



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 924 of 2010

JANE I KHALECHI.....CLAIMANT

VERSUS

OXFORD UNIVERSITY PRESS E.A. LTD.....RESPONDENT

JUDGEMENT

This is a claim dated 27th July 2010 by the Claimant Jane Khalechi citing that she was discriminated against by the Respondent and her employment terminated. A Memorandum of Defence was filed and dated 8th September 2010 where the respondent states that the claimant was declared redundant.

It is stated that the Claimant was the Publicity Secretary earning Kshs.56,959/= per month until 23rd May 2008 when she received a letter advising that her employment had been terminated as her position had been phased out and at this time she was on her annual leave and hence the termination was without due notice. That the act of termination was done in discrimination against the Claimant as she was the only one out of 80 employees working in the same department who was affected and there was new recruitment in her position and that the procedure used to terminate her while on leave was improper and by purporting to abolish her position and creating it under a different title was solely meant to justify the termination.

That these acts in themselves were unfair and no redundancy was envisaged as alleged by the respondent. That before the termination, the claimant had been transferred to the warehouse as a mailing assistant a position that amounted to a demotion.

She now claims:

- 1. A declaration that the dismissal was discriminative and amounted to unfair dismissal*
- 2. A declaration that the claimant transfer to the warehouse as a mailing assistant was unfair and discriminative*
- 3. Kshs.679,908/= salary for 12 months based on her gross monthly salary at the time of dismissal*
- 4. An order reinstating the claimant back to her position as Publicity Secretary with the respondent*
- 5. General damages*
- 6. Costs and interest of the suit*

It was the evidence of the Claimant that she started work with the respondent from 1992 as a Secretary and progressed through the ranks for over 15 years to the position of Publicity Secretary. That for the 15 years served, she had no case of indiscipline. On 23rd May 2008 as the Publicity Secretary she received a letter of termination. That earlier on 2nd May 2008 she proceeded on her annual leave and on reporting back she was not allowed back in the office and instead a letter was issued to her and advised to go home and read it. This was the letter of termination citing that she had been declared redundant.

This was the first time the Claimant heard of the redundancy and this had not been discussed with her before she proceeded on leave and there was no notice that her position was no longer available. The termination letter was dated 23rd May 2008 meaning it had been issued while she was still on her annual leave.

She was advised to go home and wait for her dues and a cheque was posted amounting to Kshs.368,283/= for service at ½ month salary per year for the time she had served. There was no notice given nor was she paid in lieu of notice or a handshake pay for the redundancy.

It was further stated in evidence that in the claimant's department there were over 100 employees and she was singled out for termination and nobody had prepared her for it and the supposed reorganization was not brought to her attention as the same was effected while she was on her annual leave and the publicity department where she used to work still exists with the respondent. That out of this termination and the manner it was effected, she has suffered stress and has been unable to get another job since. That she developed a constant headache and was advised to see a psychiatrist and hence seek damages for the suffering she has gone through.

The Claimant further confirmed that she started work with the respondent as a Copy typist in 1993 under the Publicity Officer and was in a team of about 100 people. That there were 6 secretaries of the same rank and when she joined the company she found some secretaries but one other joined after her. That while on her annual leave she received her May salary as her contract was still ongoing but when she resumed after leave the Manager gave her the termination letter and was declared redundant as from 30th June 2008. She was told to go home and when she read the letter of termination she was in shock as nobody had given her notice or warned her that her position was no more.

The Respondent stated that they wrote to the claimant on 23rd May 2008 advising that she was among the persons that had become redundant as of June 2008 and that this was a notice of the impending redundancy and therefore amounted to a notice of intention to terminate the employment of the claimant by law and that lawful procedures were applied in the redundancy process. That the same was not discriminatory as the reasons were given and that a meeting had been held with the claimant to discuss and impending termination and that due payment was made.

In evidence the respondent witness Beth Njuguna stated that she is the Human Resource manager of the respondent for the last 3 years and therefore did not work with the claimant but is conversant with the case. That as the Publicity Secretary the claimant was in the Sales Department where she worked with her supervisor Ms Kantai who has since left the respondent. That the respondent was undergoing reorganization and her position was no more as this was distributed to other departments. That for efficiency and good business management they had to do the reorganization and the counterpart to the claimant in the same department one Ms Anne was more qualified to undertake all her tasks hence the position of the claimant was no longer needed. That other staff members like Trade Manager Suleiman was laid off and in the department where claimant was, she was the most junior therefore it was decided to lay her off.

That the respondent had made a salary increment on 31st March 2008 which included the claimant and her terminal dues for service used the new salary scale and a one month notice was issued. That in the letter of termination, a meeting is referred to hence the claimant must have known that she was being declared redundant and she had not raised any complaints about it and hence the company followed due process. That she had transferred to the warehouse to avoid her being laid off but her skills could not

match the job given and there was nowhere else she could be placed. That in her case she was entitled to severance pay, notice and leave days not taken.

However there are no minutes to confirm that there was a meeting held between the claimant and anybody in management about the reorganization. The witness confirmed that in the claimant's file there was a record that a call had been made to her about the lay off on 30th May 2008 and the Human Resource Manager talked to her since at this time it was only her who was affected by the redundancy. The re-organisation started in March 2008 and in May the respondent decided not to keep the claimant. That the claimant received a cheque with her final dues but there was no pay slip indicating what the money was for.

That under Section 40 of the Employment Act claimant was the most junior staff among all the secretaries, leave days was paid in cash and severance pay was paid. However the witness did not have the record of all staff considered as against the claimant or the record or reorganization.

Parties made their arguments in Court. Both parties filed their submissions.

It is not in dispute that the Claimant was employed by the Respondent from October 1993 to 30th June 2008 and that she was the Publicity Secretary by the time of termination. That she proceeded on Leave in May 2008 and resumed in on 2nd June 2008 when she received the termination letter dated 23rd May 2008. That for the 15 years she served there was no record of indiscipline and had been promoted over time with salary increases.

In a case where redundancy is pleaded as the reason for termination this Court notes that the law is very clear on the procedure applicable. It involves a process. Employees involved are not the subject but rather the positions.

Sections 2 of both the Employment Act No. 11 of 2007 and the Labour Relations Act No. 14 of 2007, define the term 'redundancy' to mean:

the loss of employment, occupation, job or career by involuntary means through no fault of the 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.'

Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. 'Reorganisation' is not defined in our law books. Dictionary describe 'reorganisation' to include '*significant modification made to legal, ownership, or operational structures of a company to make it more profitable.*' Although not expressly defined under the Employment Act 2007, 'reorganisation' is contemplated by section 45 [2] as a fair termination reason. The provision refers to:

Operational requirements of the employer.

Companies restructure not necessarily because they are in financial distress, but for such other reasons as mechanization of the modes of production. The terms *redundancy, reorganisation and restructuring* are related, but can be separable. There are other terms used in different jurisdictions, to denote this form of employment termination. These include *downsizing, lay-off, and rightsizing*. Whatever term is used, the decision results in the dissolution of an employment agreement. In Court of Appeal of New Zealand case of **Brighouse Limited v. Bilderbeck [1994] 2 ERNZ 243 [CA]**, the Court explained in detail that the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The

employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

However, the reasons given by employers for redundancies are open to judicial interpretation. The Court must be satisfied that in all the circumstances of the case the decision made by the employer was reasonable. Re-organisations become a superfluous exercise if done for the sole purpose of getting rid of an employee.

In *the English case of Chapman v. Goonvean & Rostowrack China Clay Limited [1973] 2 All ER, 1973*, Lord Denning M.R. held that it is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before. In this case the employer terminated the contracts of certain employees on the basis of redundancy, but went ahead to recruit new employees to undertake the same roles. *The House of Lords in Polkey v. A.E. Dayton Services Limited, 1988 ICR 142 [HL]* examined the duty of employers to act reasonably in all termination decisions.

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Fairness in all forms of termination is the staple of Industrial Law. In the *Industrial Court of Kenya Cause Number 231 of 2010 between Kenya Union of Domestic, Hotel, Education, Institutions and Allied Workers [KUDHEIHA] v. Rabai Road Primary School, Justice I.E.K Mukunya* found the employer to have correctly terminated the contract of an employee for economic reasons, but concluded the employer failed on fairness and awarded compensation. Whether a redundancy decision is made in good faith is a question of fact and degree, depending on the circumstances of the case. So long as the decision is reasonable, and exercised in good faith, the Court is encouraged not to intervene. The Court however, has a duty to investigate facts and circumstances, and determine if the exercise of the managerial prerogative was reasonable and clothed in good faith.

Did the respondent act in a reasonable manner and in good faith?

I did not find evidence indicating a fair process was employed in the process of re-organisation by the respondent. No records were shared to convince this Court that indeed there were consultations within the respondent's business to ascertain the purpose and the need for a re-organisation resulting in some positions being unnecessary thus the termination of the claimant as the only persons affected.

Court is further guided by the provisions of Section 40 of the Employment Act, which provisions give the conditions precedent before one is declared redundant: these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the following:

1. Give notice to the Union or labour officer a month before the process commences
2. For those not unionised, personal letters copied to the labour Officer;
3. Use a criteria of seniority, abilities and reliability of each employee;
4. Where there is a CBA the same should not disadvantage any employee;
5. Leave days due should be paid in cash;
6. One month notice or one month pay in lieu of notice; and

7. Severance pay not less than 15 days for each year of service.

These are important steps for each employer wishing to pursue redundancies, layoffs; reorganisation and or restructuring that can be a useful tool.

Did the respondent herein apply these legal guidelines? Was the respondent in a position to comply with these legal guidelines? Were there reasonable steps taken to ensure the respondent took these legal guidelines?

There was no evidence that the Claimant was unionized and even if she was not there is no evidence before this Court that she was given notice of the re-organisation or a labour officer responsible in the area was involved in advising the procedures application in this process. The letter dated 23rd May 2008 copied to the Labour Officer is not the notification envisaged under the law. If re-organisation commenced in March 2008, that is the time the Labour Officer should have been informed and not just share the final decision of the respondent. This was not the intention of the law. The Labour officer should have been apprised of the matter to give advice before the termination notice. This is a requirement under the law.

The respondent witness stated that since March 2008 the respondent commenced a re-organisation process that resulted in the Claimant being identified as the only affected employee to suffer loss of employment since she was the most junior of all the secretaries. However no report or record of this exercise was offered in support of this assertion and the basis applied in arriving at the decision that the claimant was the most junior of staff to be declared redundant. No record was produced as to how all staff was categorized and the claimant listed as most junior staff to be declared redundant.

If indeed there was a re-organisation in the respondent business that commenced in March 2008, this was a serious management concern that should have had extensive consultations and documentation. An employer will not be allowed to just cite re-organisation and without any basis identify and single out an individual for termination. Fair procedures demand that an employee who has given their labour to an employer and in this case the claimant record of 15 years should have been a major consideration over and above meeting other procedural requirement in a process like the one the respondent seeks to rely on for her termination.

By virtue of her position with the respondent, the claimant should have been involved in ensuring the legal guidelines were adhered to in any reorganisation and or redundancies. I find the letter dated 23rd May 2008, which letter refers to a meeting whose record was not taken or produced to guide this Court was not intended to commence this process as outlined above; rather it was to communicate a pre-determined decision of the respondent. At no time did the respondent demonstrate that they intended to take any reasonable steps toward following the provisions of Section 40 of the Employment Act.

I therefore find that the decision taken by the respondent to terminate the employment of the claimant was procedurally unfair and the same was not based on any reasonable grounds and therefore substantively unfair. The termination of the claimant is therefore found to be unfair in the circumstances.

The Court having established that there was unfair termination, the remedies available are as stipulated under Section 49 of the Employment Act. I find there was Notice issued in the letter dated 23rd May 2008 and indeed the Claimant received her salary for June 2008. Though not particularised, I note the claimant received the sum of Kshs. 368,283/= and putting this into consideration, this Court will award the equivalent of 6 months' salary of the claimant at the time of dismissal.

The claimant is also seeking general damages. Damages are punitive in nature and generally intended to teach the defendant that tort does not pay. They are awarded in addition to compensatory damages. However damages may not be awarded in actions for breach of contracts as was held in ***Kenny-v-Preen [1962] 3 All ER 814, CA.***

Section 5 of the Employment Act outlaw discrimination against any employee and under part 5(3) (b)

single out that it will be discrimination where the same is done directly or indirectly:

in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment

it is the duty of an employer to prove that there was a fair practice where discrimination is cited by an employee as contravening these provisions of the law is an offence In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act and omission is not based on any of the grounds specified in the law. Thus when an employer discriminates an employee in the process of termination of employment court will award damages as contemplated under Section 12(3) (VI) of the Industrial Court Act.

Though the claimant gave evidence that she suffered shock and has had to see a psychiatrist due to the effect caused by the unfair termination, this Court was not given such evidence to help in making a good assessment of her situation as well as make an assessment as to why she has not been able to get a new job. This Court will therefore not make an order for general damages as prayed.

For the above reasons, court enters judgement for the claimant in the following terms:

- 1. Compensation for unfair termination amounting to Kshs.339,954.00**
- 2. Costs of the suit**
- 3. Interest on (1) and (2) above**

These are the orders of this Court.

Dated and delivered in open Court at Nairobi this 8th day of February 2013.

Justice Monica Mbaru

Judge

Industrial Court of Kenya

Appearances:

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