REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NUMBER 522 OF 2012

FREDRICK KERAGE …………………..…………………………………..………CLAIMANT

VERSUS

DPL FESTIVE LIMITED …………………………………………………….RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 28th March 2012 and filed in court on the same date, the Claimant FREDERICK KERAGE alleges that he was employed by the Respondent DPL Festive Limited variously as baker, oven man and flour mixer in the production department and in the packing section as a packer from April 2005 to 16th February 2011 where his employment was abruptly terminated. That he performed his work competently, diligently and faithfully throughout his employment. That the termination was unlawful and unfair. He seeks payment of notice, accrued house allowance, service pay, pay in lieu of leave and 12 months' salary as compensation all amounting to 513,372.00.

The Respondent filed its unsigned Memorandum of Reply on 24th July 2012. In the Reply the Respondent denies the contents in the Memorandum of Claim and avers that the claim by the Claimant was heard and resolved through the union. That there is a consent signed between the Claimant and his union, that the Claimant's claim has been extinguished and the Claimant is estopped from making any claim against the Respondent. The Respondent further alleges that the Claimant's terms are covered by the Collective Agreement signed between the Respondent and the Bakery Confectionary, Food Manufacturing Union and that the dispute is premature as it had not gone through the process of dispute resolution under the Labour Relations Act. The Respondent further avers that the cause of action is defective. The Respondent prays that the claim be dismissed with costs.

The case came up for hearing on 6th November 2012 when parties sought leave of the court to proceed by way of written submissions. The leave was granted and the Claimant filed his written submission on 23rd January 2012 while the Respondent filed its written submissions on 25th February 2013.

I have considered the pleadings, the written submissions and the authorities referred to. It is my opinion that the issues to be considered are the following.

1. Whether the Claimant had a right to seek redress in the Industrial Court.
2. When the Claimant was employed by the Respondent and nature of Claimants employment specifically whether or not the Claimant was a casual employee,
3. Whether the termination of the Claimant's employment was unfair and,
4. Whether the Claimant is entitled to the prayers sought.

1. **Whether the Claimant had right to seek redress in the Industrial court.**

The Respondent has submitted that the Claimant was a member of the Bakery Confectionary, Food Manufacturing and Allied Workers Union, that the union met with the Respondent on its behalf and that the claim has been filed prematurely in this court as the dispute resolution machinery under the Labour Relations Act has not been complied with. The Claimant on the other hand submits that the Collective Agreement between the Respondent and the union had expired, that the Recognition Agreement was with Dippolly Plastic Industries Limited T/A DPL Festive Bakery while the Claimant was employed by DPL Festive Limited, that the Responden is a separate legal entity and therefore the Recognition Agreement is not binding oor the Respondent, that the law is silent on who is to refer a dispute to court.

It is on record that the Respondent has a Recognition Agreement with the Union and that the parties have a Collective Bargaining Agreement. The Respondent has also confirmed that Dippoly Plastic Industries Limited changed its name to DPL Festive Limited. They have filed a Certificate of change of names.

The issue here is whether the Claimant, who it is alleged was a member of the union, can file a claim directly to the court.

The Labour Relations Act provides for the procedure for filing disputes involving trade unions. The present case is not filed by a trade union but by an employee who is a member of a trade union. The Employment Act section 87 allows an employee to lodge a complaint either with a Labour Officer or file a dispute in the Industrial Court. The Industrial Court Act also authorizes any employee whether a member of a trade union or not to file disputes relating to employment directly to court. The Labour Relations Act is not applicable in such a situation as the case is not a dispute by or against a trade union, which is the subject of the Labour Relations Act.

Again in this case the Claimant has alleged and the Respondent has not denied that the Claimant's case was taken up by the union but the meeting between the Respondent and the Union did not resolve the dispute to the Claimant's satisfaction. Since the union seems to be of the opinion that the Claimant has no case, the Claimant had a right to pursue his claim directly. There is no law barring the Claimant from coming directly to the Industrial court to pursue his claim.

I therefore find that the claim by the Claimant herein is properly before this court.

2. **WHEN THE CLAIMANT WAS EMPLOYED BY THE RESPONDENT.**

The Claimant alleges in the Memorandum of Claim that he was employed by the Respondent in April 2005. The Respondent has not contested this fact although in paragraph 7 of the submissions there is an allegation that the Claimant was a casual employee.

Having not contested the allegation by the Claimant that he was employed in 2005, the Respondent cannot allege that the Claimant was a casual as he had worked continuously from the time he was employed. Section 37(1) provides for automatic conversion of casual employment to term contracts upon completion of 1 month's continuous service or 3 months intermittent service.

I therefore find that the Claimant was not a casual employee.

3. **WHETHER THE TERMINATION OF THE CLAIMANTS EMPLOYMENT WAS UNFAIR.**

The Claimant alleged that the supervisor of the Respondent accused him of eating bread on 15th February 2011 and reported him to the Director who on 16th February 2011 at 2.30pm ordered him to leave the premises and never to return effectively dismissing him without a hearing. The Respondent has not denied this fact but states that the Claimants case was taken up by the union who resolved the matter with the Respondent on the Claimant's behalf.

As submitted by the Respondent, the hearing was after the Claimants dismissal and in the absence of the Claimant. This does not constitute a hearing within the provision of Section 41 of the Employment Act.

Again the agreement reached between the Respondent and the Union is ridiculous. They agreed that (as submitted by the Respondent) ***"The union had asked the Management to consider paying off the Claimant an amount to enable him travel home since in the collective agreement an employee is not entitled to such as a casual employee since the same was paid to him in cash. The amount was to be decided and to be paid on Wednesday 20th April 2011. The Claimant never came back for the ex-gratia payment".***

This is not a settlement by any stretch of the interpretation of the word agreement. There is no denial that the dismissal was verbal and that the Claimant was not given an opportunity to defend himself before the decision to dismiss him was made.

The dismissal of the Claimant was therefore both substantively and procedurally unfair.

4. **WHETHER THE CLAIMANT IS ENTITLED TO THE PRAYERS SOUGHT.**

The Claimant prayed for the following remedies.

a. Notice
b. Accrued house allowance
c. Service pay
d. Leave
e. Compensation
f. Costs and interest

1. **NOTICE**

Having been unfairly dismissed without notice, the Claimant is entitled to notice. The Respondent has not contested the figure of Shs.14,340.00 or produced any employment records to prove that the Claimant did not earn the said amount per month.

I award the Claimant the sum of kshs.14,340 on account of notice.

2. **ACCRUED HOUSE ALLOWANCE**

The Claimant has not shown that the amount of Kshs.14,340 was exclusive of house allowance. The Claimant has also not shown that for the 72 months he worked with the Respondent he ever complained about non-payment of house allowance.

I have looked at the salaries in the collective bargaining agreement between the Respondent and the union and the basic salary payable to the Claimant as baker, flour mixer, oven man or packer was kshs.9,442.00. The salary of shs.14,340.00 which the Claimant alleges was his salary is far higher than the basic salary inclusive of 15% house allowance.

I find that the Claimant has not proved that his salary did not include house allowance. I therefore dismiss the claim.

3. **SERVICE PAY**

The Claimant claims service pay at the rate of 1 month's salary per year worked. The collective agreement attached to the Respondents Pleadings provide for gratuity of 18 days salary for each year worked.

I therefore award the Claimant service gratuity at the rate of 18 days per year worked in the sum of Kshs.51,624/=.

4. **LEAVE**

The Claimant claims annual leave for all the 6 years worked. The Respondent has not contested that the Claimant did not take leave. According to the collective agreement the employees of the Respondent were entitled to 23 leave days per year. This amounts to Kshs.65,964 for 6 years and I award the Claimant the same.

5. **COMPENSATION**

The Claimant has prayed for compensation at the maximum rate of 12 months salary. The Respondent has not contested the prayer. Considering the circumstances under which the Claimant was dismissed, the years of service and the fact that the Respondent has not specifically denied the prayers, I award the Claimant compensation of 8 months salary. This amounts to Kshs.114,720.00.

6. **COSTS**

The Respondent shall pay the Claimants costs of this case.

In summary therefore, I enter judgment for the Claimant against the Respondent for Kshs.246,648.00 and costs.

Orders accordingly.

Read in open Court this ___**9th**_ day of ____**July**_____2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

____**Maweu h/b for Macharia** for Claimant

____**Andiva h/b for Onyony**__ for Respondent