



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2277 OF 2012

RHODA WANJIRU KIBUNJA CLAIMANT

VERSUS

ALEXANDER FORBES RESPONDENT

JUDGEMENT

1. This claim was filed on 12th November 2012 by the claimant Rhoda Wanjiru Kibunja for unfair, unlawful and unprocedural termination of her employment with the respondent Alexander Forbes. The respondents filed their response on 9th January 2013 where they admit the claimant was their employee and was terminated due to habitual lateness, insubordination, general poor attitude all in breach of the contract of employment and thus deny the entire claim. The claimant gave evidence in support of her claim while the respondent called Jane Mbatia, the Human Resource officer in support of the defence. Both parties filed their written submissions dated 16th October 2013 and 22nd October for the claimant and respondent respectively.

Claimant's case

2. The claim is that the claimant was on 1st May 2009 employed by the respondent and issued with a written contract with an annual salary of Kshs.1, 298,734.80 annually which was Kshs.108, 228.00 monthly at the time of termination. In February 2010 the claimant started experiencing difficulties with her immediate supervisor regarding Rightfax where she was constantly pushed to work with it even though it was not attainable. The supervisor took this chance to humiliate her in front of others by shouting and embarrassing her and when the claimant reported to the manager, this was not effectively dealt with. The claimant raised the issue with the chief executive officer (CEO) and this was taken to mean insubordination which resulted in victimisation and harassment. On 2nd July 2010 the CEO convened a meeting at the request of the claimant to seek a solution on protracted issues between her and the supervisor but the claimant was issued with a warning letter but this letter was never issued to her. That this letter had revoked her salary increment while other employees got one; which was discrimination against her. The claimant made a formal complaint as under the respondent Grievance Policy and procedures on 9th September 2010 but this was never addressed. On 18th March 2011, the claimant was summarily dismissed without any notice or reason. This termination was unlawful and unfair in disregard of the respondents procedures meant to deny the claimant her dues.

3. The claim is for a reinstatement and in the alternative a finding that the termination was unlawful and that there should be a compensation of 12 months, 5% salary increase that was never paid, pay for wrongful dismissal, house allowance together with costs of the case all being kshs.2,512,307.00.

4. In evidence the claimant gave her sworn statement that she was employed by the respondent as the

Document Manager in Scheme Administration in the administration of health care. She commenced work 3 days before her contract date so as to attend an ongoing training since she had already been selected for the job. She was on probation and upon confirmation; her salary was increased by 10% from 1.2 million to 1.8 million a year. That this was a new company and there were start up challenges but her work environment was fair. The main challenge was that the claimant was not able to cope with her supervisor an expatriate from South Africa particularly with the implementation of a scheme on health care. The claimant filed a grievance and the supervisor got so angry and claimed that the claimant was insubordination and thus took to harassing her, victimised her and shouted at her which was embarrassing as they were in an open office and others could hear. The grievance was filed on 9th September 2010 but was never addressed.

5. The claimant cited instances when she felt harassed by her supervisor, that she was denied parking space and on one occasion when she reported to work and found her parking space used, she requested the finance officer who did not have a car to allow her to use his space but the supervisor was not happy with this and hence took it up with the claimant and she felt harassed. Another incident was that when staff was being appraised, the claimant supervisor was away and when she returned her appraisal was done under tension and she was to get a 5% salary increase which was not affected while others got it. When she raised the issue with human resource office she was told that there was a discipline case pending against her and hence she could not get the increment. The claimant was not aware of such a disciplinary case to warrant the denial of an increment. She therefore made a report with the CEO who asked another manager to review her case, but the supervisor was not willing to have the matter settled amicably. Soon after the supervisor left and a new supervisor Lydia was appointed and the claimant raised the issue of her salary increase with her as well as her pending grievance.

6. On 18th March 2011 there was an ongoing appraisal, the claimant was called by her supervisor and human resource officer to what she expected to be her appraisal but was given a termination letter. She asked for the reasons but was told to pack her things and leave. That there was no warning or hearing before the termination. She could not have missed any warning as the records keeping person, she had to have all documents registered and acknowledged.

7. The claimant further stated that she introduced several clients to the respondent who took up contracts and was thus late on several occasions and she went out to meet these clients. The days she was away were deducted from her leave days. On allegations that she was insubordinate, the claimant stated that whenever she raised an issue, she was told that there was a notice but was never served with a copy of it and that there was a disciplinary case pending against her.

8. In cross-examination, the claimant confirmed that she saw copies of the warning letter in the defence filed in court, the warning letters were never served on her. She never got a reply to her grievance and thus escalated it with the CEO. That she received an email with regard to being late for work and was able to give an explanation. That her supervisor wrote severally with regard to the claimant being away without approval or filing the leave form and these were to be deducted from her leave days. The claimant admitted that she had a day away without approval and that this day should be deducted from her leave days.

Respondent's case

9. In defence, the respondents stated that the claimant's employment was fraught with irregularities including unauthorised leave of absence, habitual lateness, insubordination, general attitude in breach of the express terms of the contract. That the claimant had serious issues with regard to her work output and general attitude for which she was warned in addition to having disciplinary hearing with the respondent management and thus the claimant was in breach of her contract. That on 8th July 2010, there was a disciplinary hearing on the case of the claimant. That despite the respondent undertaking an appraisal, the recommendations were not binding and any salary increase was discretionary and the terms of the claimant's contract were always respected with regard to her salary.

10. That respondent never received a grievance from the claimant and that if at all it was received, it did

not address particular issues as against the complaints raised against her. The claimant got 3 warning letters before her termination and thus procedural and lawful.

11. On the claims, the respondent stated that service pay is not payable to the claimant as the same is only due as under section 35 of the Employment Act, salary increment was discretionary, the termination was lawful hence no compensation is due and the contract did not provide for a house allowance. The claim should therefore be dismissed with costs to the claimant.

Submissions

12. The claimant submitted that while under the employment of the respondent she underwent harassment and victimisation from her supervisor with shouting and embossments at the office. That in a meeting held on 2nd July 2010 to resolve pending issues, the management failed to look into the claimant concerns and the same ended up against the claimant as a disciplinary issue. The grievance filed by the claimant was never addressed and when she was called hoping to have it dealt with she was terminated. That the warning letters stated to have been issued to the claimant were never received and that all the emails sent to her she was able to respond in the best way possible. The claimant relied on section 45 of the Employment act noting that employment should not be terminated unfairly. The service pay due to the claimant is with regard to statutory deduction that should not be defeated due to the respondent's policy.

13. The respondent on the other hand submitted that the termination of the claimant was lawful as there were valid reasons. That the claimant had a serious issue with absenteeism and lateness, she had been warned about it severally but failed to improve and this was raised in the disciplinary hearing on 2nd July 2010. The absence from office was without permission or authorisation and instead of improving the claimant blamed it on her supervisor. The claimant was terminated upon getting 3 warning letters and there was hearing before termination. The respondent cited the case of **Muthuuri versus National Industrial Bank Ltd [2003] Eklr 145** where the court held that in a case where there was a contract the termination was to be in accordance with the terms of the contract. The respondent also cited the provisions of section 45(5) of the Employment Act on the factors to be considered by the court in establishing if a termination was just and equitable which factors the respondent duly considered.

14. The respondent reiterated the submissions that service pay is not due to the claimant, salary increment was discretionary and damages are not payable as this was not a case of wrongful termination and the house allowance was not under the contract.

From the pleadings and submissions the issues which I see as arising for Determination are:

I. whether the dismissal/termination of the Claimant was unlawful

II. What would be appropriate remedies if the answer to (I) is in the positive.

15. Section 41 of the Employment Act thereof has now created a statutory obligation upon employers to notify and hear representations from employees when contemplating termination of the employment contract. This is what is called *natural justice* under the common law. In the Industrial relations/employment relationship it is known as *procedural fairness*. Even in cases of dismissals pursuant to section 44 of the Employment Act, 2007 the same are also subjected to the requirements of procedural fairness set out in section 41 of the Employment Act, 2007. There are now several decisions of this court that outline the implications and import of section 41 of the Employment Act, and the requirements of procedural fairness in **Cause No. 697 N of 2009, Gilbert Nyabuto Mosome v the Standard Limited** and **Industrial Court Cause No.693 [Radido, J.]** and **Jorum Gakumo v Thika Coffee Mills Ltd. [Abuodha, J.]**

16. Therefore, the implications of section 41 is that an employer may comply with all the procedural fairness conditionalities yet fail to meet the threshold requirements of *substantive fairness* set out in section 45 and 46 of the Employment Act. Broadly, an employer is now expected to prove the validity and fairness of the reasons for termination. What this court then has to address is whether in this case the Respondent complied with the peremptory requirements of procedural fairness before making the

decision to terminate the services of the Claimant.

17. It was the evidence of the claimant that she was terminated without warning or being given a hearing. Faced with a claim of this nature, the onus rested on the respondent to prove that indeed the circumstance leading to the termination of the claim were procedural and further that the reasons advanced to the claimant were valid, just and equitable. The respondent to this and in response stated that the claimant was a habitual absentee and reported to work late, had an attitude to her work and insubordinate and communication was poor. This evidence was not supported in any material way, the witness who testified in Court, Ms Jane Mbatia was not the supervisor as to relate to the issue of general attitude and communication and the persons who could have given this nature of evidence were never called. On the issue of habitual lateness the evidence was scanty and on insubordination, it was not shown as to how this was laid out. The respondent heavily relied on the 3 warning letters that were allegedly issued to the claimant, sadly, the attachments submitted in court as the warning letters issued to the claimant are plainly written, not signed or placed on the letter-heads of the respondent, and Ms Mbatia as the Human Resource Officer for the respondent should have known better than to use such a record. It served no useful purpose.

18. Faced with a claim as this one and without any useful record to give in defence, the respondent should have plainly conceded and settled this claim. I find the respondent had the capacity, the staff and resources to put a better record forward. This being a company there must be a record filing system and if the claimant was issued with any warning letter, copies must have been filed, and in the absence of any authentic record, the claimant's case has to be taken as the plain truth.

18. This was a termination and not a summary dismissal. Where the claimant was not given a hearing or the provisions of section 41 of the Employment Act followed with regard to her being heard in the presence of a fellow employee of her own choice, this was in contravention of mandatory requirements and I find there was unfair termination.

Remedies

19. On the remedies due to the claimant, the claim for service I agree with the respondent and further note the claimant attached her payslip indicating that she was registered with NSSF and NHIF and hence falls outside the provisions of section 35 of the Employment Act. This claim will be declined.

20. On salary increment, the claimant was on a contract of service, the terms and conditions of it are clear and binding upon the parties. If there is a salary increment, the same was to be communicated to the claimant in writing for her to qualify and make it a claim owed to her. This is not the case here and will be declined.

21. House allowance is only due where the same is outlined in the contract as the one issued to the claimant. This cannot be claimed outside the employment contract as a separate entitlement. This will be declined.

22. On the finding that there was unlawful termination, the claimant will be awarded the maximum allowable compensation of 12 months' salary. Her last pay was kshs.108, 028.00.

In conclusion, judgement is hereby entered for the claimant in the following terms:

- a. **A declaration that the claimants termination was unfair;**
- b. **Claimant is awarded Kshs. 1,296,336, less taxation; and**
- c. **Costs of the suit.**

Dated at Nairobi this 22nd day of November 2013.

M. MBARU

Judge

In the presence of

.....

.....

.....

.....