



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1044 OF 2014

PRESQUELLA ADHIAMBO.....CLAIMANT

VS

GOLDEN BISCUITS LIMITED.....RESPONDENT

AWARD

Introduction

1. This action is brought by Presquella Adhiambo, a former employee of Golden Biscuits Limited. She seeks compensation for unlawful termination of employment plus payment of accrued dues. The Respondent's defence is contained in a Memorandum of Defence dated 2nd October and filed in Court on 3rd October 2014. At the hearing of the case, the Claimant testified on her own behalf but the Respondent did not call any witnesses. Both parties filed written submissions.

The Claimant's Case

2. The Claimant pleads that she was employed by the Respondent on 7th May 1991. After falling ill on 2nd April 2013, she sought permission from her supervisor to go to hospital. She resumed duty after two (2) weeks upon which she was verbally dismissed.

3. It is the Claimant's case that her dismissal was unjustifiable and un-procedural. She claims that for the entire period of her employment she never went on leave. She adds that the Respondent failed to remit her National Social Security Fund (NSSF) dues as required.

4. She claims the following:

- a) A declaration that her dismissal was unlawful and unprocedural
- b) One month's salary in lieu of notice.....Kshs. 14,000
- c) Unpaid leave.....207,900
- d) Maternity leave.....2,050
- e) Severance pay for 10 years.....980,000
- f) House allowance for 22 years.....55,440

g) Overtime compensation for 22 years.....311,200

h) 12 months' salary in compensation for loss of employment.....168,000

The Respondent's Case

5. In its Memorandum of Defence file on 3rd October 2014, the Respondent admits having employed the Claimant on casual basis. The effective date of 1991 is however denied. The Respondent also denies any knowledge of the Claimant's illness stating that the issue was first brought to its attention by the Claimant's Advocates in their letter dated 11th September 2013.

6. The Respondent states that the Claimant was on duty between April and July 2013 and was only absent in the months of August and September and thereafter resumed work in October 2013. The Respondent denies that the Claimant was dismissed and states that upon being asked to submit medical reports to prove her illness, the Claimant left, never to return.

7. In response to the claim that the Respondent failed to remit NSSF dues on the Claimant's account as required, the Respondent states that before 2009, there was no provision for NSSF deductions on account of casual employees.

8. The Respondent denies that the Claimant was paid a monthly salary of Kshs. 14,000. Rather, the Claimant was paid a daily wage in accordance with the applicable Wages Order. With regard to the claim for overtime compensation, the Respondent states that the Production Department where the Claimant worked operated between 7.00 a.m. to 6.00 pm, five (5) days a week.

Findings and Determination

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

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) The status of the Claimant's employment;
- c) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

10. The Claimant claims that she was dismissed upon resuming duty from sick off. The Respondent on the other hand states that upon being asked to produce medical records to prove her illness, the Claimant deserted duty.

11. Desertion is a form of gross misconduct which renders an employee liable to summary dismissal. However, like all cases of misconduct, it must be proved. At the very least, an employer who alleges desertion must demonstrate that a show cause notice was issued to the deserting employee. No such notice was issued to the Claimant and in the absence of any evidence to the contrary, the Court adopts the Claimant's evidence that she was dismissed upon her resuming duty after sick leave.

12. If indeed the Claimant was too ill to work, the correct procedure would have been to subject her to a specific medical examination with a view to determining her capacity to continue discharging her duties. Clearly that did not happen and the Court therefore formed the opinion that the Claimant was unprocedurally dismissed without a justifiable cause.

Status of Claimant's Employment

13. It was submitted on behalf of the Respondent that the Claimant was a casual employee. In support of this assertion, the Respondent produced wages sheets showing the daily rate paid to the Claimant.

14. Whether an employee is a casual or not is not determined merely by the frequency or mode of payment of wages. Under Section 37(1) of the Employment Act, 2007 an employee who works continuously for a period exceeding thirty (30) days cannot be called a casual employee. Although she was paid a daily rate, the Claimant evidently worked for a continuous period in excess of 30 days and she cannot therefore have been a casual employee as alleged by the Respondent.

Remedies

15. In light of my finding that the Claimant was dismissed without a justifiable cause and without due procedure, I award her twelve (12) months' salary in compensation. In making this award, I have taken into account her length of service as well as the Respondent's conduct in the dismissal process. I further award the Claimant one (1) month's salary in lieu of notice. Additionally, I award her service pay for a period ten (10) years during which the Respondent did not remit NSSF dues on her account.

16. In tabulating the award, the Court adopts the daily rate of Kshs. 686.20 provided by the Respondent, which translates to a gross monthly salary of Kshs. 20,586, inclusive of house allowance. That dispenses with the claim for house allowance.

17. The claims for annual and maternity leave pay as well as overtime compensation were not proved and are dismissed.

18. Finally I make an award in favour of the Claimant in the following terms:

a) 12 months' salary in compensation

for unlawful dismissal.....Kshs. 247,032

b) 1 month's salary in lieu of notice.....20,586

c) Service pay for 10 years (20,586/30x15x10).....102,930

Total.....370,548

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

20. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MAY 2016

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JUDGE

Appearance:

Mr. Wakiaga for the Claimant

Miss Oyombe for the Respondent