



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1308 OF 2011

EUNICE ATIENO OKOTH.....CLAIMANT

VS

OUR LADY OF NAZARETH PRIMARY SCHOOL.....RESPONDENT

AWARD

Introduction

1. Eunice Atieno Okoth, the Claimant in this case worked as a Teacher and Pre-Unit Coordinator in the Respondent School from 2003 to January 2011 when her employment was terminated. She filed a claim against her former employer by way of a Memorandum of Claim dated 2nd August 2011 and amended on 9th October 2013.
2. The Respondent filed a Memorandum of Reply on 6th January 2011 and an amended Reply on 1st November 2013. The matter was heard on 16th June 2014. The Claimant testified on her own behalf and Brother Joseph Maricky of the Catholic Religious Congregation testified for the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Teacher and Pre-Unit Coordinator effective 1st April 2003. On 10th January 2011, she was issued with a fresh letter of appointment and on 17th January 2011 she received a notice of termination of employment on the basis of reorganization. The termination was to take effect on 10th April 2011.
4. The Claimant states that during the entire period of her employment with the Respondent she did not go on leave. She also claims that the termination of her employment was unfair because she was the only one who was affected by the reorganization and that her position was not abolished since immediately after her departure she was replaced.
5. The Claimant claims the following:
 - a. Severance pay for 9 years.....Kshs. 85,653.00
 - b. Leave pay for 189 days.....Kshs.171,306.00
 - c. Salary in lieu of notice.....Kshs.19,034.00

- d. Compensation for unfair termination.....Kshs.628,122.00
- e. Certificate of service
- f. Costs and interest
- g. Any other relief the court may deem just to grant

The Respondent's Case

6. In its Memorandum of Reply the Respondent admits having employed the Claimant as a Teacher and Pre-Unit Coordinator with effect from 1st April 2003. The Claimant's employment contract was subject to annual review and could be terminated by any party giving one month's written notice.
7. The contract remained in force until 1st October 2010 when the Respondent's management decided to harmonise the contract terms of its employees and to incorporate certain benefits enjoyed by the employees such as membership to a pension scheme which had not been captured in the earlier letter of appointment. The Respondent therefore gave new letters of appointment to all its employees effective 1st October 2010.
8. The Respondent states that it explained to all its employees the necessity of executing the new letters of appointment and the Claimant signed her own letter voluntarily on 10th January 2011. The new letter of appointment provided that the contract could be terminated by either party by giving one month's written notice and on 17th January 2011, the Respondent gave notice to terminate the Claimant's employment effective 10th April 2011.
9. In response to the claim for leave pay, the Respondent states that the Claimant took her leave every year during the school holidays in April, August and December. Further in response to the Claimant's claim that the termination of her employment was unfair the Respondent states that the Claimant was not the only employee affected by the reorganization as the employment of one Mary Mwangi was also terminated at the same time as the Claimant. The Respondent denies that the Claimant was replaced stating that the operations of the Preschool section were taken over by the Head Teacher, Francisca Anyango.
10. The Respondent avers that the Claimant was paid all her terminal dues including an *ex gratia* payment of Kshs. 22,028. The Claimant refused to collect a letter to the Respondent's Pension Fund Managers for release of her pension and her certificate of service was delivered to her house.

Findings and Determination

11. The issues for determination in this case are as follows:
- a. Whether the termination of the Claimant's employment was justifiable and fair;
 - b. Whether the Claimant was paid all terminal dues and whether she is entitled to the reliefs sought.

The Termination

12. The letter effecting termination of the Claimant's employment which is dated 17th January 2011 reads as follows:

“We had been hoping that during this difficult period of reorganization we could keep all of our employees with Our Lady of Nazareth Primary School, unfortunately this is not the case.

It is with regret therefore that we must inform you that we will be unable to utilize your services after 10th April 2011. We have been pleased with the qualities you have exhibited during your tenure of employment with us and will be sorry to lose you as an employee of Our Lady of

Nazareth Primary School.

I will be happy to provide you with step by step assistance in this matter, if you so request. It is my hope that this will bring us both to a common understanding. Please also advise my Accountant/Assistant, in any matter of concern so that we may need to prepare such for you before your departure.(sic)

Please accept our best wishes for you future endeavors.

Best wishes.

(signed)

Bro. Joseph Maricky, SM

Manager, Our Lady of Nazareth Primary School.”

13. From the evidence on record, the Claimant had a good working relationship with the Respondent who supported her to pursue further training and hosted a party in her honour at the time of her departure. There was also no record of any disciplinary case against the Claimant and according to the termination notice the Claimant's separation from the Respondent's employment was precipitated by a reorganization within the Respondent School. In my view this would fall under what is commonly known as redundancy.

14. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act , 2007 define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

15. The Respondent cited a Government policy which required mainstreaming of pre-primary institutions into existing primary schools with the Head Teacher of the primary school taking responsibility for the preschool section. Implementation of the Government policy therefore rendered the position of Preschool Coordinator superfluous.

16. The Court however noted that the Government policy referred to came into effect in 2003, eight years before termination of the Claimant's employment. Moreover, according to the Claimant's letter of appointment signed on 31st March 2003, the Claimant was appointed to the position of Pre-Unit Coordinator and Teacher while the subsequent letter of appointment signed on 10th January 2011, appointed her as a Teacher with duty allowance for the position of Pre-unit Coordinator being knocked off from her emoluments.

17. It seems to me therefore that the two positions of Pre-Unit Coordinator and Teacher could be held separately and assuming that the position of Pre-Unit Coordinator was indeed phased out, no reason was advanced as why the Claimant was not retained as a Teacher.

18. In the amended Memorandum of Reply, the Respondent cites the Claimant's advanced age and ill health as an additional consideration in the termination of her employment. However, no evidence was led on the Respondent's normal retirement age nor on the Claimant's inability to work on grounds of ill health.

19. Furthermore, there was no evidence of compliance with the conditions set out under Section 40 of the Employment Act, 2007 prior to termination of the Claimant's employment.

20. As held by **Rika J** in **Aviation and Allied Workers Union Vs Kenya Airways Limited & 3 Others [2012] eKLR**, the Court has a duty to inquire into the *bona fides* and reasonableness of any declaration of redundancy. In the instant case, the Court finds that the Respondent failed to establish a basis for terminating the Claimant's employment soon after issuing her with a revised letter of appointment. Consequently, the Court finds that the termination of the Claimant's employment was unfair within the meaning of Section 45 of the Employment Act, 2007.

Reliefs

21. Having found the termination of the Claimant's employment unfair, I award her eight months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in effecting the termination. I further award the Claimant severance pay at 15 days' salary for each completed year of service.

22. The Claimant was given adequate notice of the termination of her employment and is therefore not entitled to notice pay. Further, she confirmed to the Court that she periodically took her leave during the school holidays and the claim for leave pay therefore fails.

23. Ultimately I make an award in favour of the Claimant in the following terms:

a. 8 months' salary in compensation for unfair termination.....Kshs.178,512.00

b. Severance pay at 15 days' pay for 8 completed years.....Kshs. 89,256.00

Total.....Kshs.267,768.00

24. The Respondent states that a certificate of service was sent to the Claimant. The Claimant however denies receiving any certificate of service from the Respondent. I therefore direct the Respondent to issue the Claimant with a certificate of service in accordance with Section 51 of the Employment Act, 2007.

25. The Respondent shall 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 8TH DAY OF OCTOBER 2014

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JUDGE

Appearance:

Mr. Muchoki for the Claimant

Mr. Kairaria for the Respondent