



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 63 OF 2013
(Originally Nairobi Cause No. 1954 of 2012)

KENYA HOTELS & ALLIED WORKERS UNION

CLAIMANT

v

UNITED SPORTS CLUB TRUSTEES

RESPONDENT

JUDGMENT

1. Kenya Hotels & Allied Workers Union (Union) filed a Memorandum of Claim against United Sports Club Trustees (Respondent) on 25 April 2013 and the issue in dispute was stated as *unlawful/unfair intended termination of Mr. Sabastian Kinoti on ground of trade union activities/affiliation.*
2. The Respondent filed its Memorandum of Response on 7 May 2013 and I heard the parties on 8 July 2013 and reserved judgment to 23 August 2013.
3. There were interlocutory proceedings and the same were dealt with by Nzioki wa Makau J.

The Union's pleadings and evidence

4. The Union pleaded that the Grievant was employed by Respondent as a waiter in 1994 and was later promoted to a bar man at a salary of Kshs 19,503/- and house allowance of Kshs 3700/-. The Grievant also served as a shop steward and Chairman of the Union's Mombasa branch.
5. When the Collective Bargaining Agreement between the Union and Respondent signed on 2 March 2010 expired and a new one was in the process of being negotiated, the Respondent asked the Grievant among other union officials to withdraw from the union but they refused.
6. The Union as a consequence reported a trade dispute to the Minister for Labour alleging unlawful and wrongful victimization of the Grievant and 2 others. The Minister appointed a Conciliator but the Respondent refused to attend the conciliation meetings and the Conciliator advised the union to invoke the legal process.
7. In his testimony, the Grievant stated that when he was appointed as a bar man he was never trained in the use of the ETR machine. On 25 January 2011 he was issued with a warning letter for mispunching of ETR receipts.
8. On 8 March 2011 he was issued with another warning letter for negligence at work. This was because he had confused and served the Respondent's Vice Chair with a single tot rather than the usual double tot whisky.
9. On 21 March 2011 the Grievant got his third warning letter for a shortage for which he was deducted.
10. On 19 June 2011 the Grievant got another warning letter for mispunching Kshs 300,300/- instead

- of Kshs 300/- into the ETR machine. Other warning letters were issued to the Grievant on 25 March 2011, 3 July 2011, 12 August 2011 and on 23 May 2012.
11. On 24 May 2012 the Grievant was issued with a letter giving him 4 months notice of intention to terminate his services.
 12. The Grievant case was that the termination was in breach of section 41 of the Employment Act and ILO Conventions Nos. 87, 98 and 158. He testified he was not given a hearing
 13. The Union therefore sought that the Grievant be granted various relief set out at paragraph 4.3 of the Memorandum of Claim.

Respondent's pleadings and evidence

14. The Respondent pleaded that the Grievant was its employee from 1994 until time of dismissal. At the time of dismissal the Grievant was earning a basic pay of Kshs 19,503/- and house allowance of Kshs 3700/- per month.
15. Regarding the termination, it was pleaded that this was due to Grievant's uncooperativeness, rudeness to club members and persistently failing to follow lawful instructions. It was further pleaded that the Grievant twice mispunched ETR billing system occasioning queries from Kenya Revenue Authority, overcharged members by not producing ETR receipts, threatened the Club Manager, was negligent, absconded from duty before designated time and was issued with 6 warning letters within one and a half years. There was loss of confidence
16. On hearing and opportunity to be heard, it was pleaded that the Grievant was invited twice on 12 September 2012 and 25 September 2012 but he refused to attend and was given four months notice of termination as set out in the Collective Bargaining Agreement and that he has refused to clear with the Respondent so as to be paid Kshs 229,088/- as terminal dues. The termination, it was submitted was in accord with the laws of Kenya.
17. The Respondent called its Chairman Hamendra Shah to testify. The witness testified the Grievant had been issued with several warning letters, on 19 November 2011 for mispunching Kshs 140,140/- into the ETR machine, 18 June 2011 for another mispunching Kshs 300,300/-, on 24 May 2012 for not getting rolls for ETR machine in good time, on 12 August 2012 for threatening the Club Manager and on 9 June 2011, 25 January 2011, 8 March 2011, 21 March 2011 and other warnings culminating in termination on 24 May 2012.
18. The witness stated it was impossible to work with the Grievant, he was uncooperative and the termination was in accord with the Collective Bargaining Agreement. He reiterated the averments in the pleading that the Grievant refused to attend two meetings to explain his side of the case, attended one meeting and shouted the Chairman down.
19. He concluded by stating the Grievant had refused to collect his terminal dues.

Issues arising for determination

20. In my view the issues which arise for determination based on the parties pleadings, evidence and submissions are mainly three
 - a. Whether the termination was procedurally fair
 - b. Whether the Respondent has justified, proved the reasons for the termination and that the reasons were valid and fair
 - c. Appropriate relief if the termination was unfair.

21. I will deal with each issue in turn.

Whether the termination was procedurally fair

22. The primary statutory provision dealing with procedural fairness is section 41 of the Employment Act. Prior to the enactment of the Employment Act, 2007 there was no right to a hearing before termination of employment. An employer could in fact dismiss without cause on notice or pay an equivalent sum in lieu of agreed notice period. The right to a hearing is now part and parcel of employment relationship in Kenya.

23. What an employer is expected to do by section 41 of the Employment Act, on the face of it looks straight forward. If the termination is on the ground of misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language the employee understands the reasons contemplated for the termination. The employee should then be allowed to make any representations.
24. The opportunity to be heard under section 41 of the Employment Act could be oral or documented. The statute itself has not prescribed whether it should be oral or documented. For a prudent employer, the best practice would be to document the process. Show cause letters and replies or minutes should be followed by an oral hearing, otherwise it would not make sense to ask a fellow employee to be present. The employee is also entitled to have another employee or shop floor union representative present. The employee should make representations which the employer should consider.
25. The allegations/reasons set out in the termination letter addressed to the Grievant comprise both misconduct and poor performance.
26. The letter written to the Grievant on 9 June 2011 asked him to show cause why disciplinary action should not be taken against him. He was to appear before the Management Committee. The 5th warning dated 3 July 2011 was a final warning after various warnings. The letter was copied to the Shop steward and Branch Secretary of the Union.
27. The termination letter of 24 May 2012 did not indicate that the Respondent was contemplating terminating the services of the Grievant. It made reference to several misconduct/performance of the Grievant in the past and to Clause 15(c) of the Collective Bargaining Agreement.
28. Further the Respondent's contention that it gave the Grievant an opportunity to be heard but he refused to attend the meetings with the Management Committee cannot stand. The letter of 25 September 2012 which mentioned this request was not unequivocal that the Respondent was considering changing its mind about the termination of the Grievant. The Respondent did not even inform the Court whether the Union was notified of the requests and what the agenda was.
29. In my view the termination of the Grievant was not in compliance with the provision of section 41 of the Employment Act and therefore procedurally unfair.

Whether the Respondent has justified, proved the reasons for the termination and that the reasons were valid and fair

30. Section 47(5) of the Employment Act requires an employer to justify the grounds of termination or dismissal. Section 43 of the Act on its part require an employer to prove the reasons for termination and section 45 on the other hand requires employer to prove that the reasons for termination are valid and fair. This is what has been referred to as substantive fairness in employment law.
31. The Respondent in its attempt to justify and prove the reasons for the termination annexed 5 warning letters issued to the Grievant over a span of about a year and a half. On 18 June 2011 the Grievant punched Kshs 300,300/- into the ETR machine instead of Kshs 300/-. The Respondent had to explain to Kenya Revenue Authority. The Grievant admitted his negligence nearly led to members not paying their bills in May 2012. The Grievant had threatened the Club Manager in the presence of other employees. He was overcharging clients, clocking out before set time.
32. In my view, the Respondent had justifiable reasons to terminate the services of the Grievant. It has also proved the reasons for the dismissal and that the reasons were valid and fair through the documents annexed to the Memorandum of Response and testimony of the Respondent's Chairman.
33. Unfortunately for the Respondent, it did not comply with the procedural fairness dictates of the Employment Act and I must find the termination unfair on that score.
34. The Union had pleaded that the Grievant had been terminated because of his union activities/affiliation. No evidential foundation or material was led by the Union to enable me reach the conclusion that the Grievant was terminated because of his Union activities or membership.
35. I therefore need not make any reference to ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise Convention, Convention No. 98 on the Right to Organise and Collective Bargaining Convention which are fundamental conventions and Convention No. 158 on Termination of Employment Convention which is a technical convention.

Appropriate relief

Stay of termination

36. This prayer was heard and determined by Nzioki J during the interlocutory stages and I need not deal with it.

Twelve months compensation

37. Compensation not exceeding the equivalent of twelve months gross wages is one of the primary remedies for unfair termination. I have found the termination to have been procedurally unfair. Section 49(4) of the Act has set out some thirteen factors the Court should consider in granting relief. The Court could consider any or all of them. The Respondent had offered to pay the Grievant gratuity as per the Collective Bargaining Agreement. The Respondent had good reasons to terminate the services of the Grievant but did not follow due process.

38. Putting these factors into consideration I would award the Grievant compensation equivalent of two months gross wages which I assess at Kshs 46,406/-

39. The Grievant is at liberty to collect the gratuity as tabulated by the Respondent.

Conclusion and Orders

40. I do find and hold that the termination of the Grievant though substantively fair was procedurally unfair and award him

(a) Two months gross wages compensation Kshs 46,406/-

41. There will be no order as to costs because of the ongoing relationship between the parties embodied in a recognition agreement and collective Bargaining Agreement.

Delivered, dated and signed in Mombasa on this 23rd day of August 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Okotch, Asst Secretary General

Kenya Hotels & Allied Workers union for Grievant

Mr. Nduna, Senior Legal Officer

Federation of Kenya Employers for Respondent