



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1587 of 2010

JENNIFER OSODO.....CLAIMANT

VS

TEACHERS SERVICE COMMISSION.....RESPONDENT

AWARD

Introduction

The Claimant's claim in this case is for unfair termination of employment and underpayment of dues. The matter was heard between 21st February and 18th May 2012 before Mukunya J (as he then was). When Counsel for the parties appeared before me they sought time to file written submissions upon which I would proceed to issue the award of the Court based on the documents filed in Court and the proceedings as recorded by the former Judge. The Claimant and the Respondent filed their submissions on 6th and 14th December 2012 respectively.

The Claimant's Case

The Claimant stated that she was employed by the Respondent first on temporary terms effective 1st January 1983 and then confirmed in employment effective 1st May 1983. In 1984, the Claimant was promoted to the position of Head of History Department and Patron of Drama Club at Keriri Girls' High School. She was also appointed Deputy Head Teacher at the same School. Between 1991 and 2002, the Claimant rose through the ranks from Head Teacher to Senior Principal Graduate/Approved Teacher.

In 2004, the Respondent granted the Claimant study leave with pay effective January 2004 to December 2006 to enable the Claimant to pursue a PhD Degree Programme at the University of Sunderland in the United Kingdom.

The Claimant stated that while on the said study leave, the Respondent reduced her salary from Kshs. 57,535 to 49,545 for the period between 1st July and 31st December 2004 and effected deductions cumulatively amounting to Kshs. 47,940 to recover the difference. The Claimant added that the Respondent underpaid her by Kshs. 7,640 in the month of January 2005.

Further, the Claimant stated that the Respondent effected deductions from her pay for period between 1st April and 31st December 2005, thereby reducing her salary to Kshs. 35,040 which amount was misdirected to an unknown Bank Account at Barclays Bank of Kenya, Nkurumah Road Branch in Mombasa. The Respondent subsequently paid to the Claimant the sum of Kshs. 217,076 being salary arrears for period between 1st April and 31st December 2005.

The Claimant tabulated her claim as follows:

a) Underpaid salary between 1st July and 31st December 2004
from Kshs. 57,535 to 49,545 (7,990x6 months)..... 47,940

b) Underpaid salary for January 2005
from Kshs. 58,685 to 51,045 (7,640x1 month)..... 7,640

c) Unpaid salary from 1st April to 31st December 2005
(Kshs. 35,040x9 months)..... 315,360

d) Underpaid salary between 1st April and 31st December 2005
from Kshs. 58,685 to 35,040 (23,645x9 months)..... 212,805

Subtotal..... 528,165

Less salary arrears paid by the Respondent

for period between 1st April and 31st December 2005

(Kshs. 28,265+88,811).....217,076

Balance.....311,089

e) Underpaid salary between 1st January and 31st May 2006
from Kshs. 67260 to 38,340 (28,920x5 months).....144,600

f) Unpaid salary from 1st January to 31st August 2007
(Kshs. 120,270x8 months).....962,160

g) Underpaid salary between 1st September and 31st December 2007
from Kshs. 120,270 to 40,545 (79,725x4 months).....318,900

h) Unpaid salary from 1st January to 30th April 2008
(Kshs.142, 5760x6 months).....570,304

i) Unpaid allowances from 1st January to 31st August 2008

· House allowance-Kshs. 5,000x8 months.....120,000

· Medical allowance- Kshs. 4,412x8 months.....35,296

· Transport- Kshs. 2,894x8 months.....23,152

Grand Total.....2,541,081

Following a series of extensions of the Claimant's study leave by the Respondent, the Claimant was unable to complete her studies within the scheduled time and did not therefore report back on duty. She

was interdicted and eventually dismissed from service.

The Claimant claimed that the Respondent was to blame for her failure to complete her studies in time since the Respondent failed to honour its obligation to her. She also stated that prior to her dismissal she was not given an opportunity to be heard. She therefore also sought reinstatement or in the alternative 12 months' salary as compensation for unfair termination of employment. Further, she claimed 7 days' salary for period between 1st May and 7th May 2008 as well as her pension benefits.

The Respondent's Case

The Respondent stated that the Claimant was employed as a trained graduate teacher on permanent and pensionable terms on or about 21st April 1983. The claimant was deployed as a teacher of English at Kereri Girls' High School and thereafter as Principal at Migori Teachers Training College.

Upon request by the Claimant, the Respondent in February 2004, granted the Claimant paid study leave to pursue a PhD course at the Sunderland University in the United Kingdom., between 1st January and 31st December 2006. Kevin Odhiambo Anyuor, the Respondent's Senior Human Resources Officer told the Court that under the Respondent's policy, the Claimant did not qualify for study leave with pay and that an exception had been made for the Claimant on humanitarian grounds.

And your added that one of the conditions on which the Claimant had been granted study leave was that she would submit progress reports on her study to the Respondent and that she would resume duty immediately upon expiry of the study leave. In February 2007, upon the Claimant's request, the Respondent granted the Claimant a 3 months' extension of study leave but without pay. On further appeal by the Claimant, the Respondent extended the said leave up to 30th November 2007. The Respondent also agreed to pay to the Claimant salary for 3 months while on this extended leave.

The Claimant was expected to report for duty on 1st December 2007, a deadline she failed to honour. The Respondent subsequently stopped her salary and removed her from the payroll with effect from 1st March 2008. The Respondent further interdicted the Claimant on 13th March 2008 and on 8th April 2008, wrote to the Claimant inviting her to attend disciplinary proceedings against her. The Claimant wrote back to the Respondent on 10th April 2008 indicating that she had changed her address and that she had not completed her studies. The Respondent denied having received any prior communication from the Claimant on the delay in completing her studies.

While acknowledging receipt of the Claimant's fax requesting for a rescheduling of the disciplinary proceedings against her, the Respondent stated that by the time of receipt of the said fax, the disciplinary proceedings were well under way. Upon recommendation by the Disciplinary Panel, the Respondent dismissed the Claimant on grounds of desertion of duty. A subsequent appeal by the Claimant, which was discussed at a consultative meeting at which the Kenya National Union of Teachers (KNUT) was represented, was dismissed.

In response to the Claimant's claim on underpayment and recoveries on salary, the Respondent explained that following the Claimant's deployment from the Respondent's Secretariat to Migori Teachers College, she could no longer benefit from salary increments to secretariat staff. Rather her salary would be pegged at the scales applicable to teachers. With regard to a salary increment effected in favour of the Claimant in 2005, the Respondent stated that this had been done in error occasioning recovery of the overpayment. The Respondent asked the Court to dismiss the Claimant's claims.

Determination and Findings

The first issue for determination in this case is whether or not the termination of the Claimant's employment by the Respondent was justifiable and lawful. In the written submissions filed by Counsel for the Claimant, extensive reference was made to the Teachers Service Commission Act (now repealed) and the Respondent's Code of Regulations.

Section 9(1) and (2) of the repealed Act provided that:

9. Disciplinary Proceedings against registered teachers

(1) The Commission shall investigate, consider and determine any case where it is alleged that a registered teacher should have his name removed from the register on the ground that, if he were not registered, the Commission would refuse to register him.

(2) In any proceedings under this section the Commission-

(a) shall inform the person concerned of the nature of the allegations made against him, shall afford that person adequate time for the preparation and presentation of his defence, and shall afford him the opportunity of being heard in person;

(b) may act on general evidence or statements relating to the character or conduct of the person concerned, and shall not be bound to receive and consider only evidence admissible in a court of law;

Regulation 66(2) of the Code of Regulations provides that:

(2) Letter of Interdiction

Where it comes to the knowledge of the Commission or its Agent and it is alleged that a registered teacher should be removed from the register because he/she is an unsuitable person to be a teacher, on any of the following grounds.

He/she:-

(a)

(b)

(c)

(d)

(e) has deserted duty.

The Commission or the Agents will serve the teacher with notice of interdiction in the form prescribed in Schedule XXXVIII.

Regulation 66(4) provides that:

(4) Disciplinary Proceedings by the Commission

The Commission shall in accordance with Section 9(1) and (2) of the Act investigate, consider and determine each case of interdiction whenever it is alleged that a registered teacher should have his/her name removed from the Register.

The Commission shall:

(a) inform the teacher concerned on/about the nature of the allegation made against him/her, afford that teacher adequate time for preparation and presentation of his/her defence and the opportunity of being heard in person.

These requirements are akin to those found in Section 41 of the Employment Act, 2007 which sets out the procedure for dealing with cases of employee misconduct, poor performance or incapacity as follows:

(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

The question therefore is whether the Respondent in dismissing the Claimant followed the law.

Section 44 (3) of the Employment Act provides that:

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

It is on record that the Respondent went out of its way to support the Claimant to undertake and complete her studies by extending her study leave for a full year upon expiry of the initially approved leave of 2 years. I therefore find the Respondent was well within its right to interdict and institute disciplinary proceedings against the Claimant. I further find that Claimant was given adequate opportunity to prepare her defence and attend the disciplinary proceedings.

In the case of **Jackson Butiya Vs Eastern Produce Kenya Limited (Industrial Court Cause No. 335 of 2011)** this Court stated that:

An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.

I need to add that an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend the disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the Respondent afforded adequate opportunity to the Claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the Respondent to dismiss her for desertion of duty. I find both the Respondent's action and the attendant procedure justifiable. The Claimant's claim for unfair termination of employment therefore fails.

I now turn to the specific claims for salary underpayment. The reason advanced by the Respondent for the underpayments was that since the Claimant had been transferred from the Secretariat to Migori Teachers College, she automatically reverted to the salary scales applicable to teachers which on the face of it was lower than her obtaining salary scale.

I disagree with this position since the Respondent had, in its letter to the Claimant dated 20th August 2002 expressly stated that the Claimant would continue to serve on her existing salary scale in the TSC Secretariat and that her incremental date would remain 1st January. The Respondent's letter further stated that the Claimant's salary scale was personal to her. The Respondent was therefore estopped from changing the Claimant's salary scale midstream.

Consequently I make the following award in favour of the Claimant:

a) Kshs.311,089 being balance of salary underpayment for period between 1st July 2004 and 31st

December 2005

b) Kshs. 144,600 being underpaid salary for period between 1st January and 31st May 2006

c) Kshs. 318,900 being underpaid salary for period between 1st September and 31st December 2007

d) Earned pension benefits

The Claimant failed to prove salary entitlement for 1st January to 31st

August 2007 and 1st January to 30th April 2008. These claims are therefore dismissed.

The claims for unpaid allowances for 1st January to 31st August 2008 as well as 7 days' salary for 1st May to 7th May 2008 were not proved and are also dismissed.

Each party will bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JANUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**