



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 60 OF 2013**

**HESBON NGARUIYA WAIGI ..... CLAIMANT**

**VERSUS**

**EQUITORIAL COMMERCIAL BANK LIMITED ..... RESPONDENT**

**JUDGEMENT**

The claimant Heston Ngaruiya Waigi filed this claim on 18<sup>th</sup> January 2013 for unfair termination, harassment and discrimination against him by his employer the respondent herein, Equatorial Commercial Bank Limited. On 14<sup>th</sup> March 2013, the respondent filed their defence where they admit that the claimant was their employee but was terminated due to redundancy and hence deny all other claims. In evidence, the claimant gave his sworn statement and the respondent called June Ambesa, the human resource Manager.

**The claim**

In the claim, the claimant states that on 12<sup>th</sup> November 2009 he was employed by the respondent who was then operating as Southern Credit Banking Limited, which later merged with the respondent, as a Legal Clerk, on a monthly salary of Ksh.25,000.00 which had increased to kshs.30,000.00 at the time of termination. He continued to serve diligently until 16<sup>th</sup> March 2011 when he was terminated on the basis that since the respondent had become a corporate bank, all his work had been outsourced to external persons and hence his position was redundant hence his immediate termination.

The claimant states that the respondents were in breach of his employment contract on the basis that his letter of appointment required that he should be on probation for 6 months upon which he would be confirmed. He served for the 6 months, he was evaluated but was never given any feedback but his probation was extended without any consultations with him. He was only given a salary increase and an annual bonus. He was evaluated again after several months but again, no feedback was given or a letter of confirmation issued even after serving for over 16 months.

That this breach of contract and failure to get a letter of confirmation greatly affected the claimant who was never put on the respondent's contributory administrative scheme. When he wanted to apply for a staff loan facility, he was advised that he was still on probationary contract hence not eligible for such a facility.

The claimant states that in the course of his employment he was discriminated against, was harassed, treated with abusive, demeaning and embarrassing language and treated separately as against other staff and against the respondent policy. That when he applied for staff training, he was never allowed to attend like other staff. He was shifted from his desk to other work stations without work facilities and thus felt

these were acts meant to harass, demean, embarrass and discriminate against him.

The claimant was not given notice before termination or a chance to negotiate or appeal against the termination decision. He was never given any money from the respondent contributory scheme as he was never added to it. He now claims for loss of prospective income, general damages and exemplary damages. That he was unfairly terminated and should be compensated, his contract was breached, and he was discriminated against and suffered mental anguish and should get exemplary damages with costs and interest.

In evidence, the claimant stated that he was issued with a letter of employment by the respondent dated 12<sup>th</sup> November 2009 and commenced work on 1<sup>st</sup> December 2009. He was to be placed on probation for 6 months then be confirmed upon successful evaluation. He was subsequently evaluated by the human resource officer and told to wait for feedback but he was not given any response or issued with a letter of confirmation. He was also not told if his probation had been extended and on 16<sup>th</sup> March 2011, he was terminated before he could receive his letter of confirmation and after serving for over 16 months. The reason for termination was given as due to rationalisation process ongoing at the respondent after they merged with Southern Credit Limited the claimant had been rendered redundant. That this was the first time he heard about the redundancy. There was no notice and since he was the only legal clerk of the respondent, he felt this reason was not genuine and convincing.

That his contract was grossly breached on the grounds that he was never confirmed, he went for over a year and was still considered to be under probation, he was not put on the pension scheme and he was never issued with a termination notice, all being matters agreed under his contract of employment. He also stated that he was harassed while at work. That he was subjected to abusive language by one Brian Asin, the Legal Officer. He was also subjected to discriminative work practices when he was given so much work that was not part of his duties and contrary to respondent policy.

After his termination, he was never given a chance to explain himself, he was only told to hand over respondent property and leave, which according to the claimant was discriminatory. That there was no procedure followed in this case in arriving at his termination and thus it was unfair. He was also not aware of the redundancy process and to be declared so was unfair.

The claim is seeking compensation for unfair termination and for the psychological torture. That he was mentally in anguish and trauma due to loss of income as he lost his job without notice.

That he could not access the staff loan since he was on probation terms. He was not trained annually even after he applied.

On cross-examination, the claimant stated that he was employed by Southern Credit Limited which merged with the respondent in June 2010. He was not aware that the respondent forgot to confirm him as it was the duty of the employer to do this. He was the only legal clerk and he was not aware how this position was removed. His termination was based on a rationalisation process but this was the first time he heard about it. In the staff manual, he was to receive annual trainings and when he applied, he was never taken. That he tried to apply for a loan but the human resource officer told him he was not eligible since he was still on probation.

That he was subjected to abusive language which he reported through an email but his report was not addressed. He was shifted from his desk and taken to another without facilities like a computer which he needed to do his work.

The claimant also confirmed that he has received one (1) month payment in lieu of notice. After his termination he has tried to get work but failed. He should be compensated as since he was not made part of the pension scheme he has nothing after his termination and this is a huge loss occasioned by the acts and failure of the respondent.

## **The Defence**

In defence, the respondent stated that the claimant was their employee since 25<sup>th</sup> November 2009, they did not breach the employment contract as at clause 3 it was agreed that the claimant could only be confirmed upon satisfactory completion of his probation and not by mere effluxion of 6 months, which was unequivocal condition of the contract and only after this was complied with could the claimant join the respondent's contributory administrative scheme. That the claimant was terminated on account of redundancy as under the provisions of section 40 of the Employment Act.

That the claimant did not satisfactory complete his probation and thus not entitled to claims as a permanent staff of the respondent. The respondent revised the claimant's salary from 1<sup>st</sup> July 2010 in compliance with their minimum entry level grade remuneration standard, which act was discretionary as this was not a condition under the contract.

The respondent denied that the claimant was not harassed or abused nor was he discriminated against as that he was treated in accordance with the law and policy applicable to all staff. The respondent never received any report from the claimant complaining of acts of harassment, abuse or discrimination. He was not entitled to any loan facility or training opportunities as this was not a condition to the contract and thus he has no legitimate expectation to the same. The claimant could be assigned duties anywhere within the respondent departments and thus any shift was expected and a legal clerk is not entitled to any specialised work facilities that the respondent could not afford him

The respondent further stated that the claimant was terminated due to redundancy which was communicated in writing and under section 40 of the Employment Act, the claimant was not entitled to any notice, negotiation or appeal and such a claim is a misconception of the law. Also that the claimant was not entitled to join the respondent contributory pension scheme as he was still on probation and thus has no legitimate claim in this regard.

That the termination was not unfair and no claims arise as against the respondent and the same should be dismissed with costs.

In evidence, June Ambesa gave her sworn statement that as the human resource manager of the respondent, she was aware the claimant had a letter of appointment, he was on the respondent medical scheme, and he got his annual leave but was not entitled to loan facilities or education benefit. He was given one month notice before termination according to his letter of appointment and on the basis that the termination was due to redundancy. Notice was given and payment made.

That the respondent merged with Southern Credit Limited and in the staff rationalisation, there was no position of legal Clerk and hence the termination. Notice was paid as well as severance pay and the 16 days worked in March 2011. The termination was communicated to the Labour Officer as 16 other employees were affected.

The witness further stated that the Claimant's salary was increased after the merger as his pay was lower than what the respondent policy stated. He was paid a bonus but these were discretionary payments and not as of right. The claim that there was harassment of the claimant was not warranted as this did not happen. He had a work station and given all the necessary facilities.

The witness further stated that there were staff loan facilities and the claimant being a support staff was not confirmed to qualify. He joined the respondent in 2009, this was followed by a merger in 2010 and if the restructuring had not been ongoing, he would have been confirmed to be able to enjoy all the facilities and benefits. That it was not a wilful not to confirm the claimant, it was an error.

In cross-examination the witness stated that when the claimant was terminated there was no redundancy notice issued or a reason for it. The contract stipulated a probation period of 6 months, the claimant went through it but was not confirmed yet probation period was never extended. That extension of probation can only be done with the agreement of the employee.

There was no harassment since the respondent has a whistle blowing policy on how to address harassment

and there was no formal complaint lodged by the claimant. The claimant was not evaluated in 2010 to facilitate his confirmation, promotion or salary increase.

That for respondent staff to access the loan facilities was on the discretion of the respondent. One had to apply and there was no pending application by the claimant. There was no complaint regarding the claimant's work performance and when the claimant was not confirmed, he should have also followed up the matter.

## Assessment

In assessing this case the questions that arise are:

1. Whether the claimant was terminated due to redundancy or for other reasons
2. Whether the probationary provisions of the contract were still applicable to the claimant
3. Whether the claimant suffered discrimination

Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of section 40 of the employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair:

**40. (1) an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—**

2. **where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**
3. **Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**
4. **The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
5. **Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**
6. **The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**
7. **the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**
8. **The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

Thus these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the provisions of the law. This is not a one day process as it must be participatory, consultative and informative. The employer must undertake a process to rationalise the various positions in their productivity and business line, which exercise affect various positions as held by their employees. Thus the positions become redundant and not the employees who are employed with skills needed by the employer. The process of redundancy does not affect the performance, qualification or conduct of the employees

In this case, the respondent issued the termination letter on the basis that the claimant had become redundant. This was the reason given. However, in their evidence and by the call of Ms June Ambesa, there was no indication as to the steps taken by the respondent in pursuance to the provisions of section

40 of the Employment Act. What was clear was that the claimant was terminated under the terms of probation that the respondent held to be still in existence even after the lapse of the stipulated period of 6 months.

Section 42 of the Employment Act relate to the termination of probationary contracts. From the evidence of the respondent I take it that the claimant was still held to be on probation even after serving them for over 16 months. The termination was therefore on the basis of a probationary contract that exceeded six months. This is a misapplication of the provisions of the contract as between the claimant and the respondent as the clause on probation provided for 6 months, which could not be extended for more than the legal period of one year and could be terminated within seven days. However, the respondent decided to rely on this clause for the termination of the claimant as well as not affording him other benefits due to other employees similar placed as him. He could not access loan facilities due to the status of his contract, being on probation, he could be terminated with a 7 days' notice under the law or as under his contract for one month. He was never considered as a permanent employee who could earn long term benefits like a loan that would take time to repay. This was an unfair labour practice under the meaning of section 45 of the Employment Act.

Where a person is treated differently from others similarly situated like him, and then this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.

The claimant outlined that he was employed on contract, he was to remain on probation for 6 months and upon review he was never confirmed or given feedback. He was called again but was never issued with a letter of confirmation. He tried to access a loan facility but he was told that he would not qualify since he was still on probation. It was his evidence that he would have taken the loan to improve his circumstance. This was a benefit due to other employees.

The respondent witness stated that the procedure of the respondent was to allow employees to apply for loan facilities. The claimant never submitted an application. She was aware that he was still on probation.

I find the fact that the respondent failed to confirm the claimant to his position, rendered him unable to enjoy some work benefit open to other employees. The fact that the respondent was aware that they needed to have the claimant confirmed but never did confirm him is indicative of the precarious situation they left the claimant at. In the final end, instead of confirming the claimant, he was declared redundant. Even though the respondent stated that other employees were affected by the redundancy situation, this court was not availed this record. Even if this had been availed, the fact remained that the claimant was left as though he was still on probation contrary to the law and this affected his employment benefit. He was not allowed to enjoy the loan facilities like other employees nor was he put on the pension scheme as other employee thus diminishing his pension benefits. This is an act contrary to the law and the court will award damages.

### **Remedies.**

A claim for prospective income must be clearly demonstrated by a claimant. There was no evidence to confirm that the claimant has made attempts to mitigate his circumstances. He is still young and able-bodied and despite his termination by the respondent, he has not been prevented from engaging in other industrious activities. This claim will be declined.

There is a claim for general damages and exemplary damages. From the above analysis the Court has separated the unfair labour practices with finding that the claimant was discriminated against and will

award general damages as well as make a remedy for the unfair labour practices as under Section 49 of the Employment Act. This will be assessed at 12 month pay being 30,000.00 x 12 months amounting to Kshs. 360,000.00.

**In concussion, judgement in hereby entered for the claimant as against the respondent in the following terms;**

- 1. A declaration that the claimant was unfairly terminated by the respondent**
- 2. A declaration that the claimant was discriminated against by the respondent**
  - a. Compensation for unfair termination assessed at 12 months pay amounting to Kshs.360,000.00**
  - b. Damages for discrimination assessed at kshs.100, 000.00.**

**Total award amounting to Kshs.460, 000.00**

- 3. Costs of the suit awarded to the claimant.**

**Delivered in open Court this 16<sup>th</sup> day of September 2013.**

**M. Mbaru**

**Judge**

In the presence of

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