



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2187 OF 2012

BONIFACE ODUOR.....CLAIMANT

VS

JOSPER LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 29th October 2012, the Claimant sued the Respondent for unfair termination and failure to pay terminal benefits. The Respondent filed a Response on 13th December 2012 and the matter was heard on 24th May and 14th June 2013, with the Claimant appearing in person and Mr. Jaleny instructed by Jaleny & Co Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called Stephen Okono and Patrick Makau Syovo. Both parties filed written submissions.

The Claimant's Case

2. According to the Claimant, he was employed by the Respondent in September 2007 as a driver at an initial monthly salary of Kshs. 6,500 which was increased to Kshs. 7,775. The Claimant worked as such until May 2012 when the Respondent terminated his employment, without notice or lawful cause. The Claimant testified that around February/March 2012, the Respondent's Director, Otieno Okono notified him alongside other members of staff who were stationed at the Respondent's office along Jogoo Road in Nairobi that they would be transferred to Thika. The Claimant asked for a loan to facilitate his relocation to Thika. For a few days, the Claimant operated between Nairobi and Thika but on 7th May 2012, he received a termination letter dated 19th January 2011. He was not paid any terminal dues. The Claimant told the Court that for the entire period of his employment with the Respondent, he took leave for only one year.

3. The Claimant's claim is as follows:

- a. Severance pay (7,775/30x15 daysx5 years).....15,550
- b. Unpaid leave.....38,875
- c. House allowance (15/100x7,775x2 yearsx12).....27,990
- d. Overtime (3,200 hoursx7,775x1/225x15x5 years).....82,900
- e. Compensation (12 months x 7,775).....93,300

- f. Costs and interest

The Respondent's Case

4. In its Response, the Respondent stated that the Claimant's salary was Kshs.6,500 and not Kshs. 7,775 as claimed by the Claimant. The Respondent denied having wrongfully terminated the Claimant's employment. Rather, the Claimant was retired after attaining the mandatory retirement age of 60 years. Specifically, on 19th January 2011, the Respondent served the Claimant with a nine months' retirement notice. The Claimant was duly informed of his retirement benefits.

5. Being dissatisfied with the retirement benefits as calculated by the Respondent, the Claimant referred the matter to the Labour Officer in Industrial Area, Nairobi. The matter was subsequently referred to the Labour Officer in Thika, who invited the parties for a joint meeting which the Claimant failed to attend.

Findings and Determination

6. The first issue for determination in this case has to do with the nature of the cessation of the Claimant's employment with the Respondent. The Claimant pleaded that he was terminated without notice and without lawful cause. He however admitted in cross examination that by the time he left employment he was 63 years old. He further admitted that he was notified by the Respondent that he had reached retirement age. From the foregoing, it is clear that the Claimant retired from the Respondent's employment upon attaining retirement age. The claim for unfair termination is therefore without basis and is hereby dismissed. The claim for one month's salary in lieu of notice is also dismissed.

7. Before addressing the Claimant's specific claims, I need to determine his applicable monthly salary at the time he left the Respondent's employment. The parties gave conflicting figures on this account and the Court therefore adopted the applicable minimum wage for a driver (cars and light vans) as per the Regulation of Wages (General) (Amendment) Order, 2012, being Kshs. 11,580 exclusive of house allowance. Loading house allowance at 15%, the Claimant's salary would have been Kshs. 13,317 which the Court adopts for purposes of this claim.

8. With regard to the claim for leave, the Respondent did not produce leave records as required under Section 74 of the Employment Act, 2007. In the absence of such records, the Court adopts the Claimant's evidence that he only took leave for one year and awards him pay in lieu of leave for the remainder of the period.

9. The Claimant claimed house allowance. Section 31(1) of the Employment Act provides that:

An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation

10. There was no evidence that the Claimant was housed by the Respondent and from the pay slips submitted by the Respondent, the Claimant was paid only a basic salary. The claim for house allowance is therefore allowed.

11. The claim for service pay which was admitted by the Respondent is also payable while the claim for overtime was not proved and is dismissed.

12. The final effect of this Award is as follows:

- a) House allowance (15/100x 11,580 x54 months).....93,798

b) Service pay (13,317x15 days x4 years).....26,634

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c) Unpaid leave(13,317x21 days x3 years+1.75 days x 6 months.32,627

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Total.....153,059

Any money owed to the Respondent by the Claimant is to be deducted from this Award.

The Respondent will meet the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF JULY 2013

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*