



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 383 OF 2014

GODFREY MUGOCLAIMANT

THE BOARD OF MANAGEMENT,

KAMBAA TECH. SECONDARY SCHOOL.....1ST RESPONDENT

THE ATTORNEY GENERAL..... 2ND RESPONDENT

JUDGMENT

1. The issues for determination in this Cause are, *whether the summary dismissal of Claimant was unfair, whether the Claimant was underpaid, whether the Claimant is entitled to severance/service pay and appropriate remedies.*

2. The Cause was heard on 13 May 2015 and 1 March 2016 after which the Claimant filed his submissions on 1 April 2016. The Respondents submissions were filed on 10 May 2016 (should have been filed before 29 April 2016).

Whether the dismissal was unfair Procedural fairness

3. The Claimant contested the process followed prior to his dismissal by contending that he was not given notice; not afforded opportunity to be heard; was not represented and was not heard on appeal and therefore the dismissal was unfair.

4. The Respondent wrote a show cause notice to the Claimant on 21 January 2014 and he was given up to 28 January 2014 to respond to the allegations outlined in the letter.

5. The Claimant did not deliver the response to the show cause until some unknown hour on 28 January 2014, and another show cause notice dated 29 January 2014 was written setting out the same allegations.

6. This time round, the Claimant was requested to show cause before 30 January 2014 and also to appear before the Board of Management on 31 January 2014 at noon.

7. The Board of Management met as scheduled and resolved that the Claimant be invited before an Executive Board meeting set for 7 March 2014.

8. The Executive Board met and the minutes indicate that the local Labour Officer had recommended that the employment of the Claimant be terminated with payment of full benefits.

9. The minutes also indicate that a Union (KUDHEIHA) had been involved in consultations.

10. The minutes further show that the Claimant appeared before the Executive Board and made representations.

11. It is this narrative that must be examined to confirm if it met the statutory requirements of section 41 of the Employment Act, 2007.

12. The Claimant was made aware of the allegations to confront through the show cause dated 21 January 2014 and he responded through his letter dated 23 January 2014. Thereafter, he was given another show cause dated 28 January 2014 and then he appeared before the Executive Board and made representations on 7 March 2014.

13. The Court is satisfied that the 1st Respondent substantially complied with the peremptory requirements of procedural fairness as envisaged by section 41 of the Act.

14. The Claimant also contended that he was not heard on appeal. However, he did not demonstrate that a hearing on appeal is a statutory requirement envisaged by section 41 of the Employment Act, 2007 or any other law.

15. As to whether there was a contractual requirement to be heard on appeal, no evidential basis was placed before Court.

Substantive fairness

16. It is a statutory obligation placed upon employers to prove the reasons for termination of employment (section 43 of the Employment Act, 2007) and that the termination of employment was for valid and fair reasons (section 45 of the Act).

17. The reasons for the dismissal of the Claimant were set out in the show cause notices dated 21 January 2014 and 29 January 2014.

18. The reasons included leaking information to the Kenya Anti-Corruption Commission and failing to respond to the show cause notice dated 21 January 2014 before 28 January 2014.

19. The Respondent did not place any evidence or material before Court to even remotely suggest that it is the Claimant who wrote an anonymous letter to the Kenya Anti-Corruption Commission.

20. Further, the issues allegedly raised in the anonymous letter relate to abuse of office within a public office and raising such complaints with the agency responsible for investigations on such issues, without more, would not be a valid and fair reason to terminate the employment of a public officer.

21. In the view of the Court, the Respondent has failed to prove the reasons for terminating the employment of the Claimant or demonstrate that the reasons were valid and fair reasons.

22. The dismissal was therefore substantively unfair.

Whether Claimant was underpaid

23. The Claimant appears to have anchored the claim for underpayments on a collective bargaining agreement signed between KUDHEIHA and the Ministry of Education.

24. Although the Respondent's witness admitted that the Claimant was a member of KUDHEIHA but

did not address the question whether the Claimant's remuneration was in terms of the collective bargaining agreement.

25. The Claimant himself did not pinpoint which clause of the collective bargaining agreement outlined the minimum/agreed wages and for which periods. The collective bargaining agreement appeared to have been for the period 1986-1988 while the computation was for the term of employment.

26. In the circumstances, the Court finds that the Claimant has failed to prove that he was underpaid.

Appropriate remedies *Certificate of Service*

27. A certificate of service is a statutory right and if the 1st Respondent has not issued one to the Claimant it should be issued forthwith.

Gratuity/Severance pay

28. The Claimant sought Kshs 426,080/- on account of what he stated was gratuity/severance pay. He suggested that the formula was the equivalent of 30 days' pay for each of the 20 years he served in terms of clause 31(c) of the collective bargaining agreement.

29. Clause 31 of the collective bargaining agreement sets the formula for computing gratuity as *one twelfth of each completed months of service based on his/her current salary*.

30. The 1st Respondent had paid him Kshs 125,520/- but the formula was not explained in Court.

31. The Claimant also did not demonstrate that the correct formula was not followed or show the foundation for the formula he proposed.

32. This head of claim is therefore declined.

3 months' pay in lieu of notice

33. The Claimant was paid 1 month pay in lieu of notice but he sought 3 months' pay in terms of the collective bargaining agreement.

34. The Court finds he is entitled to the balance of 2 months' pay in lieu of notice.

Compensation

35. Considering that the Claimant served the 1st Respondent for about 20 years, the Court is of the view that maximum compensation equivalent to 12 months gross wages would be appropriate and fair (gross wage according to the pay slip for October 2012 was Kshs 11,682/-).

Conclusion and Orders

36. The Court finds and holds that although the termination of the Claimant's employment was procedurally fair, the Respondents have failed to prove the reasons as valid and fair and so substantively unfair and awards the Claimant and orders the 1st Respondent to pay him

(a) Balance of pay in lieu of notice Kshs 20,400/-

(b) Compensation Kshs 140,184/-

TOTAL Kshs 160,564/-

37. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 22nd day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa/ Mr. Opar instructed by Muthanwa & Co. Advocates

For Respondents Ms. Kariuki/Mr. Kirui,

Litigation Counsels, Office of the Attorney General

Court Assistant Kosgei/Nixon