



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT NAIROBI
CAUSE NUMBER 2547 OF 2012
BETWEEN
THE REV. DR. WILLY M. NDEGWACLAIMANT
VERSUS
GRETSA UNIVERSITY, THIKARESPONDENT

Rika J

CC. Edward Kidemi

Ms. Milimu instructed by Mbugwa, Atudo & Macharia Advocates for the Claimant

Mr. Kaguro instructed by Mwangambo & Okonjo Advocates for the Respondent

ISSUE IN DISPUTE: TERMINAL BENEFITS

AWARD

1. The Rev. Dr. Willy M. Ndegwa filed this Claim on 20th December 2012. He states he was employed by the Respondent Private University, on 1st August 2009, in the position of Assistant Registrar. The contract was to run for 3 years, ending on 31st July 2012. He worked up to 31st August 2012, and opted not to renew the contract. He was not paid certain terminal benefits. These include gratuity pay at Kshs. 203,500; accumulated leave of 16 days at Kshs. 42,667; payment for 2 extra units taught between January and April 2011 at Kshs. 84,000; and ODL Modules at Kshs. 6,300, all added up at Kshs. 336,467. He claims this amount, costs and interest.
2. The Respondent concedes the Claimant was its Employee. He worked as the Assistant Registrar. His contract expired after 3 years on 31st July 2012. He continued to work to the end of August 2012. The period after 31st July 2012 was not covered under the contract. He resigned abruptly, without notifying the Respondent. He had already been allocated courses for tutoring. His terminal benefits were correctly computed and paid at a total of Kshs. 8,517 net. He is not owed any money by the Respondent.
3. The Claimant gave his evidence, and closed his case on 26th February 2014. The Respondent did not call any Witness, and relies on the pleadings and submissions on record.

4. The Rev. Dr. Willy M. Ndegwa testified he has been a Pastor for about 30 years. He also lectures at various Universities. He holds a Ph. D degree in Family Counseling. He has been a Lecturer for about 15 years. He was employed by the Respondent for a period of 3 years, beginning from 1st August 2009. He earned a basic salary of Kshs. 55,000 and house rent allowance of Kshs. 25,000 per month. He reported to the Vice- Chancellor.

5. He worked diligently. The work environment was good at the beginning, but became hostile later. He taught 2 extra units between January and April 2011. The Management had decided that Lecturers, who wished to teach extra units, could do so. He taught developmental approaches and philosophy. The contract was to expire on 31st July 2012. The semester was ending after this expiry date. He could not leave without processing the exams for his students. There would be repercussions with the High Education Commission. He would be punished by the University. He did not ask for payment for the work done between 1st and 18th August 2012. After he left employment, the Respondent did not pay him his terminal benefits. The Respondent refused to pay, alleging the Claimant did not give the Respondent notice of termination of his employment.

6. Cross-examined, the Claimant stated his contract was to expire on 31st July 2012. His Statement of Claim gave the expiry date as 31st August 2012. He worked up to 18th August 2012, and reported on 31st August 2012 to return the exam scripts. He would not just leave, because he had exams to mark. He did not have the desire to work beyond 31st August 2012, because the environment had become hostile. He claims gratuity pay at Kshs. 203,500. He was assisted by the Vice-Chancellor in arriving at this amount, based on a service period of 37 months. He was the Secretary to the Senate, and participated in the preparation of the academic calendar. Teaching of extra units was necessitated by insufficiency of Lecturers. This was meant to discourage Lecturers from 'moonlighting,' which the Claimant explained, denotes the practice where Lecturers would offer their services to other Institutions, outside the University. He was employed to teach only 1 unit, but took 3 units. The Claimant agreed that the lists of students attached to his supplementary bundle of documents, did not bear any signature. He forwarded the lists to the Respondent. Redirected, the Claimant stated he was paid the whole salary for the month of August 2012.

7. The Claimant submits that his contract was not extended by implication. The contract expired automatically, and there was no agreement to renew it. There was no intention to renew it. The Claimant was not therefore obliged to issue the Respondent a notice of termination, when he left employment on 31st August 2012. The Respondent did not contradict the Claimant on the computation of terminal dues. The Respondent deducted from the Claimant terminal dues, 3 months' salary, alleging the Claimant was obliged to give the Respondent notice, before leaving employment in August 2012. This effectively reduced the Claimant's terminal benefits to an amount of Kshs. 8,517. The Claimant relies on several Judicial Authorities, among them the case of *Samuel Chacha Mwita v. Kenya Medical Research Institute [2004] e-KLR*, which explained that "at common law, an employment contract for a fixed term terminates automatically upon the expiry period, unless the parties agree, expressly or tacitly, to renew it." The Claimant prays the Court to uphold the Claim.

8. The Respondent submits the Claimant was obliged to issue the Respondent 3 months' notice, or pay 3 months' salary to the Respondent in lieu of notice, at the time he left in August 2012. He did not do so, and the Respondent correctly deducted the amount of Kshs. 240,000 from the Claimant's terminal benefits, as notice pay due to the Respondent. He was in the end paid Kshs. 8,517. The part-time units taught by the Claimant during January- April 2011, was part of his regular duties. The contract expired on 31st July 2012, but was renewed constructively, and the Claimant continued to work beyond this date, up to 31st August 2012 when he left without notice. The Respondent relies on among others, the case of *Kenya Airways v. Satwant Singh Flora [2013] e-KLR* in urging the Court to find that "in general a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such contract was intended although never expressed, as where there has in fact been service of the kind usually performed by employees." The contract was renewed constructively. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards-:

9. The Respondent is a Private University based at Thika. It employed the Claimant as its Assistant Registrar, effective from 1st August 2009. The contract was for 3 years, lapsing 31st July 2012. The Claimant enjoyed a monthly basic salary of Kshs. 55,000 and house rent allowance of Kshs. 25,000- total Kshs. 80,000. The contract was renewable, based on the satisfactory performance by the Claimant. He was entitled to gratuity at the end of the contract, calculated at 10% of his basic salary. The contract was terminable by either party giving the other 3 months' notice, or payment of 3 months' salary in lieu of such notice.

10. The Claimant's contract lapsed on 31st July 2012. He however continued to work for the month of August 2012, after the expiry of the contract. He explained that he was in the middle of examining the students, and could not just leave before he marked the exams and handed over the results to the University. He therefore continued to work up to 18th August 2012, left, and returned to the University on 31st August 2012 to hand in the results. The work done in August 2012 was interpreted by the Respondent as amounting to constructive renewal of the contract, with the result that Claimant was obliged to issue the Respondent termination notice, before he left on 31st August 2012. He did not give notice.

11. The Respondent computed the Claimant's terminal dues, based on 37 months of service, as follows:-

- Gratuity at 10% of the total 3 year basic salary at Kshs. 203,500.
- Accumulated leave days at Kshs. 42,667.
- ODL Modules at Kshs. 6,000.

Total Kshs. 252,167

The Respondent went on to deduct 3 months' salary in lieu of notice at Kshs. 240,000, PAYE tax of Kshs. 3,650, leaving the Claimant at the end of service, with a paltry sum of Kshs. 8,517.

12. The Court does not see any justification in the Respondent's decision to deduct 3 months' salary in lieu of notice. There was no contract which was renewed, either expressly or implicitly by the Parties. There was no intention to renew. The Claimant merely overstayed his contractual period by a month, to mark the examination and hand over to the Respondent. He was under professional duty to do so. He was required by the High Education Commission to mark exams to the end of the semester, which went beyond the contractual period. He was being a responsible Lecturer, doing what was sensible.

13. The position by the Respondent, that the contract was constructively renewed, was no more than mischief making, aimed at denying the Claimant his full terminal benefits. The Respondent did not offer to renew the contract. There is no evidence of an offer to renew the contract. Why did the Respondent in any case, not pay to the Claimant, his terminal dues at the end of the contract on 31st July 2012? What defined the terms and conditions of service in the second contract if indeed there was such a contract? What would be the basis for claiming 3 months' salary in notice pay in a void? The decisions cited by the Respondent in supporting the proposition that the contract was constructively renewed, were cited out of their context. The Court must examine the circumstances and conduct of the Parties, in determining if there was renewal of their contract. In this case, the Claimant was merely serving over the period contracted, to complete obligations imposed on him by the University calendar, and arising out of a past relationship with the University. The Claimant was tied down to the end of the month of August by the examination processing schedule, which gave the date for end of trimester examination as 13th to 18th August 2012. The Respondent would only have been justified in demanding for notice pay, if the Claimant left before 31st July 2012.

14. ***The Claimant is allowed the prayer for gratuity at Kshs. 203,500.*** There was common evidence he was owed 16 days of annual leave. ***Leave pay is allowed at Kshs. 42,600.*** The Court was not persuaded by the Claimant that he was entitled to receive Kshs. 84,000 for 2 extra units taught between January and

April 2011. He did not demonstrate to the Court the terms of this part-timing. He did not show how the extra work was remunerated, and how he arrived at the amount of Kshs.84,000. He does not appear to have demanded this sum while he was still in service. The claim is declined. The Claimant was able to show he took 21 students for ODL modules. The Respondent alleged he took 20 students, which would entitle him to Kshs. 6,000. The ***Claimant is granted Kshs. 6,300 based on the figure of 21 students.***

15. Lastly, the Court is convinced the Respondent acted unreasonably, by deducting from the Claimant's terminal benefits, 3 months' notice pay. This was done in bad faith. Had the Respondent acted above board, this litigation would not have been necessary. It is little wonder that the Claimant felt the work environment had become hostile to him. The Claimant consequently has been denied his rightful terminal benefits for close to 2 years. Employers ought to pay their exiting Employees their terminal dues promptly. He deserves a grant of costs and interest. *In total:-*

a. The Respondent shall pay to the Claimant, within 30 days of the delivery of this Award, gratuity pay at Kshs. 203,500; accumulated leave of 16 days at Kshs. 42,667; and ODL Modules at Kshs. 6,300 – total Kshs. 252,467.

b. This sum shall be paid with interest at the rate of 14% p.a. from 31st August 2012 until payment is made in full.

c. Costs to the Claimant.

Dated and delivered at Nairobi this 31st day of July 2014

James Rika

Judge