



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 233 OF 2012**

**BERNARD DODO MBAJA.....CLAIMANT**

**VS**

**AIR TRAFFIC LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant, Bernard Dodo Mbaja worked for the Respondent as an aircraft/hangar cleaner. Following termination of his employment, he filed a Memorandum of Claim on 14th February 2012 seeking compensation for unfair termination. The Respondent filed a Response on 8th March 2012 and the matter proceeded on 8th July 2014. The Claimant testified on his own behalf and the Respondent called its General Manager, James Karagu Njuguna.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 22nd October 2009 at a monthly salary of Kshs. 15,100. On 11th April 2011, he was given a cover lens by the Chief Engineer, Njuguna Njagi to take to the Assistant Director, Helena Emond. The Claimant handed over the cover lens to Helena Emond and as she was trying to remove it from its wrapper, it broke. The Respondent decided to deduct the equivalent of \$ 212 from the Claimant's salary to cover the cost of the lens, blaming the Claimant for negligence.

3. The money was recovered in three monthly installments and upon completion of recovery, the Claimant's employment was terminated on 25th July 2011 without notice. The Claimant states that he was not given any reason for the termination of his employment nor was he given an opportunity to be heard. Further, he was not paid his terminal dues. He therefore claims the following:

- a) 12 months' salary in compensation for unfair termination.....Kshs.181,200
- b) One month's salary in lieu of notice.....15,100
- c) Severance pay..... 1,100
- d) House allowance.....47,565
- e) Unlawful deduction of salary.....19,458
- f) Any other relief the Court may deem just to grant

## **The Respondent's Case**

4. In its Response, the Respondent admits having employed the Claimant as an aircraft/hangar cleaner from 22nd October 2009 at a gross monthly salary of Kshs. 15,100. The Respondent states that the deduction of the equivalent of \$ 212 from the Claimant's salary was lawfully made in three monthly installments to cover the cost of a cover lens that was broken by the Claimant due to his negligence.

5. The Respondent further states that according to the Claimant's contract of service his employment could be terminated by one month's notice or one month's salary in lieu thereof without assigning any reason for the termination. Upon termination, the Claimant was paid Kshs. 21,352 in terminal dues comprising of salary in lieu of notice and leave pay.

6. The Respondent goes on to state that the termination of the Claimant's employment was undertaken in accordance with Clause 10(1) of his contract of service and was not done on grounds of misconduct, poor performance or physical incapacity which would have required adherence to Section 41 of the Employment Act. According to the contract of service, there was no requirement to give reasons for the termination where the termination was effected by notice or pay in lieu of notice.

## **Findings and Determination**

7. The issues for determination in this case are as follows:

- a) Whether the termination of the Claimant's employment was lawful;
- b) Whether the money recovered from the Claimant's salary to cover the cost of the broken lens was lawful;
- c) Whether the Claimant is entitled to the reliefs sought.

## **The Termination**

8. The Claimant's termination letter dated 26th July 2011 states in part:

***“We refer to your employment contract clause 10(a), and the Company hereby wishes to terminate your contract with immediate effect. (sic) You are therefore required to hand in all company properties that might be in your possession currently to the head of Department.***

***Also take note that any dues that might have accrued to you in form of leave allowance and salary in lieu of notice will be paid forthwith hence please contact the finance office for the same.***

***Kind regards***

***Helena Rame***

***Assistant Managing Director”***

9. While conceding that no reason was given for the termination of the Claimant's employment, the Respondent states that in fact there was no such requirement since the termination was effected in accordance with the Claimant's employment contract. With respect, this assertion demonstrates a misunderstanding of current employment law. 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.**

Section 45 (2) of the Act goes on to provide that:

**(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 effect of these provisions is that it is no longer open to an employer to terminate the employment of an employee at will. For any termination to pass the fairness test, a valid reason leading to the termination must be demonstrated. In addition Section 41 of the Act, establishes a mandatory procedure for handling cases of misconduct, poor performance and physical incapacity in the following terms:

(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;

11. Moreover, 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.

12. The Respondent's failure to give any reason for the termination of the Claimant's employment and to follow due process in effecting the termination rendered the termination unfair for want of substantive justification and procedural fairness.

### **The Recovery**

13. The Claimant claims the sum of Kshs.19,458 being the equivalent of \$212.00 to cover the cost of the cover lens broken on 11th April 2011. The Claimant denies breaking the cover lens stating that it was in fact broken by the Respondent's Assistant Director, Helena Emond. On the same day the cover lens was broken the Respondent wrote to the Claimant as follows:

**“This is to inform that you broke cover Lens P/N 68-4250258-38 costing \$212.00 due to negligence. The said amount is being deducted from your salary in three months installments.**

*Yours faithfully,*

*James Njuguna*

*General Manager”*

14. From this letter, it would appear that the decision to recover the cost of the broken cover lens from the Claimant's salary was taken before affording the Claimant the opportunity to present any defence. Employee salaries are protected under Section 17 of the Employment Act and where an employer decides to effect deductions from the salary of an employee as a disciplinary measure, due process must be followed. In the absence of any evidence to the contrary the Court finds that the deductions made from the Claimant's salary on account of the broken cover lens were unprocedural and unlawful.

#### **Reliefs**

15. Having found the termination of the Claimant's employment unfair both substantively and procedurally, I award him six months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in effecting the termination.

16. In view of my finding that the deductions made from the Claimant's salary to cover the cost of the broken cover lens were unlawful, I order refund of the entire sum recovered. The Respondent did not adduce evidence to show that the Claimant was paid one month's salary in lieu of notice in addition to salary for the days worked up to the date of termination and I therefore allow the claim for notice pay.

17. The Claimant's employment contract provided for gross pay which would ordinarily be inclusive of house allowance and the claim for underpayment was not proved. Further the claim for severance pay which is applicable in cases of redundancy has no basis and is dismissed.

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

- a) 6 months' salary in compensation for unfair termination.....Kshs. 90,600
- b) 1 month's salary in lieu of notice.....15,100
- c) Unlawful salary deduction.....19,458
- Total.....125,158**

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 17TH DAY OF OCTOBER 2014

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Kandere for the Claimant

Mr. Odongo for the Respondent