



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 733 OF 2010

CHARLES PATTERSON OTWORI.....CLAIMANT ..

VERSUS

MANAGEMENT SCIENCE FOR HEALTH.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 25th June 2010 seeking various reliefs against the Respondent who at the time was 1st Respondent among other Respondents. The Claimant amended his Claim on 1st November 2010 and sought:-

1. A declaration be issued to declare that the Claimant's dismissal from his employment on 10th June 2010 was wrongful and unfair
2. The Respondent to pay and continue to pay the Claimant his regular salary and all benefits in compliance with the contract of employment.

2(a) There be an award directing the Respondent to comply with the employment contract of the Claimant dated 11th May 2009 and have the Claimant reinstated to his employment without loss of service and continuity of service.

2(b) That in the alternative to prayer 2 and 2(a) above the Respondent be and is hereby compelled and ordered to pay the Claimant all salaries, benefits and any other payment due and owing for the whole contractual period per the contract period as per the contract of employment dated 11th May 2009 Kshs. 357,500x 40 months = Kshs. 14,300,000/-

2(c) That the Respondent is further compelled and ordered to pay a further compensation of twelve months salary benefits for wrongful dismissal of employment – Kshs 357,500/- x 12 = 4,290,000/-

3. The Respondents to pay the costs of the suit per the contract agreement

4. Pension as per the contract Agreement

5. Any other relief or Order this Honourable Court shall deem fit and just to grant.

2. The other Respondents adverted to above were subsequently struck off the suit and the reference to the

1st Respondent or Respondents will be construed as being a reference to the present Respondent only.

3. The Respondent was opposed and filed a Defence for the 1st Respondent and the 2nd Respondent at the time on 8th July 2010 and Amended Defence for the Respondent on 22nd November 2010. In the Amended Defence the Respondent averred that the decision to terminate the Claimant was justified in the circumstances and consistent with the applicable provisions of the law. It was averred that the Claimant was given a written complaint, requested to respond and that he did so and appeared before a disciplinary panel and dismissal followed. It was averred that his terminal dues would be paid after the handover and clearance.

4. After a series of interlocutory applications the matter was finally set down for hearing and the Claimant testified before the Court on 9th December 2013 and 21st January 2014. The Respondent's witness Helen Kong'ong'o testified on 21st January 2014. In his testimony the Claimant testified that he was terminated unfairly and that the accusations leveled against him were actuated by malice and vendetta. He denied the incident alleged to have occurred between him and one Pamela McQuide. There were other allegations of impropriety involving funds but that allegation was abandoned or withdrawn as there was no substance in the allegations. The Claimant testified that his alleged disciplinary meeting was an ambush and not in keeping with the dictates of the law. He thus sought the prayers in his suit.

5. The Respondent's witness was the HR Partner with the Respondent at the material time and testified that the Claimant was known to her. She testified that the Claimant was disrespectful to Pamela McQuide who was his supervisor at the company he had been seconded to by the Respondent. He was subjected to a disciplinary process and was subsequently dismissed. She testified that the pension due to the Claimant will be paid by the company handling the pension which is an off-shore pension plan. She testified that the dismissal was actuated by the verbal altercation with the supervisor which amounted to gross misconduct and displayed lack of decorum and respect.

6. In cross examination by Mr. Nyabena the witness testified that she recused herself from the interview of the Claimant when he joined the Respondent because the wife to the Claimant was known to her. She testified that she however communicated the decision of the Respondent to hire the Claimant and that they worked well and had no problem at work. She confirmed that no decision was made at the meeting convened to hear the allegations. She testified that the Respondent had reason to terminate and that the Claimant was entitled to be paid for days worked and the leave accrued. She however did not avail the figures involved.

7. The parties filed Written Submissions and the issues for determination are the following:

1. Whether the termination of the Claimant was wrongful
2. If the answer to 1) above is in the positive what remedies is the Claimant entitled to
3. Who will bear the costs of the suit

8. The Claimant submits that the 2 ingredients must be satisfied when dismissing an employee or terminating employment. The first is that the employer must show the reason for dismissal was valid and secondly that the employer must show it complied with fair procedure in arriving at the decision to dismiss an employee. It was submitted that the Respondent had no valid reasons to terminate the services of the Claimant. It was also submitted that the fair procedure was not evident in the Claimant's case. Reliance was placed on the cases of **Nicholas Otieno v Patco Industries Limited [2013] eKLR**, **Pamela Ombati Mokaya v World Wide Fund for Nature Cause 573 (N) of 2009** and **Francis Lawrence Oyatsi v Nzoia Sugar Company Cause No. 361(N) of 2009**.

9. The Respondent filed Written Submissions on 31st March 2014 and submitted that the Claimant was not entitled to the orders sought. In addition to the issues I crystallised for determination the Respondent added a fourth one which was to the effect as to whether the Claimant's case is credible, genuine and/or brought in good faith. This is a non-issue as the determination of the other issues will reveal whether the claim lies. The Respondent submitted that the Claimant's testimony was inconsistent and misleading. The

Respondent submitted that the Claimant's dismissal followed fair procedure and that the dismissal was warranted. The Respondent relied on the cases of **Abudi Ali Mahadani v Ramadhan Saidi & Another Civil Appeal No. 212 of 1998**, **Jackson Butiya v Eastern Produce Kenya Limited Cause No. 335 of 2011**, **Saflo Limited v. Lloyd Masika Limited [2010] eKLR**, **Jared Osur Ogak v Athi River Plant Limited [2013] eKLR**, **Nyoturu v Telkom Cause No. 687 of 2011**, **Nazareno Kariuki v Feed The Children Kenya Cause No. 771 of 2012** and **Zachary Mbugua Maina v Medicins Sans Frontiers, Switzerland [2013] eKLR**.

10. In the case set out, the evidence of parties was clear. The Claimant was employed by the Respondent and seconded to Intra Health where the incident at the focus of the 'disciplinary' meeting of 3rd June 2010 took place. Under the Employment Act, the onus is on the employee to prove the unfair termination or wrongful dismissal took place while it is the burden of the employer to justify the grounds of termination of employment or wrongful dismissal.

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

11. The Claimant testified that the dismissal was unfair. The Respondent denies this and submits that the Claimant was aware of the process and the outcome was therefore not a surprise as stated by the Claimant. Section 41 of the Employment Act sets in place the safeguards on a termination for misconduct.

41.(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.

12. The letter inviting the Claimant to the 'disciplinary' meeting on 3rd June 2010 woefully fails to meet the threshold in Section 41. Just because the Claimant was knowledgeable in matters of human resources and the atmosphere at the time involving him, the Respondent, Pamela McQuide and Intra Health does not absolve the Respondent from adherence to the dictates of Section 41. It is this failure that led to the case coming to Court and having a degree of credibility. Had the Respondent followed the processes set out in Section 41 the termination would not have precipitated a legitimate claim. I would find that the Claimant was not terminated in accordance to the fair procedure set out in law and for that he would be compensated under Section 12 of the Industrial Court Act as read with Section 49 and 50 of the Employment Act. The plethora of case law cited by the Respondent would have been of much aid had the Respondent followed the law in termination. The result of the process that was flawed was however a decision that would have held good due to the misconduct of the employee. I would therefore find that the Claimant is not entitled to reinstatement. He is also not entitled to the payment for the balance of his contract.

13. The Claimant is thus only entitled to the following:-

- a. Pay for days worked
- b. Leave pay for leave days not taken
- c. One month's notice pay
- d. 2 months compensation for unfair dismissal
- e. Costs of the suit
- f. Certificate of Service

14. His pension dues are not part of the Claims I can competently determine as the service provider was not party to this suit.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of June 2014

Nzioki wa Makau

JUDGE