



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 38 OF 2014

IRENE ASIAGO.....CLAIMANT

v

TRANS-NZOIA TEACHERS CONSUMER COOPERATIVE SOCIETY.....RESPONDENT

JUDGMENT

1. Irene Asiago (Claimant) was employed by Trans-Nzoia Teachers Consumer Cooperative Society (Respondent) on 23 January 1997 through a letter of even date.
2. Through a letter dated 17 December 1997, the Respondent informed the Claimant she had been confirmed to carry clerical duties on permanent terms and conditions of service.
3. On 28 September 2013, the Respondent suspended the Claimant to allow investigations into theft of a computer, computer keyboard and printer which occurred on 12 August 2013. The suspension letter also informed the Claimant that she would pay for the lost items.
4. On 19 February 2014, the Claimant commenced legal proceedings against the Respondent and she stated the issues in dispute as
 1. Unlawful and unfair dismissal and termination of employment
 2. One month salary in lieu of notice
 3. Unpaid salary
 4. Unpaid leave.
5. The Respondent filed a Response on 25 March 2014 and the Cause was heard on 21 January 2015 and 5 March 2015. The Claimant filed her submissions on 19 March 2015, while the Respondent filed its submissions on 13 April 2015.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant's employment was terminated, whether such termination of employment was unfair, whether the Claimant is owed salary arrears/shares and appropriate relief.*

Whether Claimant's employment was terminated

7. The Claimant pleaded that her employment was unfairly terminated on 28 September 2013 because she was not accorded a hearing or given any notice or valid reasons.

8. The Respondent on the other hand pleaded that it suspended the Claimant on 28 September 2013 pending investigations into a theft and that on 12 February 2014, it informed the Claimant of the end of her suspension but she ignored directives to resume work.
9. In testimony, the Claimant stated that there was theft at the Respondent's offices on 12 August 2013, and she informed the Manager who was away on leave and the Manager came and met with Respondent's Executive Committee. A report was thereafter made to the Police.
10. She also stated that on 28 September 2013, the Manager called her to go collect a letter. It was a suspension letter and the suspension was indefinite.
11. Later, the Manager called her to meet the Executive Committee and the Committee requested her to go and record a statement with the Police on 14 October 2013.
12. Earlier, on 12 October 2013, the Claimant's legal advisers had written to the Respondent querying the suspension but there was no response hence she filed the present Cause on 19 February 2014.
13. The Claimant further stated that the Respondent had a Collective Bargaining Agreement with the Kenya Union of Commercial, Food and Allied Workers of which she was a member and that the Collective Bargaining Agreement provided for suspension with full pay, but she was not paid during the suspension.
14. She further stated that the Respondent only wrote to her advocate on 26 February 2014, informing him of the lifting of the suspension and asking her to report back to resume duties (after commencement of these proceedings).
15. For the Respondent, its witness stated that after the theft on 12 August 2013, the Respondent decided to send the Claimant on suspension on 28 September 2013 to pave way for investigations. After the suspension, the Claimant was invited to appear before the Respondent's Management Board on 22 September 2013, but she failed to appear.
16. Again, the Claimant was invited through a letter dated 12 February 2014 to appear before the Board on 18 February 2014, but she did not turn up. Another invitation for a meeting for 22 February 2014 was not honoured by the Claimant.
17. The Respondent therefore decided to invite the Claimant through a letter dated 26 February 2014 through her advocate to resume duty but she did not take up the offer.
18. The witness stated that the Respondent had not decided to terminate the employment of the Claimant prior to 19 February 2014 but that on 28 February 2014, the Respondent wrote to the Claimant informing her of the termination of her employment from the date she sued the Respondent.
19. The Claimant produced a copy of the Collective Bargaining Agreement between the Respondent and her Union. Clause 5 provided for suspension for an initial period not exceeding 30 days pending investigations.
20. The Clause further provided that if the arms of the law were involved, the suspension could be extended for an indefinite period but with full benefits including house allowance.
21. It is not in dispute that the allegations of theft herein were reported to the Police (arm of law) in the afternoon of theft. The Claimant thereafter recorded a statement with the Police on 14 October 2013.
22. The Respondent clearly had contractual authority to suspend the Claimant indefinitely because the theft had been reported to the Police.
23. In this regard, the Respondent was not in breach of a fundamental contractual term to entitle the

Claimant to consider her employment terminated on ground of indefinite suspension.

24. However, the clause on suspension also provided that the indefinite suspension would be on full benefits including house allowance.

25. The Claimant's testimony that during the suspension she was not getting her wages and house allowance after September 2013 was not challenged or controverted.

26. By failing to pay the wages and benefits after September 2013, the Respondent was not only in breach of an essential term of the contract of employment but its conduct was repudiatory of the contract (the statutory framework in Kenya has not provided for repudiation and the fallback position is the common law).

27. The Claimant, being the innocent party did not accept the breach and repudiation, and her advocate wrote to the Respondent on 12 October 2013 (claimant's exh. Appendix 8) and the Union wrote to the Respondent on 7 November 2013 (claimant's exh. 11). The Advocate's letter wanted to know why despite recovering the value of the lost items from the Claimant's wages, she was still on suspension.

28. These letters were not responded to by the Respondent after which the Claimant moved to Court. By failing or declining to respond to the letters, the Respondent impliedly accepted its repudiation and which repudiation the Claimant eventually accepted by moving to Court (see *London Transport Executive v Clarke* (1981) IRLR 166 and *Geys v Societe Generale, London Branch* (2012) UKSC 63).

29. The Court therefore finds that the Respondent not only breached a fundamental term of the employment contract but repudiated the contract by its conduct, and the Claimant was entitled to treat herself as having been dismissed by filing the present Cause.

Whether the termination of employment was unfair

30. With the conclusion that the Respondent was in breach of a fundamental term of the employment contract/repudiated the contract, the Court can only conclude that the termination of the Claimant's employment was unfair.

Salary during suspension

31. The Claimant's testimony was that she was last paid her wages in September 2013.

32. With the conclusion reached that the termination of the Claimant's employment was unfair, and pursuant to clause 5 of the Collective Bargaining Agreement, the Claimant is entitled to the salaries she would have earned until 19 February 2014 when she filed the Cause.

Salary arrears pursuant to 2010/2011 Collective Bargaining Agreement

33. No evidence was led on this issue.

Shares

34. The Claimant pleaded that she was owed Kshs 73,269/- as shares. No evidence was led on the shares. In all probability, the shares scheme has rules on withdrawal or refund and the Claimant should follow up the same with the Society.

Appropriate remedies

1 month pay in lieu of Notice

35. The Claimant sought Kshs 21,000/- as one month pay in lieu of notice. The Claimant's basic pay at

48. The heads of claim for unpaid salary, salary arrears and shares are dismissed.

49. Claimant is awarded costs of Kshs 100,000/-.

Delivered, dated and signed in Nakuru on this 8th day of May 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Getanda instructed by Getanda, Rabera & Associates Advocates

For Respondent Mr. Kidiavai instructed by Kidiavai & Co. Advocates

Court Assistant Nixon