



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 368 OF 2013

BARNABAS KIPRONO.....CLAIMANT

v

KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT

JUDGMENT

1. Barnabas Kiprono (Claimant) commenced legal proceedings against Kerio Valley Development Authority (Respondent) on 28 October 2013 and the issue in dispute was stated as *withheld salaries and allowances* (this is one of a series of Causes by employees of the Respondent dismissed on allegations of absenteeism filed on the same day).
2. In a Response filed on 11 February 2014, the Respondent however stated the issue in dispute as *alleged unfair termination of the Claimant Barnabas Kiprono*.
3. The Claimant must have realised that he had misstated the issue in dispute for on 9 October 2014, he filed an *Amended Memorandum of Claim* after getting leave of Court and in which he stated the issue in dispute as *unfair/wrongful termination of the Claimant* (amended Memorandum of Claim was filed outside the agreed timeline but was admitted by the Court).
4. The amendments prompted the Respondent to file a *Response to Amended Memorandum of Claim* on 15 March 2015.
5. The Cause was heard on 3 February 2016, 4 February 2016 and 8 February 2016.
6. The Claimant filed his submissions on 15 March 2016, while the Respondent's submissions which ought to have been filed before 8 April 2016 were not on file by this morning.
7. The Court has considered the pleadings, evidence and submissions and adopts the issues as framed by the Claimant in the written submissions as, *whether the termination of the Claimant's employment was unfair and appropriate remedies*.
8. But before examining the identified issues, a factual background as captured in common documents which are not in dispute would be in order.

Background

9. The Respondent carried out a mass transfer of its employees in April 2013 and the Claimant (among over 100 other employees) was transferred to Tot Station as Farm Manager through a letter dated 26 April 2013.

10. On 15 May 2013, the Respondent's Deputy Farm Manager, Tot Station informed the Managing Director that the Claimant (and 4 others) had reported on 7 May 2013 and his transfer allowance should be processed.
11. Come 27 June 2013, the Deputy Farm Manager gave the Respondent a status report on the staff transferred to Tot and disclosed that the Claimant had been given 14 days off, returned for handing over and left again on 24 June 2013.
12. The status report prompted the Respondent to write a show cause notice to the Claimant on 27 June 2013 to explain his whereabouts within 7 days why disciplinary action ought not to be taken for absence from duty without leave or lawful cause.
13. The Claimant responded to the show cause through a letter dated 4 July 2013 and he gave an explanation of his whereabouts up to 26 June 2013.
14. On 19 July 2013, the Respondent sought an update from the Officer in Charge Tot whether the Claimant had reported back to the Station.
15. The Deputy Farm Manager responded on 27 July 2013 that the Claimant had returned on 17 July 2013 and then left on 20 July 2013 and that he had not been seen at the Station since then.
16. Thereafter, the Respondent through a summons dated 12 August 2013 invited the Claimant to appear before an Ad Hoc Committee on Discipline on 21 August 2013, to answer to a charge of desertion.
17. The Claimant (and others) in a letter dated 16 August 2013 from Mwinamo Lugonzo & Co. Advocates addressed to the Respondent challenged the summons and also objected to the composition and jurisdiction of the Ad Hoc Committee.
18. On 20 August 2013, the Claimant (and 5 other employees) filed Eldoret High Court Petition No. 16 of 2013, *Barnabas Kiprono & 5 Ors v Kerio Valley Development Authority*, challenging the transfers and disciplinary process by the Ad Hoc Committee on Discipline as constituting unfair labour practices and in violation of their constitutional rights.
19. On 21 August 2013, the Respondent replied to the letter of objection by the Claimant's legal advisers, asserting that it had the mandate to conduct disciplinary process against its employees.
20. In the event, the Claimant failed to appear before the Ad Hoc Committee on Discipline on 21 August 2013.
21. On 20 September 2013, the Respondent's Finance and Establishment Board Committee met and directed that transferred staff (including the Claimant) who had not reported to their new stations be suspended and be invited to appear before a Subcommittee of the Board which would in turn make recommendations to the Full Board.
22. On the same day, the Respondent wrote to the Claimant informing him that the response to the show cause did not give convincing reasons for the absence; noted his failure to appear before the Ad Hoc Committee, and suspended him from duty pending finalisation of his case.
23. The letter also invited the Claimant to appear before an Ad Hoc Committee of the Respondent's Board on 26 September 2013 to answer to a charge of absenteeism for 122 days.
24. The Claimant failed to appear before the Committee of the Board and the Committee at its meeting on 26 September 2013, recommended to the Full Board that he be dismissed summarily.
25. The Respondent's Board met on 18 December 2013 and approved the recommendation to dismiss the Claimant (and other employees) and consequently, the Respondent's Managing Director wrote to the

Claimant on 6 January 2014 informing him of his dismissal.

26. The reasons given for the dismissal were desertion of duty and insubordination (failure to appear before the Board).

Whether dismissal was unfair

Procedural fairness

27. The Claimant challenged the procedural fairness of the dismissal by contending that the summons did not adequately state the charges he was facing, that the Disciplinary Committee as constituted lacked jurisdiction in terms of the Terms and Conditions of Service, and that he was not heard before the dismissal.

28. Section 41 of the Employment Act, 2007 has given content to the general constitutional right to fair labour practices provided for in Article 41 of the Constitution and it provides the irreducible minimum as to the scope of the right in terms of procedural fairness.

Adequacy of charges

29. The show cause notice of 27 June 2013 informed the Claimant that the Respondent had received reports that he had not been at the duty station after 7 May 2013 and that this was in breach of the Respondent's Regulation 10.4.1(a),(c) and (e) whose terms were set out in the notice.

30. He was requested to explain in writing within 7 days, and was also informed that disciplinary action was contemplated. The Claimant responded on 4 July 2013.

31. On 12 August 2013, the Claimant was invited to appear before an Ad Hoc Committee on Discipline and the charge was stated as desertion of duties.

32. The Respondent, again through a letter dated 20 September 2013 set out the allegations against the Claimant as unlawful absence/absenteeism for 122 days (gross misconduct), and section 44(4)(a) of the Employment Act, 2007 and section 10.4.1(a) of the Respondent's Code of Regulations were cited.

33. The Claimant was requested to appear before a Committee of the Board on 26 September 2013. He did not appear.

34. From the foregoing, the Court is of the considered view that the Claimant was informed and was aware with sufficient clarity of the allegations to confront. The allegations as set out in the 2 notices were not vague and contained sufficient particulars.

35. The Court finds the allegations or charges as set out and put before the Claimant met the statutory requirements as outlined in section 41 of the Employment Act, 2007.

Jurisdiction/competency of the Disciplinary Committee

36. There is no statutory provision as to the composition of a disciplinary committee and therefore the Court must examine whether the Respondent had provided for the composition and jurisdiction in the Terms and Conditions of Service.

37. The Claimant filed with the Amended Memorandum of Claim a 2 page extract of a document which appears to be part of a Code of Regulations.

38. The Respondent did also not do any better. It annexed to the Response a 2 page extract.

39. Section 10 of the extract deal with disciplinary provisions.

40. Under section 10.1.1 the Respondent is expected to establish an Advisory Committee to advise the Management on disciplinary matters involving employees in Job Groups K.V 9 and below (the Claimant was in Job Group KV 11).

41. Section 10.1.2 mandates the Respondent's Managing Director to appoint the Chairperson of the Advisory Committee from among senior staff not below Job Group KV 12. The Personnel Manager is the automatic Secretary and the Committee is composed of 5 members.

42. In what may appear to be a contradiction, section 10.3.2 provides for a Disciplinary Committee consisting of not less than 3 and not more than 9 members appointed by the Managing Director.

43. Although the parties did not address the apparent contradiction in the sections, it appears to the Court that the Advisory Committee envisaged under section 10.1.1 has the role of advising the Respondent's management on disciplinary matters generally while the mandate to deal with and hear disciplinary cases is reserved to the Disciplinary Committee appointed by the Managing Director in terms of section 10.3.2.

44. The documents placed before Court show that the Ad Hoc Committee to deal with disciplinary cases involving staff in Job Group KV 9 and above (including the Claimant) was appointed by the Respondent's Managing Director initially through an Internal Memo dated 30 July 2013.

45. In the Court's considered view therefore, the Ad Hoc Committee was validly constituted and it was competent and had jurisdiction over the Claimant.

Role of the Board in disciplinary cases

46. The Claimant made much of the powers of the Managing Director as opposed to the Board in disciplinary cases and reference was made to sections 10.2.2 and 10.4.1 (page with section 10.4.1. was not provided to Court).

47. In my humble view, section 10.2.2 deals with sanctions/penalties and prohibits the imposition of dismissal, suspension, interdiction and demotion without involvement of the Board.

48. Both the suspension and dismissal of the Claimant were sanctioned by a Committee of the Board and or the full Board and nothing turns on this ground of challenge.

Opportunity to be heard

49. As far as the Court is aware, there is no absolute right to a hearing in disciplinary case in this country. The right is one of being availed an opportunity to be heard.

50. The Claimant was asked to show cause and he did. He was invited to appear before an Ad Hoc Disciplinary Committee, but he snubbed the offer and opportunity. He was again invited before a Committee of the Board and did not attend. He cannot cry wolf.

51. The Court therefore reaches the conclusion that the Respondent was in compliance with both the statutory and contractual requirements as to procedural fairness.

Right to fair administrative action

52. In his submissions, the Claimant made reference to the right to fair administrative action.

53. Considering the manner of the pleadings herein (no mention of Article 47 in the pleadings) and the way the Cause was prosecuted, the Court is of the view that an examination of that right in the context of the employment relationship would not be decisive save to observe that in dismissing the Claimant, the Respondent was acting pursuant to an employment contract (as an employer and not taking administrative action, and therefore primarily it is the right to fair labour practices which is more relevant/material).

54. Of course, the Court is alive to situations where the right to fair administrative action may be implicated especially where the employment relationship is underpinned by public/statutory law.

55. The Court further wishes to observe that an employee is under an obligation to cooperate with an employer during disciplinary proceedings and any misgivings during the process ought to be raised with the employer at the first instance, and not in Court.

Substantive fairness

56. Two reasons were given for the summary dismissal of the Claimant and these were absenteeism and insubordination.

57. Pursuant to sections 43, 45 and 47(5) of the Employment Act, 2007, these are the reasons the Respondent was expected to prove and not only prove, but prove as valid and fair.

Absenteeism

Up to 26 June 2013

58. The Claimant received a show cause dated 26 June 2013.

59. The Claimant did not deny that he was absent. Instead he attempted to give reasons and or explanations.

60. In the response to the show cause, he explained that he was given 2 weeks off duty after reporting to Tot station to go and prepare to settle and he was to resume on 22 May 2013.

61. As to why he did not resume on 22 May 2013, the Claimant explained that he had not been facilitated in terms of transfer allowance(s) and that upon receipt of the allowance, he reported back on 6 June 2013. He also explained his whereabouts up to 10 June 2013 and that an official handover to him only took place on 14 June 2013.

62. As to his whereabouts thereafter, the Claimant explained that he had applied for his annual leave to start on 20 May 2013, but the same was deferred and he made a fresh application to start leave on 18 June 2013, but again he learnt on 20 June 2013 that the leave had been deferred again, and that he had permission of the Regional Manager to be away on 24 June 2013 and 25 June 2013 and that he resumed duty on 26 June 2013.

63. The Respondent's documents appeared to corroborate the explanation as indicated in the Memo from the Deputy Farm Manager dated 26 June 2013, except that another memo dated 27 July 2013 suggests that the Claimant was away from 24 June 2013 to 17 July 2013 and that he left again on 20 July 2013.

64. According to his testimony, he had taken the period after 18 June 2013 to follow up on his leave application and that he was in Tot up to 17 July 2013.

65. The Respondent's Human Resource Manager testified that the Claimant never returned to work after 24 June 2013 until 17 July 2013 and that he did not have permission to be away.

66. The witness also confirmed that the Claimant visited the Respondent's head office but he required permission to visit the head office and that it did not make sense for the Claimant to visit the head office to follow up on his leave.

67. The Court finds that the Claimant had lawful cause and or sufficiently explained the absences up to 27 June 2013 and a summary dismissal on account of that absence would not have been fair or valid.

After 26 June 2013

68. The Claimant stated off hand in cross examination that he was at the work station during July, August and September 2013 but did not offer any plausible explanations as to his whereabouts or what duties he carried out over that period like he did in the response to the show cause.

69. The Respondent's second witness was the Deputy Farm Manager at Tot station. His evidence that the Claimant was last at the station on 20 July 2013 was not interrogated.

70. The Claimant's suspension only came on 20 September 2013 and the suspension letter requested the Claimant to explain the further absence from the duty station.

71. The Claimant did not explain this absence before the Ad Hoc Committee or the Committee of the Board as he failed to appear on 26 September 2013, nor did he suggest in Court that he had permission to be away or that there was lawful cause for the absence.

72. The Court has already alluded to the obligation upon an employee to cooperate with the employer even during disciplinary proceedings. The Claimant appeared to have been misadvised not to cooperate. He could have easily explained his whereabouts if indeed he was at work after 26 June 2013 (or for that matter during July, August and September 2013).

73. The Court can therefore infer that the Claimant was not at his duty station after 20 July 2013, without permission and or lawful cause.

74. The Court therefore finds that the Respondent had valid and fair reasons to dismiss the Claimant on account of the absence post show cause notice.

Insubordination

75. It is not disputed that the Claimant did not appear before a Committee of the Board on 26 September 2013.

76. In my view, this was insubordination and the only relevant question is whether in the circumstances of the case, summary dismissal was warranted/was a fit and appropriate penalty/sanction or was an overreaction.

77. Coupled with the unexplained absences post show cause notice, the Court is of the view that the circumstances warranted summary dismissal.

Pending Petition before Eldoret High Court.

78. The Claimant admitted that there was a pending Petition before the High Court in Eldoret but he did not know its current status.

79. The Court has earlier on in this judgment made reference to the Petition.

80. The Petition predates the dismissal of the Claimant, however one of the main issues raised therein is the illegality of the transfer of the Petitioners therein (including the Claimant). As it was filed before the dismissal the less said the better so as not to pre-empt its outcome.

Appropriate remedies

Reinstatement

81. This remedy is not available with the conclusion reached on the fairness of the dismissal and in any case, it is more than 3 years since the dismissal of the Claimant and pursuant to statutory prohibition and the circumstances of this case, reinstatement would not be an appropriate remedy to grant.

General damages

82. Section 49(1) of the Employment Act provide for the primary remedies where the Court reaches a finding of unfair termination of employment.

83. One of the remedies is the equivalent of not more than 12 months gross wages. It is not described as damages but by practice and custom it is referred to as compensation.

84. It is equally not available with the conclusion on the fairness of dismissal.

Salaries and allowances during suspension

85. Without a statutory or contractual authority, withholding of wages during suspension is unlawful.

86. Section 10.2.4 allows suspension of staff on half salary or without salary where in the opinion of the Respondent's Managing Director, financial loss may be involved.

87. The Respondent's suspension letter did not suggest any financial loss nor was there any such indication in the course of oral testimony.

88. Equally, the Claimant was not informed whether he would be on half pay.

89. The Court would therefore find that the Claimant is entitled to wages up to 6 January 2014 when he was informed of the decision to dismiss him.

Certificate of Service

90. This is a statutory right and the Respondent is directed to issue one to the Claimant within 14 days.

Conclusion and Orders

91. The Court finds and holds that the summary dismissal of the Claimant was fair, but that he is entitled to unpaid wages up to 6 January 2014.

92. Unfortunately the same were not computed (attempt to provide computation in submissions is a practice not known in law) and the Respondent is ordered to compute and pay the Claimant the same.

93. Save for the unpaid wages during suspension, the Cause is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 12th day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Musembi instructed by Wambua Musembi & Co. Advocates

For Respondent Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon