



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 870 OF 2011

JANE MOKUA.....CLAIMANT

VS

ALEXANDER FORBES HEALTH CARE LTD.....RESPONDENT

AWARD

Introduction

1. Jane Mokuia, the Claimant in this case worked as Personal Assistant to the Respondent's Chief Executive Officer. Following the termination of her employment on 18th March 2011, she brought a claim against the Respondent seeking compensation for unfair termination and payment of terminal dues. The Respondent filed a Statement of Response on 5th July 2011 and a further Response on 4th April 2012. The Claimant testified on her own behalf and the Respondent did not call any witnesses. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent effective 27th May 2008. On 18th March 2011, her employment was terminated without any reason. The Claimant claims that during her employment with the Respondent, she was not paid house allowance.

3. Her claim is tabulated as follows:

- a. House allowance (Kshs. 20,000x34 months).....Kshs. 680,000
- b. 7 days leave balance (Kshs. 2,000x7 days).....Kshs. 14,000
- c. 10 days study leave for 2011 (Kshs. 2,000x10 days).....Kshs. .20,000
- d. Damages for unfair termination of employment

(Kshs. 60,000x12 months).....Kshs. 720,000

e. Costs of the suit

The Respondent's Case

4. In its response and further response, the Respondent admits having employed the Respondent on 27th May 2008 and terminating her employment on 18th March 2011. It is the Respondent's case that the termination of the Claimant's employment was in accordance with her employment contract, the disciplinary rules and procedure set out in the Staff Handbook and the law.

5. The Respondent further asserts that neither the Claimant's employment contract nor the Staff Handbook provided for an entitlement to house allowance or study leave. In response to the claim for leave pay, the Respondent states that the Claimant was paid Kshs. 10,800 in lieu of accrued leave days as at the date of the termination of her employment. In addition, she was paid one month's salary in lieu of notice as well as salary for 18 days worked in March 2011.

6. Prior to the termination of her employment the Claimant had been warned regarding her conduct in the execution of her duties and absence from work without permission. She had also been cautioned regarding her attitude towards her colleagues in the office.

Findings and Determination

7. The issues for determination before the Court are as follows:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in effecting the termination the Respondent observed due process;
- c) Whether the Claimant is entitled to the reliefs sought.

Reason for the Termination

8. 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.

9. Section 45 (2) of the goes on to provide as follows:

(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.

10. The Claimant's termination letter dated 18th March 2011 reads as follows:

"I am writing to inform you that a management decision has been taken to terminate your services with Alexander Forbes Healthcare Limited with effect from the date of this letter.

Please find enclosed two cheques for payment as follows:

i) One month's salary in lieu of notice

ii) Your salary for 18 days in March 2011 and your leave days.

You are required to hand over all company property that may be in your possession including

the medical photo-card and the door access card to the HR Manager.

You may request in writing for your AFRF pension contributions through the HR office.

Yours sincerely

James Olubayi

Group CEO”

11. This letter does not disclose any reason for the termination of the Claimant's employment and the Claimant told the Court that she did not know why her employment was terminated. The Respondent on the other hand sought to justify the termination by producing correspondence which reflected the Claimant's employment record in a negative light. Specifically, the Claimant was issued with a first warning letter on 20th September 2010 apparently on her poor conduct and attitude towards her colleagues and superiors.

12. Further, following the Claimant's failure to submit certain documents required by the Human Resource Manager Jane Mbat, she was issued with a show cause letter dated 22nd November 2010. By her response dated 23rd November 2010, the Claimant apologised for the lapse in submitting the documents in time. Then in December 2010, there was correspondence on the Claimant's unauthorised absence from the office.

13. From the foregoing correspondence it would appear that the Respondent had many issues with the Claimant ranging from performance to conduct. However, none of these issues featured in her termination letter and the Court finds this omission strange. Termination of the employment of an employee is the ultimate disciplinary action and it must be grounded on solid reason and fair process; it should never be the result of knee jerk reaction from management.

14. In the case of *John Otieno Mukabi Vs Kenya Builders & Concrete Ltd [2014] eKLR* this Court held as follows:

“an employer is required to provide the reason for termination of employment of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause. Once an employer decides to take the ultimate disciplinary action of terminating the employment of an employee, the reason for the termination must be clearly stated in the letter of termination. By the time an employee exists from employment on account of termination, the reason for their termination must be clear.”

15. I need to add that a warning letter is itself a disciplinary action and therefore once it is issued, the matter in question cannot attract any further disciplinary action unless it is repeated. This assures closure of disciplinary processes and guards against double jeopardy. This does not however bar an employer from using past cautions and warnings which form part of an employee's employment record in determining subsequent disciplinary matters against the employee.

16. In the instant case, the Respondent did not state the actual reason for the termination of the Claimant's employment and the Court therefore finds the termination unfair for want of substantive justification.

Termination Procedure

17. Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct, poor performance and incapacity 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. In an e-mail dated 16th November 2010, Jane Mbatia lodged a complaint against the Claimant to the Group Chief Executive Officer James Olubayi. Mbatia recommended that decisive action be taken and Olubayi agreed. There was however no evidence that the substance of this complaint was ever presented to the Claimant to enable her to respond. The Court therefore finds that the Claimant was not given an opportunity to be heard prior to the termination of her employment. Consequently the termination was unfair for want of due process as well.

Reliefs

20. Having found the termination of the Claimant's employment unfair both substantively and procedurally, I award her three months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and her employment record. I have also taken into account the Respondent's failure to provide a reason for the termination and to afford the Claimant an opportunity to be heard.

21. The Claimant claims house allowance. Section 31(1)and(2) of the Employment Act provides that:

1. An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

22. I have looked at the Claimant's employment contract and pay slips. While the contract provides a figure referred to as remuneration, the pay slip provides for a basic salary. The Court therefore finds no expressed intention that the Claimant's salary was inclusive of house allowance. Indeed, in the written submissions filed on behalf of the Respondent it is submitted that the Claimant's employment contract did not provide for house allowance. I therefore award the Claimant house allowance at the rate of 15% of her basic salary and adopt the resultant figure of Kshs. 69,000 as the Claimant's salary for purposes of this claim.

23. From the evidence on record, the Claimant was paid for her pending leave days at termination and this claim therefore fails. With regard to the claim for study leave, the Claimant did not provide evidence such as an examination time table to prove her entitlement and the claim

therefore also fails.

24. In the final analysis I make an award in favour of the Claimant in the following terms:

- a. 3 months' salary in compensation for unfair termination.....Kshs. 207,000
- b. House allowance for 34 months.....Kshs. 306,000
- Total.....Kshs. 513,000**

25. The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF OCTOBER 2014

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JUDGE

Appearance:

Mr. Simiyu for the Claimant

Mr. Abidha for the Respondent