



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 55 OF 2014**

**DR. PETER OPIYO MC'ODERO**

**CLAIMANT**

**V**

**LAIKIPIA UNIVERSITY**

**RESPONDENT**

**JUDGMENT**

1. Dr. Peter Opiyo Mc'Odero (Claimant) filed a Memorandum of Claim against Laikipia University (Respondent) on 11 March 2014, alleging unlawful interdiction and termination of services and seeking Kshs 3,937,152/15 in total. Together with the Claim, the Claimant filed a bundle of documents.
2. The Respondent filed a Response on 25 April 2014, together with its bundle of documents.
3. The Cause was heard on 5 November 2014 and 1 December 2014. The Claimant filed his submissions on 15 December 2014 while the Respondent filed its submissions on 16 January 2015.
4. From the pleadings, evidence and submissions, the Court has identified the issues arising for determination as, *whether the Claimant was an employee of the Respondent, whether the Claimant's interdiction was lawful and procedural, whether the termination of the services of the Claimant was unlawful/unfair (whether the disciplinary process was in compliance with the contractual and statutory terms), whether there was breach of Article 47 of the Constitution and appropriate relief including entitlements of Claimant during interdiction.*

**Whether the Claimant was an employee of the Respondent**

5. The Respondent denied that the Claimant was its employee. The Respondent annexed to its Response a letter dated 19 April 1991 in which Egerton University offered the Claimant employment as a Medical Officer.
6. It is in the public domain that Egerton University had a college called Laikipia College which later on transited into the Respondent.
7. On 31 January 2013, the Respondent interdicted the Claimant and later terminated his services.
8. In its written submissions, the Respondent admitted that the Claimant was its employee on permanent and pensionable terms.
9. The Court finds that the Claimant was an employee of the Respondent.

**Whether interdiction was procedural/unlawful**

10. The Claimant challenged his interdiction on several grounds.
11. The Claimant testified that he was interdicted through a letter dated 31 January 2013. The letter was signed by a Registrar in charge of Administration and Human Resource, J. K. Kairu.
12. The Claimant contended that this was unprocedural and unlawful because pursuant to clause 5.2

- of the Collective Bargaining Agreement the Respondent signed with Universities Non Teaching Staff Union (UNTESU), the interdiction letter should have been signed by the Principal.
13. For the Respondent, Mr. Kairu who testified stated that he prepared and signed the Claimant's interdiction letter on the instructions of the Principal. This was after he had prepared a summary of the Claimant's conduct.
  14. In cross examination, he stated that according to clause 5.2 of the Collective Bargaining Agreement, it was the Principal to interdict or suspend employees and that the clause did not make reference to delegation of the power to interdict or suspend.
  15. Clause 5.2 provides

### **Suspension/Interdiction**

When in the opinion of the Principal there has been good cause as defined below, he/she shall have power to suspend a member of staff on no salary (but shall be eligible for house and medical allowances), in cases of a serious offence, or interdict on half salary pending investigations into alleged offence by a member of staff under these terms and conditions of service within thirty (30) days. The case to be referred to the relevant council committee for necessary action.

16. Clearly, the clause has given the Principal of the Respondent the power to suspend or interdict an employee. But it does not provide that the communication of the interdiction or suspension must be made by the Principal.
17. The Respondent like any other big institution or organisation will have different professionals/managers who act at the behest of the Chief Executive. The person who signed the interdiction letter was the officer in charge of Administration and Human Resources.
18. To concede to the contention by the Claimant would be to give the clause on interdiction/suspension a mechanistic interpretation not in line with the realities of big organisations with appropriate structures/specialist departments.
19. In any case, the Court was not informed of any prejudice or injustice suffered by the Claimant on the ground that the interdiction letter was signed by the Registrar and not the Principal.

### ***Interdiction for more than 30 days***

20. The Claimant further challenged his interdiction on the basis that it went beyond the 30 days provided for in clause 5.2 of the Collective Bargaining Agreement.
21. It is not disputed that the interdiction letter was dated 31 January 2013. According to the clause, interdiction should be for 30 days pending investigations and reference to the relevant Council Committee for appropriate action.
22. The interdiction letter requested the Claimant to show cause within 7 days. The Claimant wrote back making representations through a letter dated 6 February 2013.
23. On 3 April 2013, the Respondent invited the Claimant to a disciplinary committee meeting scheduled for 19 April 2013. Factually, the interdiction exceeded the 30 days provided for. The Claimant was actually on interdiction for about 5 months.
24. The Respondent's witness stated that the process took more than the stipulated 30 days because the government was upgrading about 16 colleges including the Respondent to constituent colleges and at that time there was no council and that members of the Council formed the Disciplinary Committee.
25. The Claimant did not controvert this testimony on why the process took more than the stipulated time and the Court forms the view that there were genuine reasons which made the process extend.
26. Further, the Claimant did not demonstrate any prejudice suffered but in any case, the Court may be able to compensate him with any contractual or statutory entitlements he would have earned during the *extra* interdiction period.
27. The Claimant was interdicted through a letter dated 31 January 2013. The interdiction was supposed to be for 30 days. It went until dismissal on 16 May 2013. The reasons were not of the Claimants making.
28. In my view, where there is an express provision for interdiction or suspension and the interdiction or suspension stretches beyond such period, the employee would be entitled to all benefits prior to

- such interdiction or suspension.
29. The Claimant would be entitled to the allowances from February 2013 until dismissal, a period of some 4 months.

### ***Whether the termination of services was unfair***

30. The Court can now turn its attention to the process itself and whether there was compliance with the contractual and statutory provisions on terminations and dismissals.

### ***Statutory standard***

31. Section 41 of the Employment Act, 2007 has afforded employees generally the minimum protection against unprocedurally unfair termination.
32. The Claimant was issued with an interdiction letter dated 31 January 2013. The interdiction letter informed the Claimant of the allegations and or charges he had to answer to. The general allegation was misuse of the Respondent's ambulance and the particular charge was that on 23 January 2013, he signed the work ticket for the ambulance to take him to Nyahururu.
33. It cannot be controverted that the Respondent informed the Claimant of the allegations he had to face.
34. Further, the interdiction letter asked the Claimant to make representations within 7 days and he did make written representations through his letter dated 6 February 2013.
35. The letter equally informed the Claimant that disciplinary action against him was contemplated.
36. The process contemplated by section 41 of the Employment Act, 2007 can either be conducted through correspondence or orally. The Court is satisfied that the Respondent complied with the statutory requirements.

### ***Contractual requirements***

37. But that is not all that is there to it. The Respondent had a Collective Bargaining Agreement with a Union of which the Claimant was a member.
38. The Claimant contends the process did not meet the contractual threshold in that he was not given 3 months notice contrary to clause 4.5 of the Collective Bargaining Agreement and that no Union representatives were present when a disciplinary hearing was held, contrary to clauses 4(a)(III) and 15(i).
39. The Claimant asserted that the letter inviting him to the hearing was not copied to the Union and further that he raised an objection to the constitution of the Disciplinary Committee.
40. It was further contended this was against the requirements of section 41 of the Employment Act, 2007 on union representation during a hearing.
41. It is correct that the letter inviting the Claimant to a hearing on 19 April 2013 was not copied to the Union. No letter informing the Union was produced.
42. Clause 5(1) (III) as read with clause 15 of the Collective Bargaining Agreement requires that the Union should be represented by 2 officials as part of the Staff Disciplinary Committee. Notifications to members of the Committee should be sent out at least 10 working days in advance.
43. There is nothing on record or presented through testimony that the Respondent complied with the contractual requirements as to the disciplinary process on involvement of the Union (no notification to union and no representation during the actual hearing).
44. Although the parties did not refer me to any judicial precedent on the requirement to be accompanied or have a union representative during the disciplinary hearing, it does not require rocket science to realize that during such hearings, the rights of an employee, his records and employment prospects and future may all be affected by decisions made at a disciplinary hearing.
45. To my mind, the right to be accompanied or have a union representative present during a disciplinary hearing is an adjunct to procedural fairness under section 41 of the Employment Act, 2007 and various collective bargaining agreements such as the one here, especially because an employee may be vulnerable and disadvantaged if on his own. Adverse consequences may ensue.
46. But the Court needs to look at the form and substance of each disciplinary hearing before making

- any conclusive findings as to whether there was compliance with the requirements of procedural fairness.
47. On this score, the Court reaches the conclusion that the process of actual hearing was tainted as it was not conducted in the terms of the agreement between the parties, the Claimant suffering adverse consequences.
48. The Respondent and the Union had agreed on how disciplinary hearings should be conducted and the composition of the panel and the Respondent should have ensured there was compliance.
49. With the conclusion reached, it is not necessary for the Court to discuss the substantive fairness of the termination.

### **Appropriate relief**

#### ***12 months compensation***

50. The award of compensation is one of the primary remedies where the Court finds unfair termination or wrongful dismissal. The award is discretionary and the Court is enjoined to consider any, some or all of the factors set out in section 49(4) of the Employment Act, 2007.
51. The Claimant served the Respondent for some 22 years. Further, he is a professional and should be able to secure alternative employment. Considering the length of service and that the chances of the Claimant securing alternative employment are high, the Court would award him the equivalent of 6 months gross wages as compensation based on the gross pay of Kshs 220,890/50.

#### ***6 months pay in lieu of notice***

52. Clause 4.5 of the Collective Bargaining Agreement provided for termination on 3 months' notice or pay in lieu of notice. The Committee meeting of 19 April 2013 resolved that he be terminated with payment of 3 months' salary.
53. The Claimant was paid 3 months pay in lieu of notice and this head of claim is declined.

#### ***Unlawfully deducted union dues***

54. The Respondent did not controvert the Claimant's evidence that he was deducted union dues which was not remitted to the Union. He pleaded the amount as Kshs 4,454/-. He is entitled to a refund of the same.

#### ***Extraneous allowance***

55. The Claimant sought Kshs 920,000/- being extraneous allowance from 1 December 2011 to time of termination.
56. According to the letter dated 5 February 2013 from the Permanent Secretary, Ministry of Higher Education to the Respondent's Principal, staffs working in health centres manned by the Respondent were not entitled to extraneous allowance.
57. The Collective Bargaining Agreement for 2010-2012 (clause 27) made payment of this allowance subject to government circulars.
58. This head of claim therefore fails.

#### ***Hardship allowance***

59. Prior to interdiction, the Claimant was getting monthly, Kshs 1,200/- as hardship allowance. The Court would award him Kshs 4,800/-.

#### ***Risk allowance***

60. The Claimant sought Kshs 211,000/- as risk allowance from 1 February 2013 to notice period. He was getting Kshs 21,100/- monthly under this head.
61. The Collective Bargaining Agreement provided for payment of risk allowance to medical staff.

62.The Claimant only succeeds for the period beyond the contractual interdiction period of 4 months. The Court would award him Kshs 84,400/-.

### ***Remunerative allowance***

63.Under this head, the Claimant sought Kshs 290,000/- for 10 months at monthly rate of Kshs 29,000/-. According to the January 2013 pay slip the Claimant was paid the allowance.

64.The Court awards him Kshs 116,000/- calculated at a monthly rate of Kshs 29,000/-.

### ***Medical allowance***

65.The Claimant was getting Kshs 2,800/- monthly as medical house. The Court awards him Kshs 11,200/-.

### ***Commuter allowance***

66.Although the Claimant sought Kshs 110,000/- under this head, the Court declines to award him any money under this head because he did not commute to work during the interdiction.

### ***Leave allowance***

67.The Claimant sought Kshs 132,322/15 on account of leave allowance. He admitted that he was paid leave allowance with January 2013 salary.

68.Leave allowance was dependent on grade. The Claimant's grade was not disclosed though from the pay slip he was getting Kshs 2,800/- suggesting he was in the band of grade XI-XIII.

69.The Court is unable to make an award under this head based on the material placed before it.

### **Conclusion and Orders**

70.From the foregoing, the Court finds and holds that the termination of the services of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

i. 6 months compensation	Kshs 1,325,340/-
ii. Unremitted union dues	Kshs 4,454/-
iii. Hardship allowance	Kshs 4,800/-
iv. Risk allowance	Kshs 84,400/-
v. Remunerative allowance	Kshs 116,000/-
vi. Medical allowance	Kshs 11,200/-

TOTAL

**Kshs 1,546,193/-.**

71.Claimant to have costs.

**Delivered, dated and signed in open Court in Nakuru on this 13<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant  
& Co. Advocates

Mr. Wamaasa instructed by Wamaasa, Masese, Nyamwange

For Respondent

Mr. Juma instructed by E.M. Juma & Ombui Advocates