REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 269 of 2012

FREDRICK MURIITHI THUITA ……………………………..……..CLAIMANT

V

FIVE FOURTY AVIATION LIMITED ………………………RESPONDENT

JUDGEMENT

This is a claim dated 20th February 2012 by the claimant Fredrick Muriithi Thuita for wrongful dismissal or wrongful termination of his employment by the respondent Five Forty Aviation Limited. That his termination was without notice, severance pay, leave pay, overtime pay, accrued benefits and termination dues. The respondent Five Forty Aviation Limited filed their defence dated 8th May 2012 and admitted that the claimant was there employee and that he was terminated after a discussion and it was mutually agreed that the claimant services be terminated by waiving the necessary notices.

The claimant stated that he was employed by the respondent in a contract dated 1st August 2009 as a Pilot commencing 1st September 2009i on a monthly pay of USD 3,000 net of taxation, that any overtime earned would be as an incentive paid at USD 100 per hour for any hours worked over and above 65 hours a month, and notice for termination was agreed at three months or payment in lieu of notice at 3 months pay and an annual leave of 21 days for each year worked.

That by a letter dated 29th November 2011 the respondent terminated the claimant without adherence to the terms of the contract as between the parties as no notice was given or payment in lieu of notice paid and terminal dues owing at the time were not paid. That the respondent also failed to give reasons for termination and a Certificate of Service has never been issued to the claimant. The claimant therefore is seeking compensation for unfair termination. He also seeks the following;

1. Salary for the month of November 2011 at USD 3,000
2. Severance pay at USD 3,000
3. 46 leave days due at USD 4,000
4. Three months pay in lieu of notice at USD 9,000
5. Unpaid overtime/incentive flying 193.54 hours at USD 19,354
6. Total due being USD 38,954

That notice to sue was issued and therefore the claimant seeks costs of the suit.

On the other hand the respondent stated that they had a contract with the claimant for his employment as their pilot but the same was terminated by mutual consent after holding discussions on the challenges facing the claimant and it was agreed that the claimant services be terminated and the necessary notices as required under their contract be waived. That they had employed the claimant to fly Dash 8 aircraft which the respondent later phased out due to the fact that the models were old and getting spare parts was becoming difficult. They took the claimant for training oversees so that he may qualify to fly other types of aircraft being CRJ but he failed the training and could not be kept in the employment any further as he could not be upgraded to fly any other aircraft. That since the claimant failed his training, he became uncooperative with his seniors and would pick quarrels in the cock pit with captains during flights and was thus a risk to passengers and the safety of all the people in the aircraft.

That for these reasons, it was not reasonable to keep the claimant to fly the remaining Dash 8 aircraft's and by mutual agreement, he was terminated from his employment. That the claimant was paid his salary for November 2011 and all leave due, severance pay and overtime. That the claimant never demanded to have his Certificate of Service which the respondent was ready to issue.

Both parties had extensive evidence submitted and written submission was also highlighted. Consent was subsequently drawn where most claims were settled as follows;

a) Payment in lieu of 3 months notice at kshs.675,000.00

b) Salary for November 2011 at kshs.225,000.00

c) Leave due as at 30th November 2011 (16 days) at Kshs.120,000.00

<u>Total being kshs.1, 020,000.00</u>

The claimant withdrew the claim for severance pay at USD 3,000.

The issues pending for Court determination were outlined as follows:

a) **General damages for wrongful dismissal**

b) **Unpaid overtime/incentive flying 193.54 hours at USD 19,354**

c) **Interest from the date of claimants termination**

d) **Costs of the suit**

e) **Such other relief that the court may deem fit.**

It is not in dispute that the claimant was terminated by the respondent in their letter dated 29th November 2011. This letter refers to 'discussions' held between the parties but does not give the reasons for termination. Under Section 46 of the Employment Act (the Act), an employer exercising their right to terminate an employee must give the reason or reasons for termination. This section must also be read together with Section 43 of the Act as they outline the reasons as to why giving the reasons for termination is important. It thus states at Section 43;

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

By stating this reasons to an employee, they give such an employee an opportunity to examine them and if not genuine, challenge them, and where found not to be genuine such an employee can claim to have been unfairly terminated. The termination notice therefore becomes a very crucial notice in law as it must

comply with certain standards for it to be effective.

In evidence the claimant stated that he was issued with the letter dated 29th November 2011 without prior warning or negative indication of his performance. On the other hand the respondent witness Mr. Nixon Ooko stated that when the respondent noticed the changed attitude of the claimant and the fact that he had been reported to have quarreled with his captain while at the cockpit, he called him to the office and held discussions with him. That since the claimant was unable to pass his training he had changed his attitude to his work and colleagues. Unfortunately this was disputed by the claimant. This meeting and its conversation outcomes were not documented. The termination notice also referred to discussions that the Court cannot confirm as having addressed the conduct, performance or the capacity of the claimant as being the issue having been disputed by the claimant. In any event, in law the reasons for termination should be indicated in the termination notice. That is a legal requirement.

Indeed where an employer claim that an employee was of poor performance, it should be shown that there were attempts to address poor performance through a structured system that sets target to be achieved by the poor performing employee. I note the good measure of taking the claimant for further training abroad, but apart from this professional type of training, there was need to address other underlying issues as the negative attitude of the claimant to his work. By simply stating that when the respondent realised that after the claimant failed in his training it affected his interpersonal skills was a mere averment that was disputed and cannot be verified. It was imperative on the part of the employer to put measures of appraising its employees and noting what needed to be done. Training and appraising staff is a necessary investment for employers to ensure they keep qualified staff but staff that has the right attitude to their work. This improves productivity.

If indeed the termination was by mutual agreement of the claimant and the respondent, the result would have been consent and not a termination. By giving a termination letter is indicative that even if there were discussions, the parties were not in agreement. A termination cannot be in the positive, as it arises from severing a relationship based on one parties view as against a consent that has mutual consent.

An employer retains the rights to terminate an employee at any point on condition that notice is issued and the reasons given. Where circumstances demand summary dismissal can occur but the reasons for the same must be given. In this case the respondent could have exercised this rights as outlined in Section 41 (1);

Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the <u>grounds of misconduct, poor performance or physical incapacity</u> 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 this explanation. [emphasis added].

Therefore the law provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity the employer <u>shall</u> explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice

present during the explanation. Subsection 41(2) requires the employer, before terminating the employment of an employee or summarily dismissing an employee under the section to hear and consider the employee's representations which the employee may have to make in view of the alleged misconduct or poor performance. In this case the respondent acted in contravention of these clear provisions of the Act.

This was mot summary dismissal. If it was the respondent did not state so in the letter of termination. The reasons for summary dismissal and termination are fundamentally different. I find that the claimant was unfairly terminated.

Similarly, am employer retains the means of control of his or her business and subject to supervise any employee where necessary for effective management of the business. It will not simply pass that an employee is quarrelsome, has an attitude or behaves in a manner that cannot be controlled. There are legal sanctions to such behaviour, summary dismissal for gross misconduct or termination with notice or payment in lieu of notice for sufficient reasons. Without these safeguards employees will become ungovernable and bring employers to bankruptcy for lack of guidance or effective management.

Where an employee decided to go on their own escapade without the knowledge of their employer, it is the responsibility of the employer to create systems and safeguards that guarantee effective controls and detection of any behaviour to the contrary. Mere allegations of fraud, collusion to defraud or criminal acts while at work are serious omission and commissions that should cause an employer to take stern action. This was not the case here. Even where this was suspected to have happened, the respondents choose to have ‘discussions’ with the affected employees and no stern action seem to have been taken. That is why the respondent has the Operations Manager like Mr. Nixon Ooko and the Chief Pilot to ensure smooth running and management of its business.

I note the claim for overtime/incentives for 193.54 hours. The respondent stated that all pilots like the claimant to fly extra hours was with the express permission from chief pilot as they were required to rest for a period of 10 hours between flights. The claimant is alleged not to have obtained permission to fly for the extra hours. That these extra hours were acquired fraudulently by colluding with other pilots to fly extra hours. That they were acquired clandestinely in collusion with other pilots and only came to the knowledge of management far much later and that the other staff involved were disciplined and sacked for defrauding the respondent through extra hours. That the claimant was also terminated for these fraudulent acts and should not be made to benefit from acts of fraud.

There was however no evidence to these very strong assertions of the respondent that indeed the chief pilot did not authorise the claimant to take his scheduled flights nor were the other pilots and staff who colluded with him called to give evidence or their statements submitted. To fly 193.54 hours must take several days and weeks if not months. for the claimant to have acted in a fraudulent manner in taking these flights and hours, this should have been easy to detect by the respondent if indeed the Chief Pilot and the Operations Managers were keen through the systems and schedules generated by the respondent monthly as submitted by the claimant in evidence. If indeed these hours were not genuinely earned, the respondent was not in control of its business to now visit the same on the claimant that he was putting passengers at his disposal in danger. The respondent should have foreseen this when they offered the overtime/incentive package to the claimant in his letter of employment.

Under the contract, how many overtime hours was the claimant entitled to take? How was the incentive to be earned? It is obvious that when drawing the contract, this was something reasonably expected and did not happen by mistake. How the respondent decided to manage the overtime/incentive hours beyond the allowed 65 per month was at their disposal to control and not left to the claimant to determine.

The court will therefore confirm the claim for overtime/incentive. I find the contract outline in terms of US Dollars as Kshs. 19,354.

The claim for interest is at the Court discretion upon good reasons. I agree with the respondent submission that interest cannot be claimed as a right or as a remedy as against remedies provided under Section 49 of the Act. I will therefore decline this prayer.

I note the parties drew their contract in US Dollars. This was explained by the respondent as a standard contract as they attract employees from various jurisdictions. I also note when the parties entered into a consent herein the same was drawn in local currency. I will therefore convert the judgment amount in local currency for ease of reference. I will use the Central Bank of Kenya foreign exchange rate as of 2nd May 2013. This amounts to Kshs.83.7006 x 19,354 = 1,619,941.40

For the reasons above outline, I enter judgement for the claimant in the following terms;

a) A declaration that the claimant termination by the respondent was unfair.

i. I grant compensation equivalent to one month pay amounting to Kshs 225,000.00; and

ii. Overtime/incentive amounting to Kshs.1,619,941.40.

Total amounting to Kshs. 1,844,941.40

b) Issue Certificate of Service

c) Each party to bear their own costs.

Delivered in open court at Nairobi this 3rd day of May, 2013.

Monica Mbaru

JUDGE

In the presence of

…………………………………

……………………………

Court clerk