



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1645 OF 2011

JOSPHAT BUNDI MURITHICLAIMANT

VERSUS

PASICO EASTERN AFRICA LTD RESPONDENT

JUDGEMENT

1. On 28th September 2011, the claimants Josphat Bundi Murithi filed his claim against the respondent Pasico Eastern Africa Ltd for unfair termination and non-payment of his terminal dues and thus seek reinstatement or compensation for the unfair termination. The respondent admitted to having employed the claimant but was forced to terminate his services due to the need to restructure its operations as many other positions were declared redundant and therefore denied

2. The claims as filed. At the hearing, the claimant gave his sworn evidence and at the close of his case, the respondent could not be heard as their witness was said to have travelled out of the country. The next hearing date was fixed *ex-parte*; a Hearing Notice was served and received by the respondent on 22nd August 2013 indicating hearing date was for 18th December 2013. These are also averments in the Affidavit of Service sworn by Lazarus Felix Maero and dated 16th December 2013. On the basis that the respondent was aware of the hearing dates when their evidence was to be adduced and in their absence the court, being satisfied that the respondent was dully served and failed to attend, closed the hearings and reserved the matter for judgement.

Claimant's case

3. On 1st May 2010 the claimant was employed by the respondent as a Service Technician at a gross salary of kshs.32, 000.00. On 15th August 2011 the claimant received a letter from the respondent on the basis that the business was not doing well and thus he was to be dismissed within a month. To the claimant, he saw this as a cover up for termination so as to facilitate the respondent in bringing in somebody else which was without any reasonable cause or justification. The claimant was not given notice or paid his terminal dues or leave days not taken contrary to the law. The claim is for reinstatement or 12 months compensation, notice pay and 15 days of leave not taken.

4. In evidence, the claimant testified that since his employment with the respondent he was issued with a letter of appointment and he served diligently with no disciplinary case. He worked for 15 months when on 15th August 2011 he was issued with a dismissal letter which was to take effect on 17th September 2011 which was also to serve as his notice period. He had not taken his leave on 2nd September 2011 the claimant was issued with another letter where he was told to leave the respondent premises immediately. He was not paid. On 3rd September, the claimant went back to the respondent

premises to seek his terminal dues but was informed by guards at the gate that he was not to be seen against at the respondent premises.

5. The claimant further stated that as the Technician, he came across email communications between his superiors where they were discussing retrenchment of staff and he was identified as one such person to be affected by retrenchment. This email communication was not copied to the claimant but due to his position, he was able to access it. That his dismissal was unfair and thus should be reinstated or in the alternative be paid his terminal dues and compensation, notice pay and leave not taken.

6. In cross-examination, the claimant confirmed that his contract provided for termination upon notice of 7 days but there was no such notice or payment in lieu of notice. There was a reason given for the termination that the respondent business was not doing well. That the claimant accessed emails that were not directed to him in his capacity as a technician. All emails were from the same server @pasicoea.com an open address to all employees and thus he was able to read an email that related to his dismissal.

7. The claimant thus reiterated his claim for compensation, notice pay, 15 days he was not allowed to work and leave days due. That his termination did not follow laid down procedures.

Respondent's case

8. In the defence filed by the respondent, it states that the claimant's termination was informed by the need to restructure in response to reduced business and not as a cover up to dismiss the claimant. That due to the need to restructure the respondent operations, many other positions were declared redundant. The respondent therefore gave the claimant a valid reason for the termination of his employment. That the claimant refused to pick up his cheque in settlement of his final dues from the respondent causing them to deposit it in his personal account. The claimant was given notice and was paid his service pay and terminal dues as well as one month's salary in lieu of notice and cannot claim loss and damage. The termination was lawful and no compensation is due.

9. To the statement of defence, attached is the statement of Andrew Kimani which notes that in March 2011 the respondent started incurring losses and a decision was taken to restructure operations and downsize on the number of employees by merging some and declaring others redundant. Some positions were abolished and the bearers of these offices terminated on grounds of redundancy. On 28th April 2011 a memo was issued, giving notice of impending retrenchment of some employees. The memo did not bear any particulars as to who was to be affected. The respondent directors held a meeting on the restructuring, those affected were individually called and handed their letter of termination. The claimant was one such affected employee who was retrenched. In the meeting between the claimant and the respondent, it was noted that the claimant could not handle any duties out of his job description and consequently, it was decided that he should leave the respondent. On 15th August 2011, the claimant was issued with his letter of termination. There was one month notice, salary was paid and the leave days not taken.

10. Also attached to the defence are termination letters of other employees. Cheque deposit the total dues amounted to kshs.45, 116.00 was deposited in the claimant's personal account. There are also letters from various creditors where the respondent is a debtor.

Issues for determination

Whether there was any basis for the termination of the claimant

Whether there are any remedies

11. Both parties agree on the reason given for the termination of the claimant. That the respondent performance was on a downturn. There was need to restructure in response to reduced business and several positions were declared redundant. I take it then from the claim and the defence that the respondent due to circumstances beyond their control, they were incurring losses and could not meet their financial obligations in good time or at all affecting operations and thus forced to declare several

positions redundant where the claimant was affected. Some creditor wrote demand letters to the respondent due to unpaid bills. KK Security guard made a demand dated 16th November 2011;

Rift Valley Bottlers made a demand dated 12th October 2011;

J CB Powered Products Ltd made a demand dated 18th March 2011;

Kenya Grange Vehicle Industries ltd demand dated 15th November 2011;

Kansam Agencies demand dated 22nd August 2011;

Autosueco Kenya Ltd demand dated 10th June 2011;

Josatronics Data Systems demand dated 1st August 2011; and

Ports Conveyors Ltd demand dated 14th November 2011.

12. These are not events that took place on one day. They seem to have taken several months. The downturn did not just happen. The respondent thus did a restructuring and some positions were declared redundant.

13. Redundancy has been defined under section 2 of the Employment Act to mean;

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

14. Whereas Companies restructure not necessarily because they are in financial distress, but for such other reasons as mechanization of the modes of production. The terms *redundancy, retrenchment and restructuring* are related, but can be separable. There are other terms used in different jurisdictions, to denote this form of employment termination. These include *downsizing, rightsizing, and de-layering*. Whatever term is used, the decision results in the dissolution of an employment agreement.

15. In Court of Appeal of New Zealand case of ***Brighouse Limited v. Bilderbeck [1994] 2 ERNZ 243 [CA]***, the Court explained in detail that the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

16. However, the reasons given by employers for redundancies are open to judicial interpretation. The Court must be satisfied that in all the circumstances of the case the decision made by the employer was reasonable. Re-organisations become a superfluous exercise if done for the sole purpose of getting rid of an employee.

17. In this case, part of the respondent’s defence was the statement of Andrew kimani which states that;

The claimant was one of the employees affected [by the restructuring] and from the meeting between him and ourselves, it was noted that he could not handle any duties out of his job description and consequently, it was decided that he leaves the company

18. Was this therefore a review of the claimant’s capabilities or a restructuring process based on

performance criteria? There was no evidence offered by the respondent over these facts to enable the court assess the offered defence that there was a restructuring that affected the claimant's position. Even in a case where there was a valid capability concern by the respondent as an employer, the law separates what is to be considered during a restructuring process, a termination process or dismissal. In this case, the respondent defence was that this was a restructuring process to which the claimant equally conceded.

19. In this contest section 40 of the Employment Act become applicable which provisions give the conditions precedent before one is declared redundant: these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the following:

1. Give notice to the Union or labour officer a month before the process commences
2. For those not unionised, personal letters copied to the labour Officer;
3. Use a criteria of seniority, abilities and reliability of each employee;
4. Where there is a CBA the same should not disadvantage any employee;
5. Leave days due should be paid in cash;
6. One month notice or one month pay in lieu of notice; and
7. Severance pay not less than 15 days for each year of service.

20. These are important steps for each employer wishing to pursue redundancies, layoffs; reorganisation and or restructuring that can be a useful tool.

21. Did the respondent herein apply these legal guidelines? Was the respondent in a position to comply with these legal guidelines? Were there reasonable steps taken to ensure the respondent took these legal guidelines?

22. There was no evidence that the Claimant was unionized and even if he was not there is no evidence before this Court that he was given notice of the re-organisation or a labour officer responsible in the area was involved in advising the procedures application in this process. The memo issued to all staff of the respondent on 28th March 2011 is not the notification envisaged under the law. If re-organisation commenced in March 2011, that is the time the Labour Officer should have been informed and not just share the final decision of the respondent. This was not the intention of the law. The Labour officer should have been apprised of the matter to give advice before the termination notice. This is a requirement under the law.

23. The respondent witness stated that since March 2008 the respondent commenced a re-organisation process that resulted in the Claimant being identified as the only affected employee to suffer loss of employment since she was the most junior of all the secretaries. However no report or record of this exercise was offered in support of this assertion and the basis applied in arriving at the decision that the claimant was the most junior of staff to be declared redundant. No record was produced as to how all staff was categorized and the claimant listed as most junior staff to be declared redundant.

24. If indeed there was a re-organisation in the respondent business that commenced in March 2008, this was a serious management concern that should have had extensive consultations and documentation. An employer will not be allowed to just cite re-organisation and without any basis identify and single out an individual for termination. Fair procedures demand that an employee who has given their labour to an employer should be taken through this procedural requirement in a process like the one the respondent seeks to rely on for the termination of the claimant.

25. By virtue of his position with the respondent, the claimant should have been involved in ensuring the

legal guidelines were adhered to in any restructuring, organisation and or redundancy. I find the memo stated in the defence for 28th March 2011, which memo refers to a meeting whose record was not taken or produced to guide this Court was not a notice to the claimant as intended to commence this process as outlined above; rather it was to communicate a pre-determined decision of the respondent. At no time did the respondent demonstrate that they intended to take any reasonable steps toward following the provisions of Section 40 of the Employment Act.

26. I therefore find that the decision taken by the respondent to terminate the employment of the claimant was procedurally unfair and the same was not based on any reasonable grounds and therefore substantively unfair. Whether there were creditors to be paid or not, all businesses have creditors and debtors. The process of restructuring must take cognisance of statutory provisions applicable in Kenya. The termination of the claimant is therefore found to be unfair in the circumstances.

27. The Court having established that there was unfair termination, the remedies available are as stipulated under Section 49 of the Employment Act. I find the Notice issued in the letter dated 15th August 2011 is the notice as stipulated under section 40 of the Employment Act. I however note that the claimant was offered a package in settlement immediately after his termination, he refused to acknowledge this and the same was deposited in his bank account. This is not denied. This is noted to be payment for salary due, leave days and notice pay amounting to Kshs.45, 116.00. With the finding that the notice issued to the claimant is not what is commensurate to Notice under section 40, I will award for unfair termination and pay in lieu of notice of one month and unfair termination equivalent to payoff 6 months.

For the above reasons, court enters judgement for the claimant in the following terms:

- a) **Compensation for unfair termination amounting to Kshs.192,000.00;**
- b) **Notice pay Kshs.32,000.00;**
- c) **50% Costs of the suit**

These are the orders of this Court.

Dated and delivered in open Court at Nairobi this **6th** Day of **February** 2014.

Justice Monica Mbaru

Judge

Appearances:

.....

.....