



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1530 of 2011**

**SUNIL KUMAR CHHABRA.....CLAIMANT**

**VERSUS**

**G4S SECURITY SERVICES LIMITED.....RESPONDENT**

***Rika J***

**CC. Elizabeth Anyango**

***Mr. Odongo instructed by Nyachoti and Company Advocates for the Claimant.***

**Ms. Ogalo instructed by Oraro and Company Advocates, for the Respondent.**

**ISSUE IN DISPUTE: SEVERANCE PAY**

**AWARD**

1. The Claimant instituted the proceedings by filing a Statement of Claim on 7<sup>th</sup> September 2011. He subsequently filed a Reply to the Counter-claim, and lastly, filed his closing submissions on 30<sup>th</sup> October 2012. The Respondent filed its Statement of Reply on 26<sup>th</sup> September 2011. This was followed up by the filing of an Amended Statement of Reply and Counter-claim, Bundle of Documents, and finally closing submissions received in Court on 23<sup>rd</sup> November 2012. The Advocates consented to have the matter disposed of by way of the pleadings and the submissions, under Rule 21 of the Industrial Court [Procedure] Rules 2010.

2. The Claimant was employed by the Respondent Private Security Company, as its Financial Director, on 15<sup>th</sup> September 2007. The Respondent undertook a restructuring exercise. On 30<sup>th</sup> June 2010, the Claimant opted to exit employment through early retirement. The Respondent accepted the Claimant's application to retire early. In the acceptance letter dated 30<sup>th</sup> June 2010, the Respondent tabulated retirement benefits due to the Claimant as follows:-

- a) Pay for days worked up to the last date of employment;
- b) Pay for leave earned but not taken;
- c) Three months' pay in lieu of notice amounting to Kshs. 2,586,600;
- d) Severance pay equivalent to three months' salary amounting to Kshs. 2,586,600; and

e) Car loan write off.

3. This dispute arose because the Respondent did not pay to the Claimant his severance pay, as agreed in the letter dated 30<sup>th</sup> June 2010. The company wrote to the Claimant on 17<sup>th</sup> November 2010, explaining why it would not pay to the Claimant his severance pay. The letter explains, *''Since reaching agreement with you regarding your departure from G4S, we have discovered evidence of financial irregularities which lead us to suspect that the company's 2009 result was significantly overstated. With this in mind we are not in a position to make any further payment to you until this investigation has been completed. I anticipate the investigation will be complete by 30<sup>th</sup> November [2009?], at which point I will write to you again....*

*Yours Sincerely,*

*John Wheator,  
Managing Director.''*

The severance pay was not paid. The Respondent held that investigations revealed that the 2009 bonus was paid to employees in error. A special group audit confirmed the 2009 result was overstated, and bonus paid to employees had no justification. The company had decided to claw back the bonus. The Claimant would not receive his severance pay, because bonus paid to him had been clawed back. Adam Miller, the Regional Managing Director gave the Respondent's final word to the Claimant, in a letter dated 10<sup>th</sup> June 2011 stating,

*''I find no reason that will make me reverse the decision taken and I am afraid therefore that your request is not accepted.''* The Claimant argues that the Respondent's action contravenes section 25 [1] of the Employment Act 2007. It is unlawful, unjust, without merit and an infringement of the Claimant's employment right.

4. The Respondent's reason for with-holding the Claimant's severance pay was not a fair reason at all. The decision was not taken in accordance with justice and equity, and the Claimant's exemplary service with the Respondent, over a period of three years, was disregarded. Chhabra did not have any disciplinary lapses. The audit investigations did not link the Claimant with any financial irregularities. The decision had caused the Claimant anguish, cast aspersions on his character, adversely tainted his good name amongst his peers and former co-employees and affected his employability. The Claimant urges the Court to Award him his full severance pay at Kshs. 2,586,600; costs; interest; and any other suitable reliefs.

5. The Claimant explained that prior to the payment of bonuses in 2009, the Respondent's accounts were audited by professional and duly qualified internal and external auditors. These auditors did not detect any anomalies or irregularities. The decision to claw back is illegal. Retirement benefits are a legal entitlement. The Respondent cannot be allowed to punish innocent employees who received bonuses lawfully, and who were not shown to have been involved in any irregularities or anomalies. In his answer to the Counter-claim, Chhabra stated that if the Respondent was aggrieved, the proper persons to pursue would be the specific individuals involved in the allocation of receipts or raising of credit notes, alleged to have resulted in loss to the company. He has never had his integrity questioned. There was no complaint against him at any Police Station. The final Report by PricewaterhouseCoopers limited did not in any way, implicate the Claimant. Even after unearthing the alleged improprieties, the Respondent did not involve the Criminal Investigations Department [CID]. There is no law or policy in Kenya that allows an employer to claw back bonus paid as a result of overstated accounts. A decision to claw back must be based on a known policy, written law or some predetermined procedure. The PricewaterhouseCoopers' Report did not purport to be conclusive, cautioning, *''the procedure we performed did not constitute an examination in accordance with generally accepted auditing standards. Accordingly, we provide no opinion or other form of assurance with respect to our work, or other information upon which our work was based. We did not audit or otherwise verify information supplied to us in connection with this engagement, from whatever source, except as may be specified in this Report.''* The Report was not based on proper investigations that could result in claw back of bonus paid. The Claimant prays the Court to disregard the Counter-claim and enter the Award in his favour.

6. The Respondent explained in its pleadings and submissions that the Claimant's final dues, were to be paid in instalments. This was the agreement between the parties. Before the final payment, the Respondent discovered evidence of financial irregularities. The Respondent suspected the 2009 Financial Result was significantly overstated, leading to payment to the staff, of undeserved bonus. The Claimant's payment was withheld pending investigations, a fact communicated to him in a letter of 17<sup>th</sup> November 2010. The Respondent denied stating that the Claimant was linked to the financial irregularities, in the letter of 17<sup>th</sup> November 2010. The Respondent elected to handle the matter internally and did not see any reason to invite the Police. Clawback is justified both in law and fact. Bonus was paid based on overstated financial statements. All employees were affected, with bonus deducted from serving employees' salaries. The recovery was fair and justified. The Employment Act allows an employer to deduct wages paid in error. The Respondent gave full consideration of the Claimant's tenure and performance. It considered that the Claimant negotiated an early retirement exit package. These considerations did not justify the Claimant's demand for monies that are not legitimately his. The Claimant was the Respondent's Finance Director. He had overall responsibility and oversight of the financial function. This included ensuring accurate reporting of Respondent's Financial Results.

7. An audit conducted by PricewaterhouseCoopers Limited in December 2010, revealed the Respondent's financial result for 2009 was, as a result of financial irregularities, overstated by about Kshs. 40 million. The effect was that the Respondent was deemed to have achieved its target budget. This triggered payment of management bonus to the tune of Kshs. 23 million in early 2010. A decision was made to claw back bonuses. All affected employees were to repay bonus paid out, which was based on significantly overstated results. The bonus had been paid in error. The Respondent therefore asked the Court to order the Claimant to repay the sum of Kshs. 2,325, 089 being the bonus paid to the Claimant irregularly. The Respondent prays that the sum be allowed in its favour with interest at Court rates. It also asks for costs of the Claim, and for any other suitable relief.

8. The Respondent submits that the Claimant was paid terminal benefits pursuant to Sections 35 and 36 of the Employment Act 2007. The Respondent graciously provided the Claimant with a car loan write off, and severance equivalent to three months salary amounting to Kshs. 2,586,600. These two were solely at the Respondent's discretion. They were not part of the Claimant's entitlements. Severance was not payment wrongly withheld or deducted contrary to section 25 of the Employment Act, as submitted by the Claimant. An employee is entitled to not less than fifteen days' salary for each year completed in service, under the redundancy law contained in Section 40 of the Act. The Claimant however, opted to retire early. He did not leave employment at the instigation of the Respondent. The Respondent is under no obligation to grant severance pay as demanded by the Claimant. *The Black's Law Dictionary, Garner the 8<sup>th</sup> Edition*, describes clawback as money taken back, or the retrieval or recovery of tax allowances by additional forms of taxation. It is the recovery of money which has been paid to a person or company, typically because that payment should not have been made for legal or moral reasons. The Respondent adopted the unjust enrichment approach. It is a justifiable approach, both in law and fact. The Claimant had a fiduciary duty of care to the Respondent, as its Finance Director. He acted in breach of this duty. He ought to have detected the financial irregularities in the course of his execution of his role. He did not, and should not benefit from his breach. He is not entitled to severance pay. The Respondent urges the Court to reject the Claim and uphold the Counter-claim.

#### *The Court Finds and Awards:-*

9. The common evidence of the parties is that the Claimant was employed by the Respondent, as its Finance Director. He was employed on 15<sup>th</sup> September 2007. He worked for about three years, taking an offer for early retirement on 30<sup>th</sup> June 2010. It is not contested that the parties agreed on the terms of early retirement. This agreement is captured in the Respondent's letter to the Claimant, dated 30<sup>th</sup> June 2010. The Claimant was offered Kshs. 2,586,600 as severance pay in addition to other terminal benefits. These facts are not disputed. He left employment, and payment was due to be made on 12<sup>th</sup> October 2010. There was no payment.

10. The Respondent justified its decision not to pay on evidence of financial irregularities at the

Respondent, unearthed after the Claimant had left employment. It was said the financial result for the year 2009 was overstated. This resulted in bonuses being paid out to staff. The Claimant had been paid the sum of Kshs. 2,325,089 as bonus.

11. The Court finds the withholding of the Claimant's severance payment to be without justification. He took early retirement on the strength of a negotiated contract with the employer. Part of the attraction in the early retirement proposal, was the severance payment, the equivalent of three months' salary. The Claimant was not advised that the retirement package was tied down to any subsequent investigations of financial irregularities. He left employment on clear terms, and the Respondent had no reason to unilaterally alter those terms.

12 The question must be asked at the first instance, why the Respondent has continued to withhold Kshs. 2,586,600, while what is claimed as bonus clawback is Kshs. 2,325,089. There is an amount of Kshs. 261,511, which would not be in any way affected, by the dispute the Respondent created after the Claimant left employment. Why would this sum be clawed back, while it was not part of the bonus paid as a result of the impugned 2009 financial result? The withholding of this small, undisputed amount, from an employee who retired, portrays the Respondent as an employer driven by bad faith, and whose explanation of the decision to withhold the entire severance pay lacks credibility.

13. Clawback is not a concept that is common in employment relationships. It is a term borrowed from the US law and can have three meanings. One, it is recovery of performance related payment, based on the discovery that performance is not genuine. This is the clawback invoked by the Respondent, in justifying its decision to deny the Claimant his severance pay. Two, clawback is a rule under US law, which permits a party to take back evidentiary materials that were mistakenly turned over to the other party, but to which the other party would not have been entitled. Three, clawback is money that a party is entitled to keep under one tax provision, but which is taken from them by another tax provision. Of relevance in this dispute is the first form of clawback.

14. In finance and economics, clawback is described as *“when an organization that is attempting to recover from catastrophic shift and/or collapse [e.g. worldwide financial crisis], attempts to essentially tame its past practices, by giving its most highly paid employees bonuses in pay that can be withdrawn or reclaimed, if the reason for bonus is later found to be invalid.*

*The Clawback scheme is tied specifically to the performance of financial products the individual employee may have created and/or sold expecting high profit. If the product does well indeed over a long period of time, and permanently improves the nature of the firm, the bonuses paid to an individual are allowed to be retained. If the product fails, and damages the nature of the firm, even years down the line from the product's inception- then the firm has the inherent right to revoke, reclaim or otherwise repossess some or all of the bonus payment”* [see Wikipedia on clawback].

15. It is useful to note that we do not have in Kenya a legal provision that regulates bonus clawback. The US Sarbanes- Oxley Act 2002 requires the Securities and Exchange Commission [SEC], to pursue the repayment of incentive compensation from Senior Company Executives that are involved in fraud. Section 304 of this Act requires CEOs and Senior Managers to reimburse their company for any bonus or similar compensation, or any profits realized from the sale of the company stock, for the 12 month period following a false financial report, if the company is required to prepare an accounts restatement, due to material non-compliance of the company, as a result of misconduct. This Court has not in the preparation of this decision, come across the equivalent of Section 304 of the Sarbanes- Oxley Act 2002. An individual may be ordered to disgorge funds that he or she received as a result of a violation. In the absence of a clear statutory law regulating such disgorgement, the employer may resort to equitable disgorgement. In all cases, the employee must be shown to have been involved in some violation. It must be shown that the employee has engaged in wrongdoing, to warrant disgorgement of funds. What was the wrongdoing by the Claimant?

16. The Respondent argues that the Claimant was the Finance Director when the false results of 2009 were registered. The Respondent did not show to the Court how the Claimant was personally responsible

for the questionable financial result. He had served for three years without any disciplinary caution or warnings. He stated, and this was not contested by the Respondent, that the financial report of 2009 was the product of internal as well as external auditors. These auditors are still serving the Respondent. What was the Claimant's material violation, non-compliance or wrongdoing in the alleged false results? The law relating to clawback encourages that even in the cleaning up of the corporate world, due process protections must be accorded the concerned employees. Section 304 of the Sarbanes-Oxley Act for instance, mandates the SEC to file a lawsuit in the Federal Courts, to order the employees to reimburse their employers. This ensures that the due process guarantees owed to the employees are not infringed. The Respondent could not just determine unilaterally, after the employee had left employment, that the employee was no longer entitled to severance pay. Chhabra was no longer an employee of the Respondent, at the time the decision to withdraw his severance pay was made. He was not given any chance to interrogate the PricewaterhouseCoopers Report. The Report cautions that *"the procedures we performed did not constitute an examination in accordance with generally accepted standards... we did not audit or otherwise verify information."* This is not a Report that could be used to prejudice the retirement terms, agreed before, between the Claimant and the Respondent. It was inappropriate to condemn the Claimant, without seeking his views on the shaky Review of 2009 and 2010 Accounts Receivables Balances.

17. The letter dated 30<sup>th</sup> June 2010 affords the Claimant a clear promissory estoppel. It contains all the four features of promissory estoppel. Firstly, it has a clear and definite promise. Chhabra was informed that he would be paid for days worked; three months' salary in lieu of notice; unutilized leave days; and severance pay the equivalent of three months' salary. Secondly, the letter was made with the expectation that the promisee, would rely on it. The Respondent expected the Claimant would leave, in line with the restructuring requirements of the Respondent. Chhabra took the drastic decision to retire early. He left employment relying on the contents of this letter. Thirdly, he reasonably relied on the promise; and lastly, that promise has resulted in definite and substantial detriment. The Claimant is out of work and without the full range of his retirement benefits. He was validly released from employment by this letter of 30<sup>th</sup> June 2010. Valid release is the heart of a separation agreement. Chhabra left employment in the knowledge that he did not owe the Respondent, and the Respondent did not owe him, anything outside the letter of 30<sup>th</sup> June 2010. The essence of invoking the doctrine of promissory estoppel is to avoid the substantial hardship or injustice which would result, if such a promise were not enforced. This Court is of the view that unless there is a law or contractual provision that clearly specifies that cash can be clawed back under certain circumstances, employers should exercise utmost caution in unilaterally enforcing disgorgement, particularly in a situation like this, where the employee had already retired, relying on an unambiguous terms agreed with the employer, and where no particular wrongdoing in justifying disgorgement, can be attributed to the employee.

18. The Respondent put the alternative argument that, severance pay was in any case, offered at the discretion of the employer. It is not a requirement under the law. The Court's opinion is that retirement arrangements are exit contracts, negotiated and agreed between the employer and the employee. The Employment Act 2007 does not dictate to the parties what should be an ideal retirement package, but only offers minimum employment standards. Parties may negotiate standards above the statutory minimum. Once an agreement is made, such as was made between the parties on 30<sup>th</sup> June 2010, it is the primary responsibility of the Industrial Court to enforce the agreement. There is no longer discretion left to the employer. The terms of early retirement became binding. The Court disagrees that severance was at the discretion of the Respondent, and finds that it was a contractual benefit. Section 19[1] of the Employment Act 2007 allows employers to deduct any amount paid to the employee in error as wages in excess of the amount of wages due to him. This law does not allow for clawback in the manner suggested by the Respondent. The bonus agreement was not shown to the Court. It is not known what the terms of the bonus were, whether it was contractual or discretionary bonus. It was not a wage paid in error, as described by Section 19 [1], but a monetary incentive paid either through contract or discretion of the employer. Any deductions on the Claimant's retirement package would be shown in the letter of 30<sup>th</sup> June 2010. It was for instance stated that *'these dues will be subject to normal statutory tax.'* Section 19[3] states, *'Without prejudice to any right of recovery of debt due, and notwithstanding the provisions of any written law, the total amount of all deductions which under the provisions of subsection [1] may be made by an employer from the wages of his employee at any one time, shall not exceed two thirds of such*

wages or such additional or other amount as the Minister either generally or in relation to a specified employer or employee, or class of employers or employees or any trade or industry.’’ Even if the Court were to equate a discretionary and normally variable supplemental wage in the nature of a bonus, as a deductible wage regulated under Section 19, the law would not have permitted the Respondent to claw back at the entire bonus at once. The Employment Act does not define the term ‘wages’ or ‘salaries.’ Part IV is devoted to protection of wages and salaries. The Act instead defines the broader term ‘remuneration’ under Section 2 to mean, ‘the total value of all payments in money or kind, made or owing to an employee arising from the employment of that employee.’’ The Court lastly, does not think that any deductions under section 19 [1], can be made without the involvement of the employee. The argument about the need to observe procedural protections in enforcing clawback has been mentioned earlier on in this decision. An employee needs to understand, and even challenge, any form of deductions made from his remuneration. The approach by the Respondent was wrong. The Court is persuaded the Claim is merited, and the Counter-claim has not been established. In the end the Court Orders-:

***[a] The Respondent shall pay to the Claimant Kshs. 2,586,600 in severance pay, within 30 days of the delivery of this Award;***

***[b] The Counter-claim is disallowed; and,***

***[c] No order on the cost and interest.***

Dated and delivered at Nairobi this 12<sup>th</sup> day of April 2013

**James Rika**

**Judge**