



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 521 OF 2012

PEUGEOT NYABUTO ELIJAH.....CLAIMANT

VERSUS

DPL FESTIVE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed this suit on 28th March 2012 seeking resolution of a dispute he framed as wrongful, unlawful and/or unfair withholding of terminal dues and/or benefits. He averred that he was employed by the Respondent in April 2007 in the production section as a baker, flour mixer, oven man and in the packaging section as a packer for a monthly salary of 12,570/-. He averred that he executed his duties diligently and faithfully until he resigned from the employ of the Respondent at the end of April 2011. He averred that he was not paid his terminal dues. He sought payment of accrued housing allowance at 15% of basic pay for 48 months, service pay at rate of one month for each year worked and payment in lieu of notice for 4 years. The sum sought was Kshs. 191,064/- plus interest and costs of the suit.
2. The Respondent filed a Memorandum of Reply on 12th July 2012 whereby it denied each and every allegation of the Memorandum of Claim. The Respondent sought the dismissal of the claim with costs. The main attack on the claim was the fact that the Claimant had resigned from employment. It was averred that the Claimant was also paid his leave allowance and that his pay was consolidated and was inclusive of house allowance. The Claimant was stated to be a casual and thus not entitled to the reliefs he sought.
3. Upon directions being given that the suit could be determined by way of documents as provided for under the Rules of this Court, the Claimant filed his submissions on 14th October 2014 and the Respondent filed its submissions on 28th October 2014. In the submissions the Claimant abandoned the claim on service pay but submitted that house allowance was payable as no evidence was availed of the employment records to suggest there was any payment made in that regard. The Claimant also submitted that the leave pay for the months not taken was also payable. The Claimant thus sought payment of the sums due together with costs of the suit.
4. The Respondent submitted that the Claimant was a casual employee. The Respondent relied on the collective bargaining agreement – CBA produced in the case for its full tenor and effect and submitted that it applied to the Claimant. The Respondent submitted that the Claimant was bound by the CBA. It was admitted that the Claimant was not paid a house allowance as he was a casual employee and further that the leave pay was included in the payment made to the casual employee.

5. The parties are *ad idem* as regards the termination. The Claimant voluntarily resigned from employment. The Claimant rightly did not seek any relief regarding the termination of the contract of service. The Claimant sought payment of house allowance. House allowance was said to be applicable only to permanent employees and not casual employees. The CBA which the Respondent signed with the Bakery, Confectionary, Food Manufacturing and Allied Workers Union provides in Clause 27 as follows:-

Where a casual employee –

i. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

ii. performs work which can not be reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more;

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly.

6. The Employment Act 2007 defines a casual employee as follows:

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time;

7. Under the Employment Act 2007, there is provision in Section 37 as follows:-

37. (1) Notwithstanding any provisions of this Act, where a casual employee?

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or ?

(b) performs work which can not reasonably be expected to be completed within a period, or a number of working days amounting in the ?aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

8. Section 35 of the Employment Act provides as follows:-

35. (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be?

(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

(3) If an employee who receives notice of termination is not able to understand the notice, the

employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

(4) Nothing in this section affects the right-

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or ?

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law. ?

(5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of-

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

9. The conversion of a contract of service from casual to monthly contract comes into play after two or more consecutive months of service. This means the contract of service between the parties was converted under section 37(1) upon the Claimant's continuous service after the second month.

10. The Respondent asserts that the CBA applies. If indeed this is so, and I accept that assertion, the CBA between the parties provides that with effect from 1st July 2011 every employee covered by the CBA shall be paid in addition to his/her basic wage/salary, a monthly house allowance at the rate of eighteen percent (18%) of his/her basic wage/salary.

11. There is no record availed in terms of Section 74 of the Employment Act 2007 and as the pleadings by the Respondent are that no house allowance was payable. The Claimant avers none was paid and so it is clear there was none paid though the CBA provides that it is payable. The Claimant was thus entitled to the payment of house allowance in terms of the CBA at the rate of 18% of the basic pay. It is also stated in Clause 14 that each employee is entitled to annual leave at rate of twenty-three (23) working days after every twelve consecutive months of service with the company. The CBA also provides that each employee of the Respondent covered by the CBA shall receive a letter of appointment spelling out his terms and conditions of services applicable are in accordance with this Collective Agreement.

12. It is clear that the benefits that would accrue differs depending on whether one is a casual employee or not. A casual employee is entitled to only the daily rate pay. The daily rate pay includes notice pay, leave pay and terminal/service benefits.

13. The Employment Act provides under Section 37(2) that a casual employee is entitled to one paid rest day after a continuous six days working period. Notably under Section 37(3) the employment of the casual employee converted in accordance with subsection 1 the employee is entitled to the terms and conditions of employment he would entitled to under this Act had he not initially been employed as a casual employee.

14. It is clear that the employment of the Claimant was converted after working continuously for two months with the Respondent. He actually served for 4 years. This means that he was entitled to all the rights of a permanent employee. He was entitled to house allowance at 18% of the basic pay, leave and

leave travel allowance as well as service. He abandoned his claim on service pay and thus will not recover. However he is entitled to the following in judgment:

(a) House allowance at rate of 18% for 4 years Kshs. 129,988.80

(b) Leave days not taken monthly salary times years worked – (Kshs. 15,278.10x4) Kshs. 61,112.10

(c) Costs of the suit.

(d) Interest on the above sums from date of judgment till payment in full.

(e) Certificate of service.

Orders accordingly.

Dated and delivered at Nairobi this **16th** day of **December** 2014

Nzioki wa Makau

JUDGE