



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1954 OF 2013

CATHERINE KATHINI MULATYA.....CLAIMANT

VERSUS

INNCOR KENYA LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – the irregular and unlawful termination of employment

Background

1. By the consent of parties herein, several issues were resolved which include;

(1) The payment in lieu of notice and

(2) salary due in September 2013; Total sum of Kshs.25, 140

2. On the claim for irregular and unlawful termination of employment, parties called evidence.

3. The claim is that the Claimant was employed by the Respondent as a Prep Chef on 16th March 2010 until 16th September 2013 when without any lawful cause there was termination of employment. At the time the Claimant was earning Kshs.12, 570.00 per month. That due to the unlawful manner of termination, the Claimant is seeking compensation as there was no notice or reasons given for the termination.

4. In evidence, the Claimant testified that upon employment as a Chef, she was promoted as a Cashier and issued with an appointment letter. On 16th September 2013, a customer came and ordered for pizza which was placed aside when another customer came and made a similar order plus a soda which gave it a different price.

As the Claimant made these transactions, the manager called her and directed her to go home.

5. A termination letter was issued accusing the Claimant of theft. That this was not true as she was accused of taking an order without a docket or with an order which should state the items needed and a receipt issued together with the foodstuffs ordered. That this is what the Claimant had done and the correct monies charged and paid to the respondent. There was no case of theft. There was no loss incurred to the detriment of the respondent.

6. The Claimant was terminated without a hearing or being given a chance to explain herself and what

had happened. Even though she was asked to write a statement before termination, there was no chance for hearing.

Defence

7. In defence, the respondent's case is that they employed the Claimant but was justifiably dismissed for gross misconduct which reasons were set out in the letter of termination. The Claimant failed and neglected to hand over company property in her custody for clearance to allow the Respondent pay her terminal dues in accordance with the set policy. No remedies are due as claimed.

8. No witness was called to support the defence.

9. Both parties filed written submissions. The submissions by both parties only reiterate matters set out in the pleadings.

Determination

10. By letter dated 16th September 2013, the Respondent dismissed the Claimant from her employment on the grounds that;

Theft – you were found to have dispatched an order without a docket. This means that you did not follow the stipulated procedures.

11. The claim is therefore that the dismissal was irregular and unlawful on the basis that there was no notice and hearing while the defence is that the Claimant committed gross misconduct and was given a chance to write her statement in defence.

12. Section 44 of the Employment Act give an employer the right to summarily dismiss an employee but there are procedural requirements to be followed for the same to be lawful and to ensure the employee is given safeguard to avoid abuse and violation of rights at work. However, whatever misconduct is committed an employer is required to ensure the protections set out under section 41(2) of the Employment Act by;

(2) Notwithstanding any other 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.

13. The above provisions are mandatory unless an employer is able to demonstrate that there existed exceptional circumstances that they were not able to issue notice or hear the employee. Such circumstances must be demonstrated. The court must be satisfied that the employee was given notice and a hearing and where not possible, what constraints existed. Without such demonstration, a dismissal that is without due process becomes procedurally unfair in terms of section 45 of the Employment Act.

14. It is not sufficient that the employer is willing to pay for notice. Even where there is such an offer, the legal procedural protections due to an employee must be guaranteed and ensured before a dismissal can be found to be lawful. In this case, the Claimant was directed to write her statement but such a statement is not a substitute to a hearing as set out under section 41 of the Employment Act. At such a hearing forum, the employee is allowed to call and make representations in the presence of a fellow employee and call any other evidence from the shop floor as this is the primary source of such evidence. Without being given the right to a hearing and presence before a representative, the safeguards set in law are lost and the resulting dismissal is negated due to this illegality.

15. The Respondent in the notice of dismissal state that the Claimant failed to *follow the stipulated procedures* in dispatching an order without a docket. However, the *stipulated procedures* are not set out as to what exactly the Claimant did or failed to do and where the policy procedures were available for

reference. It therefore becomes very subjective in the instant case to simply dismiss an employee without making available the standards or procedures required to be adhered to that are alleged to have been violated. The dismissal was therefore not justified and failed to comply with mandatory provisions of the law under section 44, 41 and 45 of the Employment Act.

Remedies

16. As noted above, parties have since filed consent on several items save for compensation due for unlawful termination of employment. Based on the above findings that there was unfair termination, and putting into account the settlement of the parties, a compensation of 6 months gross pay is found appropriate in terms of section 49 of the Employment Act. The Claimant was earning Kshs.12, 570.00 at the time of dismissal and is awarded Kshs.99, 420.00.

17. Costs are also due at 50%.

Judgement is hereby entered for the Claimant against the Respondent with a declaration that the termination of employment was unlawful and unfair; the Claimant is awarded compensation at Kshs.99, 420.00; and costs at 50%.

Delivered in open court at Nairobi this 8th day of December 2016.

M. MBARU JUDGE

In the presence of:

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