



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 240 OF 2013

DOROTHY ASINA ATELA.....CLAIMANT

VS

HENKEL CHEMICAL (EA) LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 20th February and filed in Court on 21st February 2013, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Defence on 13th June 2013 and the matter proceeded to full hearing with the Claimant testifying on her own behalf and the Respondent calling its Chief Accountant, Allan Wabwire and Accounts Assistant, Caroline Kinya Mburugu.

The Claimant's Case

2. The Claimant was employed by the Respondent on 1st March 2007 in the position of Accounts Assistant. Her duties included compiling sales commission reports, data entry and filing. According to the Claimant, she was assigned additional duties relating to petty cash custody for which the Respondent undertook to pay her additional salary. The Respondent did not however honour its commitment in this regard.

3. On 31st January 2013, the Claimant was issued with a first and second warning for alleged misconduct at the workplace and on 7th February 2013, she was summarily dismissed. The Claimant states that her dismissal was unlawful and unfair and therefore claims the following:

- a. A declaration that the termination of her employment was unlawful
- b. Compensation for breach of contract.....Kshs.852,000.00
- c. Underpayment.....Kshs.65,000.00
- d. Unpaid house allowance.....Kshs.781,000.00
- e. 3 months' pay in lieu of notice.....Kshs.213,000.00
- f. Salary for 7 days worked in February 2013.....Kshs.16,569.00
- g. 15 days' leave pay.....Kshs.35,505.00
- h. Costs and interest

The Respondent's Case

4. In its Memorandum of Defence filed on 13th June 2013, the Respondent admits having employed the Claimant a Sales and Marketing Assistant effective 1st March 2007. This employment was terminated

on 21st July 2008 upon which the Claimant was paid all her dues. She was subsequently deployed as an Accounts Assistant effective 6th March 2008.

5. The Respondent denies an undertaking produced by the Claimant in support of her claim for salary underpayment stating that only the Human Resource Department could effect a salary review. The Respondent further states that the Claimant misconducted herself on two occasions on 31st January 2013 as follows:

- a. Shouting and talking in a very high voice while at her place of work thereby lacking office etiquette and decorum and disturbing other employees;
- b. Hanging up on the Respondent's Human Resource Manager who had called her to seek an explanation as to why she was misconducting herself, and then deserting duty for two and a half days without permission.

6. The two joint warnings issued to the Claimant on 31st January 2013 were therefore warranted. Prior to the joint warnings, the Claimant had been issued with two warning letters on 13th August 2009 and 15th October 2009 on allegations of misconduct at the workplace.

7. With regard to the incident of 31st January 2013, the Respondent contends that the Claimant was offered an opportunity to be heard but she chose to disconnect a telephone call she had received from the Respondent's Human Resource Manager and to abscond duty for two and a half days. The Claimant apologised for her behaviour by letter dated 7th February 2013.

Findings and Determination

8. The following are the issues for determination before the Court:

- a) The Claimant's salary as at the time of her dismissal;
- b) Whether the Respondent had a valid reason for summarily dismissing the Claimant;
- c) Whether in effecting the dismissal, the Respondent followed due procedure;
- d) Whether the Claimant is entitled to the remedies sought.

The Claimant's Salary

9. The Claimant's claim for underpayment is premised on her letter dated December 2012 addressed to Mrs. Henkel in which she proposed a salary increment to a gross figure of Kshs.60,000. A hand written comment on the letter by Mrs. Henkel states as follows:

"I fully agree. You are one of our most trusted and devoted employees. Plus intelligent and loyal."

10. In defence of this claim the Respondent produced a letter dated 5th September 2012 by which the Claimant was notified of additional duties and responsibilities assigned to her without change of her terms and conditions of employment. The Respondent also produced its Human Resources and Procedures Manual citing clause 14 which sets out the procedure for effecting salary increments. According to this clause, salaries at the Respondent Company are revised annually taking into account company performance and profitability and backed by recommendations by the immediate supervisor of the employee.

11. From the evidence advanced by the Claimant, it would appear that Mrs. Henkel recommended that the Claimant's salary be increased to a gross figure of Kshs. 60,000. The Respondent did not produce any evidence to show that there was objection to this recommendation and the fact that no steps were taken to

formalise the salary increment cannot be held against the Claimant.

12. The Court therefore finds that the Claimant's monthly salary ought to have been Kshs.60,000 effective 6th December 2012, the date Mrs. Henkel approved the Claimant's request for salary increment.

The Reason for Dismissal

13. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. This requirement applies in normal termination as well as in cases of summary dismissal.

14. The Claimant's letter of summary dismissal dated 7th February 2013 states as follows:

*“We regret to advise you that your employment has been summarily terminated for gross misconduct as provided by the provisions of **Section 44(4) (d) & (e) of the Employment Act, number 10 of 2007.***

On the 31st day of January 2013, you engaged in a chit chat during official working time. In the heat of this, you spoke in such a high voice that you could be heard in the whole place, including the executive office downstairs where one of the Directors heard and immediately reprimanded you verbally. When the matter reached the undersigned Human Resources Manager, he tried to find out why you were chatting in a noisy manner, but you instead hung up on him in a disrespectful manner. As if this blatant disrespect was not enough, you immediately and unilaterally took two and a half days absence from duty, without the permission and/or approval of the HR Department or Accounts Department (as presently headed by Mr. Dattu and Allan).

You are well familiar with the HR procedures in place, but you chose to absorb a verbal reprimand (which was done in clear compromise) in a grossly unprofessional and unacceptable manner. In light of this, you were issued with two joint warnings (resulting from your overlapping misconduct); again in a clear compromise for an offence whose requisite disciplinary measure is summary dismissal as provided for by section 44(4) of the Employment Act, 2007. You however refused to sign the copy of this warning letter even after being given an opportunity (again leniently) to do so in front of all the undersigned and Allan Wabwire, the Chief Accountant right in the office on 7th February 2013.

We are left with no other choice but to summarily dismiss you from employment because of this gross misconduct you have exhibited. Please therefore ensure that you have fully cleared before claiming your dues, which will be computed as follows (your certificate of service will be ready for collection as well):-

- a) 3 months' pro rata leave pay, less days already utilized if any;*
- b) 3 months' pro rata leave travelling allowance;*
- c) Salary for days worked, if any; less anything that may still owe o the company after confirmation of your clearance status.*

Finally, we wish you well in your endeavours.

Yours faithfully,

HENKEL CHEMICALS (E.A),

.....

Ruth Henkel,

.....

Carrie Henkel,

.....

Alvin Kipng'eno,

HUMAN RESOURCES MANAGER”

15. From the dismissal letter, it would appear that the Claimant's dismissal was triggered by her refusal to sign the joint warning letter issued to her on 31st January 2013. Had the Claimant signed this letter, the disciplinary process would have rested since a warning letter is a complete disciplinary action.

16. In *Dr. Joseph Mainji Maitha Vs Permanent Secretary Ministry of Medical Services and Another [2015] eKLR* this Court held that once some form of disciplinary action is taken against an employee, the offence(s) forming the subject matter of the concluded disciplinary process cannot be used against the employee at a future date. However, if an employee declines to sign a warning letter, a new offence is committed and further disciplinary action may be taken.

17. The Respondent stated that the Claimant refused to sign the warning letter issued to her on 31st January 2013. In the absence of any evidence to the contrary, the Court adopts the Respondent's testimony in this regard and finds that the Respondent had a valid reason for terminating the Claimant's employment.

Termination Procedure

18. I will now examine the procedure adopted by the Respondent in effecting the termination. The offence facing the Claimant would fall under what is commonly known as misconduct. Section 41 of the Employment Act, 2007 sets out the procedure for handling cases of misconduct as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

19. The Respondent's Chief Accountant, Allan Wabwire told the Court that the Claimant was called to a regular management meeting at which she was asked to sign the warning letter and apologise.

20. The process to be followed in undertaking a disciplinary process at the workplace is well set out in law. In *Nazareno Kariuki Vs Feed the Children Kenya [2013]eKLR* this Court held that because of the severe consequences arising from a disciplinary process, an employee facing such a process must be specifically notified that what they are going through is in fact a disciplinary process with its full ramifications.

21. Discussion of a matter on the sidelines of a regular management meeting cannot pass the procedural fairness test set out in Section 41 of the Employment Act, 2007. I therefore find that the Respondent failed to afford the Claimant an opportunity to be heard and the resulting termination was therefore procedurally unfair.

Remedies

22. Having found the Claimant's termination unfair for want of due process, I award her three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and her employment record including her refusal to sign the warning letter issued to her on 31st January 2013. I have also taken into account the Respondent's conduct in the disciplinary process.

23. I further award the Claimant one (1) month's salary in lieu of notice. The claim for underpayment succeeds but only with respect to the period between 6th December 2012 and 7th February 2013. On the claim for leave pay the Claimant produced a leave application form dated 1st December 2012 showing her leave balance as 15 days. In the absence of contrary evidence by the Respondent, this claim succeeds and is allowed. The claim for salary for 7 days worked in February 2013 is admitted and is also payable.

24. The Claimant also claims house allowance. Section 31(1)and(2) of the Employment Act, 2007 provides that:

1. *An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.*

2. *This section shall not apply to an employee whose contract of service-*

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

25. I have looked at the Claimant's letter of appointment dated 6th March 2008 which provides for a gross salary of Kshs. 20,000 as well as the Claimant's own letter of December 2012 in which she asked for a gross salary of Kshs. 60,000. From these documents, the Court formed the opinion that it was the intention of the parties that the Claimant would be paid a gross salary inclusive of house allowance. The claim for house allowance therefore fails and is dismissed.

26. Ultimately, I make an award in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation for unfair termination..... Kshs.180,000.00
- b) 1 month's salary in lieu of notice Kshs.60,000.00
- c) Salary underpayment for 2 months @ Kshs.13,000.00..... Ksh.26,000.00
- d) 15 days' leave pay (60,000/30x15)..... Kshs.30,000.00
- e) Salary for 7 days worked in February 2013 (60,000/30x7).....Kshs.14,000.00

Total Kshs.310,000.00

27. The Respondent shall meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

28. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF MAY 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Ogosso for the Claimant

Miss Nyamwata for the Respondent