



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2073 OF 2012
CAREY FRANCIS MBARAKA.....CLAIMANT
VS
DELTA TRADING EQUIPMENTS COMPANY LTD.....RESPONDENT

AWARD

Introduction

1. Carey Francis Mbaraka, the Claimant in this case worked as Power Systems Sales Manager in the Respondent Company. He filed this claim on 12th October 2012 seeking relief for unfair termination of employment and payment of entitlements. The Respondent filed a Memorandum of Defence on 1st November 2013 and the matter proceeded to hearing on 23rd January 2014 with Mr. Shivaji appearing for the Claimant and Mr. Njiru for the Respondent. The Claimant testified on his own behalf and the Respondent's Human Resource Manager, John Kiiri testified on behalf of the Respondent.

The Claimant's Case

2. The Claimant was employed by the Respondent on 7th April 2011 at a monthly salary of Kshs. 212,800. On 4th September 2012, he was invited to a disciplinary hearing on 5th September 2012 over his performance. On the same day, he was issued with a letter terminating his services and was offered the following terminal benefits:

- a. Salary up to 5th December 2012
- b. 1 month's salary in lieu of notice
- c. 18 days' leave pay
- d. Leave traveling allowance for 2011 and 2012.

3. It was the Claimant's case that he was not given a fair hearing prior to the termination of his employment. He therefore claims the following:

- a. A declaration that the termination of his employment is null and void
- b. Salary up to retirement age of 60 years
- c. General and special damages
- d. Costs

The Respondent's Case

4. In its Statement of Defence, the Respondent admitted having employed the Claimant as Power Systems

Sales Manager by letter dated 25th February 2011. The Claimant was given month by month sales targets including an average of US\$ 3,000 for Genset Units and US\$ 60,000 for parts.

5. As the Head of the Power Systems Sales Department, the Claimant was directly responsible for departmental staff whom he was expected to guide and supervise. The Claimant failed to deliver on his targets prompting the Managing Director as his immediate supervisor to caution him.

6. On 26th June 2012, the Respondent's Managing Director wrote to the Claimant seeking an explanation for the Claimant's poor performance. The letter made reference to previous discussions held within the preceding 3 months between the Managing Director and the Claimant.

7. It was the Respondent's case that the Claimant had failed to manage his sales team causing them to be demoralized. On 3rd September 2012, the Managing Director wrote to the Claimant inviting him to a disciplinary hearing on 5th September 2012, over his performance. The Claimant was notified of his right to be accompanied by a fellow employee. The Claimant's employment was terminated on the same day. The Claimant attempted to circumvent his termination by tendering a resignation letter which was rejected by the Respondent's Human Resource Manager.

8. As part of his tools of work, the Claimant had been issued with a laptop computer by the Respondent which he declined to surrender at the termination of his employment. The Respondent calculated the Claimant's terminal dues at Kshs. 311,568.21 less Kshs. 65,500 being the cost of the laptop. These funds were forwarded to the District Labour Office, Industrial Area. The Respondent stated that the laptop computer contained sensitive company information.

Findings and Determination

9. The main issue for determination in this case is whether the termination of the Claimant's employment was justifiable and fair. Section 43 of the Employment Act, 2007 provides that:

(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.

10. Section 45 of the Act provides 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 employees conduct, capacity or compatibility ;or

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

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

11. *Halsbury's Laws of England (4th Edition Vol 16)* at page 482 states that in determining the reasonableness of an employer's conduct, an employment court does not seek to superimpose its own

views on those of the employer. What the court does is to make an inquiry on the basis of what a reasonable employer would do. The function of the court then is to determine whether in light of the particular circumstances of the case the decision to terminate an employee falls within the band of reasonable responses which a reasonable employer might adopt.

12. The reason for the termination of the Claimant's employment as provided by the Respondent was poor performance. According to the Respondent, assessment of the Claimant's performance was based on set targets as well as supervision and support to departmental staff.

13. The Respondent produced e-mail communication from the President, Industry & Transport and the Country Managing Director in which they raised concern over the failure by the Claimant and his department to meet set targets. In addition, the Human Resource Manager took issue with the Claimant's failure to submit end of probation assessment report for Francis Waweru Wamathai, a staff within the Claimant's department.

14. In the course of the hearing, it emerged that the relationship between the Claimant and Wamathai was strained and at some point, the Claimant sought to extend Wamathai's probation, an action which according to the Human Resource Manager, the Claimant had no authority to take. Kiiri told the Court that upon complaints by Wamathai that he was not receiving support from the Claimant, the Managing Director had to intervene to facilitate support to enable Wamathai to perform his duties. According to Kiiri, Wamathai was a star performer within the department.

15. The Claimant defended his performance record stating that he in fact had done better than his colleagues in spite of the fact that he had suffered an injury in May 2012. He testified that between June and August 2012, he had achieved 64% against a target of 100% in sales and 90% against a target of 92% in customer coverage. With regard to employee management, the Claimant stated that he had a good working relationship with staff in his department save for Wamathai who had issues of insubordination.

16. Having evaluated the evidence presented by the parties, the Court has arrived at the conclusion that prior to the disciplinary hearing and the subsequent termination of employment on 5th September 2012, issues surrounding the Claimant's performance had been under discussion as between the Claimant and the Respondent for a while. The reason for the termination of the Claimant's employment was therefore clear and I find that the Respondent has established a valid reason for the termination.

17. I will now examine the procedure adopted by the Respondent in effecting the termination. Section 41 of the Employment Act, 2007 establishes 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;

18. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

19. On 3rd September 2012, the Respondent's Managing Director, Fred Aryeetey wrote to the Claimant inviting him to a disciplinary hearing over his performance. The letter stated *inter alia*:

“Reference is made to the numerous warnings over your dismal sales performance among other performance indicators.

The purpose of this letter is therefore to inform you to attend a disciplinary hearing on

Wednesday 5th September 2012 with the undersigned at 1400hrs.

You are entitled to have another employee representative of your choice present during the hearing.

Fred Aryeetey

Managing Director”

20. On the same day the Claimant was issued with a termination letter in the following terms:

“Further to your discussion with the Managing Director and the undersigned on 05th September 2012, this letter serves to inform you that your employment contract has been terminated with effect from 05th September 2012 on the basis of non-performance.

Your dues will be calculated and paid out as follows:

- 1. Salary for days worked up to 5th September 2012**
- 2. One (1) month's salary in lieu of notice**
- 3. 18 days leave earned but not taken up to 5th September 2012**
- 4. Pro-rated leave travel allowance for years 2011 and 2012**

Any amount owed to the Company will be recovered from your final dues.

Please hand over any Company property, which may be in your Custody to your immediate manager.

Regards,

Yours faithfully,

For: Delta Trading & Equipment Company Limited,

John Kiiri

Human Resource Manager”

21. The Claimant told the Court that the meeting of 5th September 2012 lasted no more than 3 minutes while Kiiri testified that the meeting lasted between 45 minutes and 1 hour. No record of proceedings was produced and the Court could not therefore establish the nature and content of the disciplinary hearing against the requirements set out in Section 41 of the Employment Act, 2007. There was also no evidence that the Respondent followed its own internal disciplinary rules.

22. Furthermore, the notice given to the Claimant for the disciplinary hearing was too short to afford him a fair opportunity to prepare his defence. The Court therefore finds that the procedure adopted by the Respondent in effecting the termination of the Claimant's employment fell below the threshold set by Section 41 of the Employment Act, 2007.

23. If the facts of this case ended here, the Claimant would have been entitled to some compensation. However, an unfortunate twist was introduced by the Claimant's act of withholding a laptop issued to him by the Respondent as a tool of work. Kiiri testified and the Claimant confirmed that the laptop contained vital company information. Kiiri added that the Claimant had initially reported that the laptop was lost but when requested to make a report to the police he declined. During the hearing, the Claimant told the

Court that the laptop was still in his possession.

24. The Court was unable to understand why the Claimant would keep a laptop belonging to his former employer from September 2012. The Industrial Court is not a playing field for errant employees and where an employee engages in acts of lawlessness against his employer, the Court must take that into account.

25. Those who come to equity must come with clean hands. In view of the foregoing and in spite of my finding on the procedure adopted by the Respondent in effecting the termination of the Claimant's employment, I decline to grant any relief to the Claimant.

26. Each party will bear their own costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF APRIL 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*