



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Suit 375 of 2012

DOROTHY A. RANDIKI..... CLAIMANT

VERSUS

THE REGISTERED TRUSTEES ACTION AGAINST

HUNGER – USA/KENYA MISSION..... RESPONDENT

J U D G M E N T

By a statement of claim filed in Court on 7th March, 2012, the claimant states that she was employed by the respondent as a Finance Coordinator by what she described as “short term employment contract,” with effect from 2nd November, 2012 to 30th June, 2012.

She avered that the contract was contradictory in so far as it provided a contract period in one clause and termination clause without following due process in another.

The claimant further avered that on 26th January, 2012 the respondent maliciously and without any or any reasonable cause terminated her contract. She therefore sought the Court's intervention to order the respondent to pay her Kshs. 222,925/- as one month's salary in lieu of notice; Kshs. 52,949.20 as salary for the seven days worked before termination. She further sought to be paid Kshs. 907,700/- as salary for the remainder of the contract not served.

The respondent in its memo of claim filed on 3rd April, 2012 refuted the claimant's claim stating that the contract of employment was consistent with section 35 and 36 of the Employment Act and that the probation clause in article five of the contract was consistent with section 2 of the Employment Act. The respondent further avered that the claimant's dismissal took place during the probation period and was consistent with the section 42 of the Employment Act.

It was further the respondent's position that the claimant was paid all her dues which included payment in lieu of notice for the seven days worked, prorated gratuity, unused leave days and prorated transport allowance.

At the trial the claimant reiterated most of her allegations in the memorandum of claim and maintained that her contract was a fixed term contract and could not be subject to probation. According to her, the probation clause was contradictory and that she was assured it would be rectified once she signed the contract.

On termination the claimant testified that she was terminated without any notice and that she was not given any reason for her termination. She testified that she was intimidated on the day of her termination in that the Human Resource Officer pushed her out of the office. She further testified that the HR

Procedure was not followed in terminating her. It was her evidence that on the day of termination she was given a cheque which she refused to take as she wanted her full contract payment. She further testified that she was paid Kshs. 100,099/- on account of leave, gratuity and days worked by the time of her termination.

In cross examination, the claimant stated that she had worked for 2 ½ months by the time of her termination.

The respondent through its Head of Human Resource Ms Vivian Aleso and Mr. Herve Belliot opposed the claimant's claim, maintaining that all her dues were paid and that her January pay had been made by the time of her termination.

According to Aleso, the claimant had a contract with three month's probation and that she had worked for 2 months and 5 days by the time of her termination. According to her, after 3 months, a confirmation evaluation required to be done. The claimant was however dismissed before the end of her probation.

Aleso testified that the claimant used to report to a Mr. Coogan and that a dispute was reported to her between the claimant and Mr. Coogan. It was her evidence that Coogan complained to her that he was having difficulties working with the claimant. According to Coogan, the claimant was unwilling to undergo training that was required before she could take up her duties. The claimant felt the training was a waste of time.

She further testified that the claimant had complained that a colleague called Sharon wanted to take her job and further that another colleague complained that the claimant always called her late at night complaining about Coogan. According to her the HR department became demoralised as a result of the conflicts the claimant had with colleagues yet she was meant to head it.

The respondent's second witness Mr. Herve Belliot testified that the claimant was not unfairly dismissed. According to him, the claimant was dismissed for two reasons: First, she did not want to learn work procedures and second, she had problems with people including the HR Manager. That is to say, she was not a team player. He stated that there was a meeting between Mr. Coogan, the claimant and himself regarding the problems the claimant had with colleagues and her behaviour at the workplace.

Having attempted to set out the facts as both pleaded and testified during the hearing, the questions the Court have to address in order to reach a determination of this dispute are: first the claimant having been granted a definite short term contract, was the respondent right in law to terminate the same prematurely? If the answer to this question is in the negative, what are the consequences for such termination

To begin, what is a fixed term contract and what are its implications in an employer-employee relationship?

A fixed term contract is a contract with a definite date of commencement and expiry or it may be a contract to perform a specific task which terminates upon the completion of that task.

Fixed term contracts are often used in the labour field for different reasons. Sometimes employees are needed on a project for a specific time period or a position is only available for a time, for instance where an employee is on maternity leave and another is hired in her place for the period of the leave.

A further example is in the building industry. Fixed term contracts could be terminated at the arrival of a specific event, to illustrate, a plasterer's contract will terminate if that portion of the project is finalised.

In order to be a fixed term contract of employment, one of the essentials of such a contract is that the duration must be fixed or limited by a specific agreement of the parties. If this is not done, the contract is for an indefinite period. Other essential elements which may be considered as secondary but important include: First, the contract may not contain provisions which are unlawful, and second, the contract may not contain provisions which are unfair.

It is further the essence of a fixed term contract that, the employer may not unilaterally terminate a fixed term contract, unless the contract expressly provides for the exact terms by which this may happen.

These contracts come to a natural end at the time stipulated in the contract or at the arrival of a specific event, when the employee's services will terminate. That is then the end of the relationship.

The claimant's contract under article 1 on duration stipulates that: "...This short-term employment contract is starting from 21st November, 2011 to 30th June, 2012." In the context of the above definition, the claimant's contract was therefore a fixed term contract

During the trial, a question arose as to whether this being a fixed term contract it was logical to place the claimant under probation. It was the claimant's contention that article 5 of the contract that provided for probation period was in contradiction with article 9 that provided for one month termination period.

Apart from being a fixed term contract, the claimant's contract was in addition described as "Short term employment contract". Indeed it was a short term employment, considering that it was intended to run for a period of 8 months. Such contracts and at the level the claimant was hired, are usually for highly skilled staff who are hired on the basis of their experience and expertise. In many organizations jobs that could be performed by short term employees are in appropriate cases outsourced to consultants. Considering the duration of the contract and the level at which the claimant was hired, to place her on three months probation was unreasonable. It would have been more reasonable to provide for a termination clause in the contract as was done under article 9 which the respondent claimed was only operational after confirmation. In this regard the Court finds that the three month's probation period was unfair and reliance thereon to terminate the claimant's employment is hereby invalidated.

The common law rule is that fixed term contracts may not be terminated for any other reason than material breach or repudiation of the contract by the employee. That is to say an employee may resign before the date of termination, or if found guilty of serious misconduct and dismissed. In such contracts therefore, parties bind themselves in the contract for a specific time period and the commitment should be honoured.

In the case of the claimant, evidence was led by the respondent that she was proving difficult to work with in that she refused to undergo training terming it a waste of her time. Evidence was further led that the claimant did not have a good working relationship with her colleagues especially Mr. Coogan. It was as a result of the disharmonious working relationship that the respondent decided to terminate the claimant's contract invoking the probation clause. The termination letter however did not make any reference to the bad working relationship with colleagues but this could perhaps be because the respondent was relying on the probation clause that does not oblige the respondent to give reason for terminating an employment contract during probation.

The Court had opportunity to listen to the claimant and observe her demeanour in Court and with all fairness to her, the Court noted that the claimant appeared to have had a problem with controlling her emotions and on more than one occasion the court had to caution her to respect the Court and the respondent's counsel and answer questions as put to her and avoid issues that were not relevant to the case. The Court further sternly warned her at some point that unless she conducted herself in a way that does not disrupt the Court proceeding she would have to be excluded from the proceedings. It would therefore not be unfair to the claimant if the Court reaches the conclusion that the respondent was justified in terminating the claimant's contract.

Concerning the procedure for her termination, the Court having found that it was unreasonable to put the claimant on three month's probation for such a short term contract hereby finds that the claimant was entitled to one month's notice or payment in lieu thereof and hereby enters judgment in that regard.

In conclusion, the claimant having been paid her other dues which she admitted in Court, the claimant shall be entitled to one month's pay in lieu of notice as reasonable compensation for premature termination of her services. This award shall be less the seven day's salary in lieu of notice already paid to

the claimant and shall further be subject to statutory deductions.

It is so ordered.

Dated at Nyeri this 30th day of January, 2013.

Abuodha J.N.
Judge

Delivered this 18th day of February, 2013.

**Delivered in open Court in the presence of for the Claimant and
..... for the Respondent.**

Rika
Judge