



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 755 OF 2012

ESTHER WANGECHI NGERU.....CLAIMANT

VERSUS

PRIVATIZATION COMMISSION.....RESPONDENT

JUDGMENT

1. The claimant herein was employed by the respondent on 16th April, 2009 on a fixed term contract for 3 years. Her appointment was by way of secondment from the National Treasury. That is to say she would return to the National Treasury upon expiry of her contract with the respondent.
2. By a letter dated 3rd February 2012, the respondent terminated the claimant's services by having her recalled to the Ministry of Finance. According to the claimant, this recall was unlawful, illegal and unfair.
3. The respondent in resisting the claim averred that due to apparent conflict of interest regarding the claimant's position with the respondent, consultations were held between the respondent and the Ministry of Finance which culminated in the claimant being sent back to the parent ministry.
4. According to the respondent, the claimant was suspected of involvement in fraudulent medical reimbursement claim subsequent to which the claimant issued a notification to audit the procurement of the medical service provider for the respondent. The claimant further falsely complained of discrimination in training opportunity for herself. According to the respondent, these issue made it clear that the claimant would not be objective, impartial or independent in her audit. The respondent therefore averred that the claimant's claim was baseless and spurious.
5. In the oral testimony in Court the claimant stated that she never received a recall letter from Ministry of Finance. She denied knowledge of reason for her termination. She however admitted receiving her dues up to 6th February, 2012. Her contract was due to end on 17th May, 2012. She admitted receiving a show cause letter but denied the accusations contained in the said letter.
6. In cross-examination she stated that she applied for secondment after being hired by the respondent to secure her pension. It was her evidence that termination of her services required that she be given three months termination notice. According to her, her services were terminated by the CEO when he issued her with the letter of recall. According to her Treasury never recalled her.

7. The respondent's CEO Mr. Solomon Kitungu gave evidence on behalf of the respondent. According to him seconded officers remain employees of departments they came from but paid salary by the organizations they are seconded to in order to avoid double payment. According to him, the claimant's services were not terminated as alleged but that he had a meeting with the Permanent Secretary Treasury and chairman of the respondent and it was agreed that the claimant be recalled.

8. It was Mr. Kitungu's evidence that the claimant wanted to travel to Singapore for a course while a similar one was taking place in Mombasa. This was against the respondent's policy that an officer cannot be sent abroad for training when a similar course is taking place in the Country. The Training Committee refused her request and she wanted him to overrule the committee but he refused. According to him the claimant thereafter started becoming hostile and started to send him memos.

9. The witness further stated that the respondent's insurer declined to pay one of the claims presented by the claimant because it thought the claim was fraudulent. He asked the claimant over the same but instead she started saying the insurer was fraudulently procured as there was no quorum during procurement. She wrote to Finance and Administration Manager demanding to be shown documents on the procurement. The claimant also wanted a reaudit of training. The finance and Administration Manager felt there would be a conflict of interest hence another officer from Treasury was called to carry out that work. It was from this point when a meeting was held with Permanent Secretary and a decision reached to recall the claimant.

10. In cross-examination he stated that he was verbally instructed by the Permanent Secretary Treasury to write the letter of recall. He further stated that the contract between the respondent and the claimant was stand alone and that there was no recall clause in the contract however when the claimant applied for secondment she became subject to recall under Public Service Code of Regulations. According to him the key reason for the claimant's recall was conflict of interest.

11. Termination of contract of employment is permissible either by statute or as provided in the contract of employment itself. Just like ordinary contracts an employment contract is terminable by any of the methods available for terminating a contract. Where the termination is in breach of the contract or statute or both, the remedies are normally provided for in the Employment Act and or the contract of employment.

12. There was a written fixed term contract of employment between the claimant and the respondent. Clause 4.0 of the contract provided that the commission/respondent could terminate the contract by giving not less than 30 days notice. The same applied to the claimant. Clause 4.1 (d) gave the Commission/respondent sole discretion and for any reason whatsoever to terminate the contract.

13. The respondent through its CEO Mr. Kitungu informed the Court that the claimant could no longer continue working for the respondent due to conflict of interest and generally frictious relationship between him and the claimant.

14. Whereas, the respondent had the sole discretion to terminate the claimant's contract for any reason whatsoever as provided in the contract, the same had to adhere to the provisions of the contract of employment between the parties and the Employment Act.

15. The contract of employment never provided for recall however the act of recalling the claimant upon request by the respondent could only be read to imply termination of her services. By a letter dated 3rd February, 2012 the claimant was required to report back to the Ministry of Finance with immediate effect for redeployment. Nothing was shown by way of evidence or pleadings that the claimant was subjected to any hearing process in which any of the allegations against her were made, heard and she was accorded a chance to defend herself prior to terminating her services as required by law. In the circumstances the Court makes a finding that the

termination was in breach of her contract of employment and unfair in terms of section 45 of the Employment Act.

16. The Court will not award the claimant for the remainder of the contract period since the contract had a termination clause hence could be brought to an end prematurely by either party as has happened here.

17. In conclusion the Court awards the claimant as follows:-

Kshs.

- a. One month's salary in lieu of notice.....270,000.00
- b. Three months salary for unfair termination
of services.....810,000.00
1,080.00.00
- c. Costs of the suit.

18. This award shall be subject to taxes and statutory deductions.

19. It is so ordered.

Dated at Nairobi this 3rd day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 3rd day of June 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge