



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 105 OF 2014

WYLLIS COLLINS AKEYO MUGANDA

CLAIMANT

v

GEOTHERMAL DEVELOPMENT COMPANY

RESPONDENT

JUDGMENT

1. Wyllis Collins Akeyo Muganda (Claimant) was offered employment by Geothermal Development Company (Respondent) on 22 April 2010 as a Technician (Analytical Chemistry) GD 9. A contract of employment embodying the terms and conditions of the employment was signed by the Claimant on 20 May 2010.
2. The Respondent, through a letter dated 7 February 2011 informed the Claimant that he was being confirmed in the position of Laboratory Technician Grade *GD 8* effective 22 October 2010.
3. Barely a month later, on 16 March 2011, the Respondent suspended the Claimant pending investigations into allegations of forging a pay slip to secure a credit card.
4. On 28 April 2011, the Respondent wrote to the Claimant informing him of his summary dismissal in terms of section 44(4)(g) of the Employment Act, 2007.
5. The Claimant then consulted an advocate who wrote to the Respondent on 23 June 2011, bringing to its attention the fact that Police investigations had established the person responsible for the forgery and that person had been charged in Court.
6. The advocate requested the Respondent to reconsider the summary dismissal of the Claimant. The Respondent did not respond to the letter.
7. On 22 January 2014, the subordinate Court convicted and sentenced the suspect who had been charged with the forgery and making of a false document.
8. The conviction must have prompted the Claimant to commence legal proceedings against the Respondent on 17 April 2014, in which he stated the issues in dispute as
 - (1) *Unfair termination of employment.*
 - (2) *Failure to pay terminal dues to the Claimant.*
9. The Respondent filed a Reply to the Memorandum of Claim on 22 May 2014.

10. On 18 November 2015, the Court in the presence of both parties' legal representatives fixed the Cause for hearing on 21 July 2016.

11. When the Cause was called out for hearing on the scheduled date, the Respondent was not present. Neither was its legal counsel in Court.

12. And because the date was fixed in the presence of the Respondent's legal counsel, the Court allowed the hearing to proceed and the Claimant testified and the Court reserved judgment to 30 September 2016.

13. However, on 23 August 2016, the Respondent moved Court seeking among other orders, to be granted leave to cross examine the Claimant and also to call witnesses.

14. Because the Claimant is currently undergoing studies in Germany and bringing him back for cross examination would have been at considerable cost, the Respondent abandoned the order to have him cross examined. Leave was granted for Respondent's case to be taken.

15. The Respondent's case was taken on 11 October 2016. The Claimant had filed his submissions on 15 August 2016 and supplementary submissions on 24 October 2016. The Respondent had until 15 November 2016 to file its submissions but none were on file by this morning.

16. The Court has considered the pleadings on record, the evidence and submissions and adopts the issues for determination as framed by the Claimant, to wit, *whether the summary dismissal of the Claimant was unfair and appropriate remedies.*

Whether summary dismissal was unfair

Procedural fairness

17. The Claimant testified that after his suspension he sought audience with the Respondent's Human Resources Manager in Nairobi who assured him that a Disciplinary Committee would be set up in terms of the Respondent's Human Resources Policies & Procedures Manual to consider his case, but that he was not summoned to appear before any such Disciplinary Committee.

18. Instead he received the dismissal letter.

19. The Respondent's Area Officer in Charge of Human Resources on his part testified that although the Claimant was given 72 hours to make representations, he failed to comply and therefore he was dismissed.

20. Section 16.8.5 of the Respondent's Human Resources Policies and Procedures Manual has established a Main Disciplinary Committee to deal with staff in Grades GD5 to GD 13.

21. Pursuant to section 16.8.5(a)(iv) of the Policies and Procedures, it is the responsibility of the Manager, Human Resource to convene the Disciplinary Committee without delay.

22. There is absolutely nothing in the Respondent's witness testimony, the Reply to the Memorandum of Claim and the voluminous documents filed by the Respondent to suggest that the Claimant was taken through the provided for disciplinary process in the presence of a colleague.

23. On that score alone, the Court is of the considered view that the Respondent's decision, being in breach of its internal disciplinary procedures was procedurally unfair.

24. The Court in reaching that conclusion is aware of the legal principle that a failure by an employer to properly observe its own internal disciplinary procedures in taking action against an employee amounts to breach of contract (see *The Post Office v Strange* (1981) IRLR 515 EAT, which the Court endorses as setting a sound legal principle even in our jurisdiction in terms of Article 41 of the Constitution).

25. However, were the Court's conclusion reached on the basis of failure to comply with contractual disciplinary procedures wrong, an examination of the statutory provisions would lead to a similar conclusion.

26. Section 41(2) of the Employment Act, 2007 provides that

Notwithstanding any provision of this Part, an employer *shall*, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of *misconduct* or poor performance, and the person, if any chosen by the employee within subsection (1) make.

27. The reason given for the dismissal of the Claimant fell under the family of *misconduct*.

28. It is correct that the Claimant was requested through the suspension notice to give explanations within 72 hours but, in the Court's view, that request and explanation was part of an investigative process to establish the facts before commencement of a formal disciplinary process.

29. That request would therefore not be sufficient, in my considered view to meet the test outlined in section 41(1) and (2) of the Employment Act 2007.

Substantive fairness

30. By dint of sections 43 and 45 of the Employment Act, 2007, a statutory obligation has been placed upon employers to not only prove the reasons for terminating the employment of an employee, but that the reasons are valid and fair.

31. The Respondent's witness confirmed that he became aware after the Claimant's dismissal that the Police exonerated the Claimant and a suspect (employee of the bank) to which the alleged forged pay slip was presented was arrested and charged in Court.

32. The Court also takes note that the suspect who was charged was later convicted and sentenced to reach a conclusion that the Respondent did not have valid and fair reasons at the time of dismissal to send the Claimant packing.

Appropriate remedies

Grade 8 remuneration

33. The letter confirming the Claimant indicated that he was on Grade *GD 8*.

34. Under section 5.1.2 of the Human Resources Policies and Procedures, an employee (is) was eligible for promotion after 3 years of service.

35. The Claimant had not served for 3 years, and the Court is unable to accede to the claim that he ought to have been paid on this grade.

Wages during suspension

36. Section 16.8 of the Human Resources Policies and Procedures allowed the Respondent to suspend an employee on half pay, but does not provide for what happens to the withheld balance when the employee is dismissed.

37. The Court would have given the Claimant the benefit of doubt in respect of this head of claim, unfortunately, he knew or ought to have known the exact wages and specified the same, but he did not (the attempt to sneak in the amount in the submissions which should have been a matter of evidence is rejected).

