



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 165 OF 2014
FRANCIS OBULINJI.....CLAIMANT

v

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

JUDGMENT

1. Francis Obulinji (Claimant) was employed by the National Cereals & Produce Board (Respondent) through a letter of employment dated 10 October 1986 as a Clerk. On 15 October 1993, the Respondent appointed him as MICRO-COMPUTER Supervisor. He was promoted with effect from 1 January 1998.
2. On 13 September 2010, the Respondent suspended the Claimant from his duties on the allegations that he was suspected of having posted into the computer system Customer Despatch Advices (CDAs) not supported by green copies of Sales Orders and posting one Sales Order to support two CDAs unprocedurally.
3. The suspension letter requested the Claimant to show cause within 72 hours why disciplinary action should not be taken against him. The Claimant responded through a letter dated 21 September 2010.
4. On 6 January 2011, the Claimant appeared before the Respondent's Staff Advisory Committee. The Committee recommended that he be dismissed for negligence of duty.
5. Consequently, the Claimant was dismissed through a letter dated 14 March 2011.
6. The dismissal aggrieved the Claimant and on 26 May 2014, he sued the Respondent in a vaguely worded Memorandum of Claim seeking payment of terminal benefits, repayment of a Barclays Bank Ltd loan, general damages and interest.
7. The Respondent filed a Response on 31 July 2014 prompting the Claimant to file a rejoinder on 18 February 2015. The parties filed other supporting documentation and the Cause was heard on 5 May 2015.
8. The Claimant filed his submissions on 26 May 2015 while the Respondent filed its submissions on 2 June 2015.
9. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the summary dismissal was unfair, whether Claimant has proved defamation and appropriate remedies/Claimant's entitlements.*

Whether summary dismissal was unfair

Procedural fairness

10. The Claimant was suspended through a letter dated 13 September 2010 as already indicated. The suspension letter set out the allegations against the Claimant and requested him to respond within 72 hours.

11. The Claimant responded to the allegations through a letter dated 21 September 2010.

12. On 6 January 2011, he appeared before the Respondent's Staff Advisory Committee. The minutes produced show that he made representations before the recommendation to dismiss was reached.

13. The Claimant in the pleadings and testimony challenged the process on the grounds that he was not accorded ample time to be heard/was condemned unheard and that documents he sought were not made available to him.

14. Section 41 of the Employment Act, 2007 has made procedural fairness an integral part of the employment relationship when an employer is considering terminating the services of an employee.

15. The essential ingredients of the statutory procedural fairness as I understand it are, one, that the employer should inform an employee of the allegations or charges to confront.

16. In the instant case, the Respondent outlined the allegations against the Claimant in the suspension letter.

17. Two, the employee should be afforded an opportunity to challenge or respond to the allegations. The Claimant herein was given 3 days to respond. He responded on 21 September 2010.

18. Apart from pleading and stating that he was not given ample time, the Claimant did not demonstrate why in the circumstances of his case, 3 days was not adequate or whether he suffered any prejudice or injustice.

19. The Claimant further attended a face to face hearing. The minutes produced show that he made representations before the Committee and it is only then that the recommendation and decision to dismiss was taken. The hearing was in January 2011, some 3 or so months after the charges were laid.

20. The Court is unable to accede to the contention by the Claimant that he was not given sufficient time. The time was more than sufficient as any representations he did not make in writing could have been made during the hearing.

21. But there are other essentials of procedural fairness the Court need to discuss briefly. The statute cited envisages an employee facing disciplinary action being accompanied by a colleague or shop floor union representative.

22. The minutes do not bear out whether the Claimant was accompanied or not. The Claimant however, in the pleadings and testimony did not suggest or show that he suffered any injustice or prejudice because he was not accompanied.

23. The Court therefore finds that the Claimant did not suffer any substantial injustice in this respect.

24. Further, the Claimant contended that he was not furnished with documents (green copies) which could have assisted him to defend himself.

25. The Claimant wrote to the Chairperson of the Respondent's Staff Advisory Committee on 10 January 2011. The letter leaves no doubt that the Claimant sought that the material documentation and records be

checked out. The Claimant was seeking for what he called a postmortem.

26. In my view, the Respondent should have made available and considered the documents and records. There is nothing placed before Court to suggest that the Committee considered the documents and records before recommending the dismissal.

27. According to the letter, the Claimant's checking of the records showed there were no double entries on Sales Orders/CDAs. His request to confirm the dates the entries were keyed in were ignored.

28. The documents/records were crucial to the Claimant's case and without determining whether they would have changed the recommendation(s), the Court is of the view that the Claimant was prejudiced and suffered a detriment.

29. In this regard, the Court finds that part of the process was unfair to the Claimant.

Substantive fairness

30. An employer should prove the reasons for dismissal (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45).

31. The dismissal letter gave the reason for dismissal as negligence in performance of duties. The details or particulars were in the suspension letter. These were that the Claimant had posted into the Respondent's computer system Customer Despatch Advices which were not supported by green copies of Sales Orders and posting 1 Sales Order to support 2 Customer Despatch Advices leading to loss of Kshs 1,758,350/-.

32. These were the reasons the Respondent was under an obligation to prove.

33. According to an investigations report by the Respondent's Internal Auditor dated 31 August 2010, it is an Assistant Depot Manager, John Mark Opuka who received Kshs 1,758,350/- but did not surrender the same.

34. The Claimant's role, according to the report was assisting in the fraud by posting into the system CDAs not supported by green copies of Sales Orders and 1 Sales Order to support 2 CDAs.

35. The author of the report testified. He stated that he decided to manually match the CDAs one by one. 21 CDAs were outstanding and the details were given in page 4 of the audit report. The dates range from 12 March 2010 to 24 June 2010.

36. The witness also stated that the Claimant was on authorised leave during some of the period under consideration. He also stated that the Claimant was based in Eldoret while the losses were in Ainabkhoi depot.

37. In cross examination, he stated that the alterations could have been made by anyone or in any office involved in the process and that there were other computer operators who were under the Claimant.

38. When questioned by the Court, the witness stated that although there was no log-in system, there were records of the persons in the Data Centre who received the Sales Orders and Customer Despatch Advices.

39. There are several gaps in the Respondent's case which merited and could have been explained, but were not.

40. First, the entries and or documents tampering occurred over a period of time. During part of that time, the Claimant was on leave. Exactly when he was on leave was not disclosed.

41. Two, the green copies, Sales Orders and Customer Despatch Advices in contention were not produced

in Court and the failure was not explained.

42. Three, the Respondent's witness stated that each Sales Order and Customer Despatch Advice could be traced to a particular person in the Computer Data Centre.

43. The Court was not informed of who exactly received any of the 21 Customer Despatch Advices among the Computer Data Operators.

44. With these gaps which could have been easily explained left unexplained, the Court finds that the Respondent has failed to prove that it is the Claimant who posted into the computer system (21) Customer Despatch Advices not supported by green copies of Sales Orders and or that he posted 1 Sales Order to support 2 Customer Despatch Advices.

45. The summary dismissal was therefore substantively unfair.

Defamation

46. Although the Claimant pleaded defamation, no case was made for the same or even whether it was a competent cause of action before this Court as opposed to the High Court.

Counterclaim

47. The Respondent contended that the Claimant owed it Kshs 2,300,117/78. It sought the same.

48. Part of the amount (Kshs 1,758,350/-) was admitted (in audit report) as having been received by one Opuka who was the Assistant Depot Manager at Ainabkhai where the loss occurred and the Court cannot see a legal basis for claiming the same from the Claimant as well.

49. The other portion includes imprest and staff credit sales which the Respondent is entitled to deduct from any dues to the Claimant.

50. On the Barclays Bank Ltd loan, that is a matter best settled between the Claimant and the bank, as the Respondent did not show its interest in the loan.

Appropriate remedies

Terminal benefits

51. Terminal benefits should have either a contractual or statutory foundation. The Claimant did not establish any such basis neither did he compute the same. The head of claim is therefore unmerited.

Repayment of Barclays Bank Ltd loan

52. The amount of the loan was pleaded as Kshs 605,317/75. The Claimant did not prove that he actually took a loan. No legal nexus (remoteness) was laid between the loan and the dismissal to make the Respondent incur a liability.

General damages

53. The Memorandum of Claim was vaguely worded. Mention was made of lost income. The same was taken up in the submissions.

54. Lost income should be capable of at least some estimated computation. The same was not disclosed or urged. No contractual or legal basis was laid for an award of lost income.

Compensation

55. Section 49(1) of the Employment Act, 2007 has outlined the primary remedies for unfair termination of employment.

56. The Claimant did not expressly plead unfair termination or wrongful dismissal, but the Court has reached a conclusion the dismissal was unfair.

57. The Court is of the view this is a suitable case to make an award of compensation. The Claimant served the Respondent for about 24 years.

58. However, the Claimant did not disclose his wages at time of separation. The Statement of Final Dues produced by the Respondent is not clear either on the monthly remuneration but it appears to be Kshs 31,041/-.

59. Using the same, the Court would award the Claimant the maximum compensation assessed as Kshs 372,492/-.

Conclusion and Orders

60. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

a. 12 months wages compensation Kshs 372,492/-

61. Other heads of claim are dismissed.

62. Claimant is denied costs for having failed to serve submissions as directed.

Delivered, dated and signed in Nakuru on this 10th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Nasimiyu instructed by Morgan Omusundi & Co. Advocates

For Respondent Ms. Kavangi instructed by Lutta & Co. Advocates

Court Assistant Janet