



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

CAUSE NO 2163 OF 2012

BENSON MWANIA.....CLAIMANT

VS

BESTFAST CARGO (K) LIMITED.....RESPONDENT

AWARD

Introduction

1. Benson Mwanja worked as a Declaration Clerk at Bestfast Cargo (K) Limited from July 1998 until 28th February 2011. He brought this action by way of Memorandum of Claim dated 25th October 2012 and filed in Court on even date, seeking compensation for unfair termination of employment. The Respondent filed a response on 20th November 2012. The Claimant testified on his own behalf and the Respondent called its Chief Executive Officer, Jayendra B. Solanki.

The Claimant's Case

2. The Claimant was employed by the Respondent from 1st August 1998 at an initial monthly salary of Kshs.7,500.00. By the time of leaving employment, the Claimant earned a salary of Kshs.24,000.00. The Claimant's employment was terminated on 28th February 2011. It is his case that the termination was unlawful and unfair. He therefore claims the following:

- a) 12 months' salary for wrongful dismissal.....Kshs.288,000.00
- b) Severance pay.....Kshs.84,000.00
- c) General damages
- d) Costs and interest

The Respondent's Defence

3. In its response filed on 20th November 2012, the Respondent states that the Claimant was employed as a Declaration Clerk from 1st August 1998 until 6th July 2006 when he resigned. He was subsequently re-employed to the same position effective 1st December 2008.

4. It is the Respondent's case that the Claimant was summarily dismissed for mistakes and improper performance of his work. The Claimant's claim that his termination was unlawful and unfair is denied. The Respondent states that the Claimant had previously been issued with warning letters and therefore his employment record was unfavourable. In particular, the Claimant had used the wrong exchange rate in calculating payable taxes resulting to an overpayment of taxes to the tune of Kshs.87,463.00 including Kshs.49,087.00 in extra duty. The Respondent avers that the Claimant's final dues were tabulated and paid to him.

Findings and Determination

5. The following are the issues pending determination before the Court:
- a) Whether the termination of the Claimant's employment was justifiable and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Termination

6. The Claimant's termination letter dated 28th February 2011 states as follows:

“Dear Benson

RE: TERMINATION OF SERVICES

The management has been monitoring your performance in the declaration department and we have noted that you are continuing to make mistakes despite giving you verbal & written warnings and these mistakes are costing the company in terms of money & time.

The most recent mistakes which you are aware of are:

1) Sunny daze Ltd – in the customs declaration you used the exchange rate of the Euro while all the documents were reading US dollars. This has resulted in overpayment of taxes of shs.87,463/- and which the client will not pay us.

2) MPPS shipment of keys – We asked you to do a working for taxes payable which you did and this we gave to the client who gave us a cheque for the same. At the time of lodging the entry, you informed us that the working you had given us was wrong, since you had used duty of 10% instead of 25%. It is very embarrassing for us to go back to the client and tell him that we had given them the wrong workings as we are supposed to be professionals in our field.

Apart from the above you are well aware of the other mistakes you have been making in the declarations and we cannot continue in this manner and we therefore regretfully inform you that we are terminating your services with immediate effect.

Kindly arrange to collect your final dues from the Accounts Office on 4th March at 2.30pm.

Kindly sign a copy of this letter to acknowledging (sic) receipt of this letter.

Yours faithfully,

J.B. SOLANKI

MANAGING DIRECTOR”

7. A reading of this letter indicates that the termination of the Claimant's employment was based on poor performance. Section 41 of the Employment Act, 2007 establishes the following procedure for handling

such cases:

- 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.

8. An employer who advances poor performance as a ground for termination of the employment of an employee must show that the shortcomings complained of have been pointed out to the employee who is then given a reasonable time to improve. (see ***Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)***)

9. In support of its assertion that the Claimant was indeed a poor performer, the Respondent produced two letters dated 3rd March 2010 and 4th September 2010 citing declaration errors allegedly made by the Claimant. The Respondent termed these letters as warning letters in the Claimant's employment record. Their content however reveals a further disciplinary action of surcharge against the Claimant and the Court did not find any evidence of the Claimant having been given an opportunity to contest the surcharge.

10. It seems to me therefore that the Respondent took a unilateral decision to surcharge the Claimant and this amounted to disciplinary action without due process. More importantly, once the Claimant was punished for these offences, they could no longer be used against him in future disciplinary proceedings without offending the rule against double jeopardy.

11. Back to the errors that sent the Claimant home. The termination letter dated 28th February 2011 accused the Claimant of causing two errors; one relating to exchange rate on customs declaration and the other on percentage rate used in calculating payable taxes. In his testimony, the Claimant told the Court that the errors were not occasioned by him but by another employee in his department. There was no evidence that the Claimant was given a chance to explain himself on these two errors.

12. In ***Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR***, this Court held that disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41 of the Employment Act, 2007. It follows therefore that any disciplinary action such as the one taken against the Claimant that falls outside this framework is both unjustifiable and unfair.

Remedies

13. Consequently, the Court finds that the termination of the Claimant's employment was both substantively and procedurally unfair and he is entitled to compensation. I therefore award him six (6) months' salary in compensation. In making this award I have taken into account his length of service based on his second stint at the Respondent Company. I have also taken into account the Respondent's conduct in handling the Claimant's case, including un-procedural surcharge against the Claimant.

14. The Court did not find any basis for the claims for severance pay and general damages which are hereby dismissed.

15. Ultimately I make an award in favour of the Claimant in the sum of Kshs.144,000.00 being salary for six (6) months in compensation for unfair termination of employment. The award amount which is subject to statutory deductions shall attract interest at court rates from the date of the award until payment in full.

16. The Respondent shall meet the costs of this case.

17. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JULY 2015

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JUDGE

Appearance:

Mr. Ongegu for the Claimant

Mr. Mureithi for the Respondent