



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NUMBER 1948 OF 2014**

**EMILY WAMBUI KIMANI.....CLAIMANT**

**VERSUS**

**NATIONAL GENDER AND EQUALITY COMMISSION.....RESPONDENT**

**RULING**

1. By a motion dated 31<sup>st</sup> October 2014 brought under certificate of urgency the claimant seeks in the main:-

(a) That the Respondent be restrained either by themselves, their employees, agents, servants, officers or through any other persons from declaring vacant, advertising, filling by any means or deploying any other person to undertake the duties of the position of Legal/Investigation Officer held by the Claimant with the Respondent pending the hearing and determination of this application interpartes.

(b) That the Respondent be restrained either by themselves, their employees, agents, servants, officers or through any other persons from declaring vacant, advertising, filling by any means or deploying any other person to undertake the duties of the position of Legal/Investigation Officer held by the Claimant with the Respondent pending the hearing and determination of this suit.

(d) That a mandatory injunction do issue compelling the Respondent to forthwith reinstate the Claimant to her position of Legal/Investigating Officer with full pay and all benefits with effect from 6<sup>th</sup> October, 2014.

2. The application was supported by the affidavit of Emily Wambui Kimani, the applicant sworn on the same date.

3. The applicant depones on the main that:-

(a) That she was until 6<sup>th</sup> October, 2014 the Respondent's Legal/Investigating Officer when the Respondent illegally, unfairly and wrongfully terminated her employment on 6<sup>th</sup> October, 2014.

- (b) That in her letter of termination, she was accused of being dishonest and negligent.
- (c) That she was never in the course of her employment with the Respondent, been warned of any wrongdoing whether orally or in writing or subjected to any disciplinary action on any of the grounds advanced in the letter of termination or on any other grounds for that matter.
- (d) That she was unfairly, illegally and wrongly accused of the above allegations in her service as chair to the tender evaluation committee for the Insurance No. NGEC/01/2013/2014/INS.
- (e) That by a memo dated 20<sup>th</sup> May, 2014, she was informed that she had been appointed to chair the Technical Evaluation committee for Procurement of Insurance No. NGEC/01/2013/2014/INS.
- (f) That despite objecting to sitting in the committee due to her heavy workload, a decision was made that she had to sit since there was no adequate time to appoint other members to the committee.
- (g) That she chaired the Technical Evaluation Committee which comprised three other members and the committee was mandated to give a recommendation on the appropriate medical service provider as per the Public Procurement and Disposal Act, 2005 and the regulations thereof.
- (h) That after the successful completion of the process and before signing the report that had to be prepared by the secretary to the Technical Evaluation Committee, she travelled to Samburu on official scheduled duty from 16<sup>th</sup> June, 2014 and returned to the office on 26<sup>th</sup> June, 2014.
- (i) That upon her return she was informed by the secretary to the Technical Evaluation Committee in the presence of his supervisor that the Technical Evaluation committee had overlooked a technical aspect in the evaluation and that it warranted a rectification of the draft evaluation report.
- (j) That the secretary later circulated the final report, which all the Technical Evaluation Committee members signed.
- (k) That on 15<sup>th</sup> July, 2014 after official working hours, she received a phone call from one Comfort Mwaiti an administrative assistant in the chairperson's office ambushing her to see the chairperson in the office boardroom and no reasons were advanced for the same.
- (l) That during that sitting which was attended by all the Commissioners, she was asked to explain about the medical cover evaluation.
- (m) That at no time prior to or during the proceedings she was informed that she was under investigation and particulars of the same shared, which was against the rules of natural justice.
- (n) That by a letter dated 25<sup>th</sup> July, 2014, she was issued with a Notice to show cause why she should not be disciplined to be responded to in 14 days and accusing her of signing a new evaluation report, making alterations without reference to the evaluation committee members which amounted to dishonesty, fraud, and or willful breach of trust.
- (p) That as a diligent and dutiful employee she complied by giving a written response dated 8<sup>th</sup> August 2014 to the Respondent's letter of 25<sup>th</sup> July, 2014, denying all the

allegations leveled against her. In addition. She also advised the Respondent that there was a conflict of interest in them purporting to investigate, prosecute and adjudicate over a matter that they had a direct interest.

(q) That by the said letter, 8<sup>th</sup> August, 2014 she also sought to be furnished with documents referenced in the letter 25<sup>th</sup> July, 2014 which purported to form the grounds of the notice to show cause why she should not be disciplined.

(r) That she has not to date been furnished with the said evidence the Respondent purported to have relied on.

(s) That the Respondent thereafter proceeded to illegally, wrongfully, and unfairly terminate her contract of employment vide its letter of 6<sup>th</sup> October, 2014.

(t) That while the technical Evaluation Committee was composed of four members, it came to her knowledge that she was the only member of the technical evaluation committee who was terminated on account of the evaluation process in sheer disregard of the provisions of the Public Procurement and Disposal Act 2005 and Regulation 16 of the Public Procurement and Disposal Regulations, 2006.

4. In his submissions filed in Court Counsel for the claimant submitted that no valid grounds existed to warrant the termination of the claimant's services. He contended that the decision to terminate the claimant's contract of employment and the manner in which the termination was effected by the respondent infringed on her constitutionally guaranteed right to fair administrative action, right to equality and freedom from discrimination, fair hearing etc.

5. Counsel contended that being a public entity, any procurement grievances that arose should have been channeled through the Public Procurement Oversight Authority established by law. According to counsel, the failure by the respondent to have independent investigation by competent agencies on a matter where the respondent was a direct beneficiary of the outcome before her termination amounted to bias as the respondent acted as its own complainant, investigator, prosecution and adjudicator. Counsel contended that the respondent's own minutes stated that it would consider forwarding the matter to EACC and PPOA to investigate. This according to counsel was an admission by the respondent that termination was premature.

6. Regarding the disciplinary procedure, counsel submitted that though the applicant was issued with a show cause letter, the respondent did not thereafter grant her an oral or written warning, interdiction or suspension. Instead the respondent went ahead and terminated the claimant's services without any notice and without paying her terminal dues.

7. To this extent counsel submitted that the respondent failed or refused to follow neither the procedure stipulated by the law nor the disciplinary procedure contained in its own human resource manual.

8. The respondent on its part submitted that the conditions for grant of interlocutory injunction are well articulated in the case of **Giella Vs. Cassman Brown** and that the grant of an injunction is a judicial discretion that should be exercised judiciously and sparingly and not in any way be used to suffocate management prerogative of an employer. According to counsel therefor, the applicant has not demonstrated in any way that her case satisfied the requirements for an injunction to be granted.

9. Counsel argued that the decision to terminate the claimant's employment contract was based on the grounds that she failed to ensure that each member of the Evaluation Committee did an evaluation of each tender independently from each other prior to sharing their analysis and ratings as required by Public Procurement and Disposal Act. The claimant further facilitated or allowed the alteration of the evaluation report to show Resolution Health was the lowest bidder in Tender

No. NGE/01.2013/14 while she was aware that the Evaluation Committee had recommended BRITAM as the lowest bidder.

10. According to Counsel therefore, the claimant's actions significantly contributed to the delay in completing the procurement process leading to the respondent incurring additional cost of Kshs.3 million which could have been avoided had the process been finalized in time. This delay according to counsel amounted to gross negligence, sabotage and concealment of information that involved breach of legal duty and trust to the respondent.

11. Regarding procedure for termination counsel submitted that the procedure laid down in the NGE Act was strictly followed. The claimant was given a hearing in accordance with section 41 of the Employment Act.

12. This is an interlocutory injunction application and the principles for granting such applications generally are now more or less settled. In employment cases however, the Court ought to be a little bit more cautious in granting interlocutory injunctions especially where an employee has been dismissed by the time the action is brought to Court. That is not to say interlocutory injunctions cannot be in a proper case, be granted where an employee has already been dismissed. To say so would open a pandoras box where sharp employers would be quick to dismiss knowing they cannot be enjoined. To issue an injunction post-dismissal requires compelling circumstances. The applicant in such a case needs to demonstrate that the dismissal was in gross violation of the contract employment, the Employment Act and rules of natural justice generally.

13. One of the tests applied by Court in deciding whether to grant or refuse an interlocutory injunction is whether damages would be an adequate remedy if the claim ultimately succeeds. This is not to say that simply because damages are quantifiable and may be considered adequate the Court cannot issue an interlocutory injunction. It will be issued where the balance of convenience leans more towards granting than refusing it even if damages would turn out to be an adequate remedy at the conclusion of full trial.

14. I have perused the memorandum of claim filed by the applicant and noted that one of her prayers is damages for wrongful termination of contract of employment. This means damages can be quantified and awarded to her as compensation for termination of her services.

15. Employment relationship is a personal relationship. The traditional view has been that it would be awkward to compel two unwilling parties to continue in it. Lord Denning MR in the case of **Hill v. Parsons (1972) chD 305** observed that in granting injunctions the Court would have to be satisfied that trust and confidence still existed between the parties and that damages would not be an adequate remedy.

16. In this particular case the Court is not persuaded that the claimant has demonstrated that if successful damages would not be an adequate remedy. In the circumstances the Court declines to grant the orders sought with the consequence that the application is dismissed with costs.

17. It is so ordered.

**Dated at Nairobi this 22<sup>nd</sup> day of May 2015**

**Abuodha J. N.**

**Judge**

**Delivered this 22<sup>nd</sup> day of May 2015**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**