



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 425 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th December, 2015)

HENRY TANUI.....CLAIMANT

VERSUS

ECOBANK KENYA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant Henry Tanui filed his Memorandum of Claim through the firm of Arwa & Associates Advocates on 19.03.2014 seeking compensation for unfair/unlawful termination by the Respondent. The Claimant avers that he was employed by the Respondent with effect from 5.01.2009 as the Country Risk Manager on permanent and pensionable terms with effect from 5.02.2009. Upon successful completion of the probationary period the Claimant was confirmed as the Country Risk Manager on 4th August, 2009. As at the time of termination his monthly gross salary was Kshs. 521,390/=.

2. The Claimant avers that he performed his duties with diligence and competence and constantly exhibited outstanding performance while in the employment of the Respondent until 17.02.2014. According to the Claimant he states that in January 2014, his supervisor embarked on an appraisal process to assess the Claimant's performance for the year 2013. On 16th January, 2014, when the appraisal was underway the Claimant discovered that his position had been advertised.

3. On 10th February, 2014, he was issued with a deed of separation which he purportedly requested for, and he communicated the same to the Respondent. This concern was never addressed by the Respondent and on 17.02.2014, with no reason whatsoever, the Claimant was issued with a letter of termination.

4. It is the Claimant's assertion that the appraisal process was conducted by the Respondent contrary to the applicable Human Resource Performance Management Policy and Procedure and was tainted with malice and vendetta against the Claimant as the Respondent failed to have a fair assessment of his performance despite the Claimant's protests. The Claimant further states that The Respondent served him with a letter dated 10.02.2014, and a deed of separation of even date purportedly signed by him.

5. The Claimant states that he responded to the letter of 10.02.2014 on 11.02.2014 denying the deed of separation ever being made by him. On 17.02.2014 the Respondent's head of Human Resource in Kenya served him with a letter of the same date terminating his services for no specified reason.

6. The Claimant further states that the termination of his services by the Respondent lacked substantive

and procedural fairness for the following reasons:

a. It was contrary to section 45 of the Employment Act 2007;

b. No reason was given for the termination;

c. The Claimant was not given an opportunity to be heard;

d. The Respondent's actions were in contravention of the Claimant's right to fair administrative action as enshrined in Article 41 (1) and 47(1) and (2) of the constitution.

e. The Respondent is guilty of discriminating against the Claimant contrary to section 5 of the Employment Act, 2007 and Article 27 (5) of the constitution;

f. The Respondent failed to follow the provisions of the Human Resource Performance Management policy and procedure and its Human Resource Disciplinary Policy and Process.

7. The Claimant prays for Judgment against the Respondent for a declaration that the termination was unfair and unlawful, salary in lieu of notice of Kshs. 521,390/=, unpaid leave days of Kshs. 312,834/=, 12 months' salary of Kshs. 6,256,680/=, pension as per the Respondent's Provident Fund Scheme and a Certificate of Service.

8. The Respondent filed a memorandum of response on 28.04.2014, where they admit having offered the Claimant employment as the Country Risk Manager on a probationary period of six months and the position was confirmed on 4.08.2009. That the Respondent was subject to an annual appraisal of his performance for the previous year. The performance appraisal was applicable to all of the Respondent's employees and the Claimant was well aware of the Key Performance Indicators. In 2014 the Claimant was appraised by his line manager which appraisal was done fairly and the Claimant was given ample time to gauge his own performance for year 2013.

9. As a result of the appraisal of the Claimant by the Respondent, the Respondent alleges that pertinent issues arose such as a show cause letter issued to the Claimant on 15.10.2014, as a result of grievous weaknesses revealed by the CBK inspection report. The Claimant responded to the show cause letter but failed to give a satisfactory explanation to his line manager. On 20.01 .2014, the Managing Director of the Respondent had their first 2013 appraisal discussion. The Managing Director requested the Claimant's line manager for his input regarding the Claimant's appraisal. The line Manager wrote back to the MD stating that the Claimant had over-estimated his performance.

10. The Respondent further states that on 24th January, 2014, the MD wrote to the Risk Committee of the Board regarding the Claimant's performance. At the Claimant's request the MD requested the Board Chairman to be present during the final discussion on the Claimant's performance. The Claimant appraised his own performance at 2.817, well below the Respondent's average of 3. On 31.01.2014, the Claimant, the MD and the Chairman of the Risk Committee of the Board of Directors held the final discussion regarding the Claimant's performance during which the Claimant's final rating was given at 2.45.

11. Pursuant to the Claimant's final appraisal meeting the Respondent received a letter from a member of the Risk Committee stating that he had no objection to terminating the Claimant's employment. On 5.2.2014, the Claimant and the Respondent's head of Human Resources had a meeting during which the Claimant proposed amicable separation. On 10.02.2014, the Respondent's Head of Human Resources presented the Claimant with a separation proposal on a without prejudice basis. On 11.2.2014, the Claimant declined the amicable separation that he himself had proposed. The Respondent consequently terminated the Claimant's employment on 17.2.2014, after invoking the termination clause in the Claimant's contract and offered to pay the Claimant one month's salary in lieu of notice.

12. The Respondent also alleges that it never advertised the Claimant's position and they have actually

written to the Company which posted the Advertisement to verify its authenticity. The Respondent denies that the Claimant is entitled to the reliefs sought because he was not unfairly and unlawfully dismissed.

13. I have considered the evidence and submissions of both parties. The issues for determination are as follows:

1. Whether there were valid reasons to warrant termination of the Claimant.

2. Whether due process was considered in the process.

3. What remedies if any the Claimant is entitled to.

14. On the 1st issue, the Respondents in their termination letter to the Claimant dated 17.2.2014, they stated as follows:

“I make reference to your contract of 5th January 2009 with Ecobank (K) Limited which was signed by yourself on the 12th January 2009. In particular, I would like to bring to your attention of the termination Clause - the second paragraph under the subheading – Probation Period – “This employment if accepted by you commences with effect from 5th February 2009 and can be terminated by one month’s notice (or one month salary in lieu of notice) by either party.

I would therefore like to notify you that Ecobank Kenya Limited will be terminating your contract under the same Clause effective today the 17th of February 2014.

The following will be paid to you-----“

15. The letter of employment signed on 12.1.2009 stated that the Claimant would have a period of (6) months probation after which if his duties were satisfactory, he would be confirmed as a permanent staff of Ecobank (K) Limited. Claimant was confirmed on 4th August 2009 as per Appendix HKT2.

16. By the time Claimant was terminated in 2014, therefore the probation period had since lapsed and he had been confirmed in employment. Reference in his termination letter to probation period is not therefore not in order.

17. I have looked at the termination letter and no reason is given for the termination. The contract had provided that the relationship will be governed by the Labour Laws of the Republic of Kenya and such other Rules and Regulations now in force or which may hereafter be promulgated or published by Ecobank.

18. Under Section 43 (1) & (2) of Employment Act 2007 states as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

19. The Respondents were therefore duty bound to explain to the Claimant why his services were being terminated but they opted not to explain but only cited the notice Clause.

20. In their evidence, the Respondents contend that they terminated the Claimant due to non-performance following an appraisal report. Then what was so difficult in stating this position in their termination

letter?. It is clear from the pleadings and documents submitted that the Respondents set the cart before the horse. The appraisal that the Claimant was taken through appears flawed in that the same was not conducted as expected according to procedure. In an email exchange at page 23 of Respondent's documents, this came out clearly as one Ekoum – informed Dayo and Kassi how the performance process was to be conducted. The Claimant at one point also requested for an independent person to assess him (page 26 of Respondents documents) but the Chairman he had requested to sit as an independent assessor seems to have already made up his mind – stating:

“Given your rating and the poor self-assessment, is there any need for a meeting?. Be it as it may I can come in at 9 am on Friday morning – please confirm----“.

21. After this biased assessment, attempts to have the Claimant leave on his own volition were not successful and the Claimant was therefore terminated.

22. Given that the reasons for the termination were not expressly stated to the Claimant, provisions of Section 43 of Employment Act 2007 were flouted.

23. On the issue of due process Section 41 of Employment Act 2007 states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

24. This process was also not undertaken. The Claimant was not taken through the disciplinary process as envisaged herein. It is therefore this Court's finding that the termination of the Claimant was unfair and nugatory in terms of Section 45 (1) & (2) of Employment Act 2007 which states as follows:

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

25. In the final analysis, I find for Claimant and I award him as follows:

12 months salary as compensation for unlawful termination = 12 x 521,390 = 6,256,680/=

Plus costs and interest

26. Since the Claimant admitted being paid for 1 month in lieu of notice and leave not taken nothing is

awarded on these prayers.

27. The amount awarded will attract interest at court rates with effect from the date of this Judgment.

Read in open Court this 14th day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

No appearance for Claimant