minds and asked for payment in Kenya Shillings and the instructions were not amended to that effect. This had happened severally previously, upon a random check.

23. On 21st October 2011, the grievant was invited to a disciplinary hearing scheduled for 28th October 2011. He was informed in the invitation letter that he could be accompanied by a colleague or a union representative. The grievant was indeed accompanied by a union official Mr. Chege wa Chege in the disciplinary hearing.

Determination

- i. Did the respondent have a valid reason to terminate the employment of the grievant?
- ii. Was proper procedure followed in disciplining the grievant?
- iii. What remedy if at all is the grievant entitled to?

Issue i

24. It is the court's considered view and finding that the grievant on two different occasions on 10th August 2011 had done foreign money transactions where customers asked to get dollars from their credit cards. The grievant would then run the cards on PDQ to get the Kenya shillings and change the money to Dollars. The grievant however paid the customers in Kenya shillings and did not have corresponding forex sale transactions on the system amended to reflect a change of mind by the customers to be paid in Kenya shillings.

25. The conduct by the grievant on those two occasions was irregular since the request forms clearly showed that the customers had requested for dollars and not Kenya shillings equivalent. The result of this, is that the bank was denied revenue since commission was also included while running the cards.

26. The panelists had recommended that the grievant be given a warning letter. The Human Resource Director did not support the recommendation by the panelist because the grievant was guilty of doing personal business of buying and selling foreign currencies with funds from his pocket.

27. The grievant had served the bank for about five years and was well versed with foreign transactions as stipulated in the Bank procedures ((BOPM).

28. The Director was of the view, which the court upholds that the grievant could no longer be relied upon by the bank. That the relationship of the bank and its employees is one of utmost good faith and it is the court's view that the grievant had breached this relationship.

29. The court finds therefore that the respondent had a valid reason to terminate the employment of the grievant.

Issue ii

30. It is not in dispute that the grievant was given full opportunity to explain the alleged misconduct. He appeared before a disciplinary hearing and was represented by a union representative. The grievant's

explanation was found to be unsatisfactory and the employer had decided to terminate his employment.

31. It is the court's finding that the respondent followed a fair procedure in terminating the employment of the grievant inspite the fact that the disciplinary panel had recommended that the grievant be warned. The ultimate decision lies with management once the disciplinary process has been concluded.

32. The respondent demonstrated to the court that the offence committed by the grievant destroyed the relationship based on trust and good faith and therefore, continued employment was untenable. The claimant has in the final analysis failed to prove its case on a balance of probability.

Issue iii

33. Since the grievant was terminated from employment and not dismissed he is entitled to all terminal benefits due to him in terms of his contract of employment and the CBA between the claimant and the respondent.

34. However, as set out in the counterclaim, which fact is not denied by the claimant, the grievant had an outstanding staff personal loan of Kshs.982,883.70 and Barclay card debt of Kshs.36,917.30 as per appendix '8' to the statement of defence and counter claim.

35. The respondent was entitled to deduct these sums from the terminal benefits of the grievant from the date of termination of his employment.

36. The court finds that the grievant owes the respondent Kshs.1,018,901.00. The court is however inclined to waive any interest that was accumulated on the debt, by fact of the failure by the respondent to deduct the debt from the date of termination to date.

37. Accordingly, the respondent is directed to compute and pay terminal benefits owed to the grievant (if any) within thirty (30) days from date of this judgment less the sum of Kshs.1,018,901.00 owed to it by the grievant.

38. The computation to be filed with the court. Considering the facts of the case, each party to bear their own costs of the suit.

Dated and Delivered at Nairobi this 5th day of February 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE