REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 68 OF 2013

(Originally Nairobi Cause No. 336 of 2012)

KENYA PETROLEUM OIL WORKERS UNION **CLAIMANT**

v

KENYA PETROLEUM REFINERIES LTD **RESPONDENT**

JUDGMENT

Introduction

1. Twalib Okello Odongo (Grievant) was employed by Kenya Petroleum Refineries Ltd (Respondent) on 23 November 1995 as a trainee Operator. In the course of time he was promoted to Operator Technician, the highest level in the union cadre. He also served as the Chairman of the Refinery branch of Kenya Petroleum Oil Workers Union (the Union).
2. On or around 5 September 2011 the services of the Grievant as an employee of the Respondent were terminated. The Grievant consulted the union and attempts to resolve the dispute according to mechanisms agreed between the Union and Respondent were put in motion but did not succeed.
3. On 5 October 2011, a Joint Industrial Council meeting was held between the representatives of the Union and the Respondent to resolve the dispute but no resolution was reached.
4. On the same day the Union reported a trade dispute to the Minister for Labour which the Minister accepted on 25 October 2011 and appointed Mr. K. Katana as conciliator. After hearing from the parties the Conciliator observed that at the time of termination the Grievant had only one valid warning letter in the file and in his recommendation he stated that the decision to terminate the Grievant was quite extreme and so recommended reinstatement without loss of benefits according to Clause 1-20 of the Collective Bargaining Agreement.
5. The Respondent did not accept the recommendation and the parties signed a certificate of disagreement on 9 February 2012 necessitating the present proceedings.

Union's case

6. The Union's case is that the termination of the Grievant was unfair and unjustified because the Grievant had finished all training requirements, the termination was in breach of section 41 of the Employment Act since the Grievant was not given a notification and hearing prior to termination, because clause 1-18 of the Collective Bargaining Agreement was not followed, Grievant was a victim of discrimination because of union activities and that the reasons for the termination were not valid and fair reasons, warning system was not followed and the termination was not in accord with justice and equity.

7. The Union therefore sought the Grievant's unconditional reinstatement without loss of earnings or compensation equivalent to foregone years to retirement, maximum twelve months compensation, general damages and costs.
8. The Union called the Grievant to testify. He stated that he had served the Respondent for 18 years and that at time of termination he was earning Kshs 65,000/- as basic salary, Kshs 12,000/- as house allowance and Kshs 9,751/- as shift allowance totaling Kshs 86,756/-.
9. On why the termination was unlawful, the Grievant testified that the reasons given were not clear and that he had finished/completed all training requirements on tasks and skills and the same were signed by his supervisor. He further stated that he attended all the trainings during working days but did not attend those that fell during public holidays.
10. The Grievant also testified that the Collective Bargaining Agreement did not make provision for examinations for progression to next grade after reaching Operation Technician Category 5. The Grievant feared he would be victimized were he to be promoted to next level, a management grade.
11. Regarding absenteeism the Grievant stated that all he had were sick offs and the records were with the Respondent and otherwise he had permission to travel to Israel on union activities.
12. On warnings, the Grievant stated that at the time of termination there was no active warning letter in his file because the last warning was in 2009.

Respondent's case

13. The Respondent filed a Response on 8 November 2012.
14. In the Response it was pleaded that the Grievant was served with a warning letter on 1 February 2011 regarding his progression from Category 5 to JG 9 because he had failed an assessment for promotion on 7 December 2010. And that the Grievant was given an opportunity to re-sit another assessment within two months and to complete all Tasks & Skills pending. A meeting was held on 2 February 2011 to review the Grievant's assessment.
15. On 9 February 2011 the Grievant and Respondent signed a pending Tasks and Skills sheet but the Grievant failed to complete the tasks and skills as he had agreed to. On 12 April 2011 the Grievant sent out an improper email raising concern about his progression.
16. On 24 May 2011 a progression meeting for the Grievant was held and a report made. The report recommended that the issue of the Grievant's progression be handed over to the Human Resources Manager for disciplinary action because he had not finished his tasks and skills within two months as agreed in February 2011. A progression report for the Grievant from 16 November 2001 to 9 February 2011 was prepared on 23 August 2011.
17. On 5 September 2011 the services of the Grievant was terminated through a letter of even date. Several reasons were given in the letter (I will revert to these later) and the letter also stated that the termination was pursuant to clause 1-20(i) of the Collective Bargaining Agreement. Efforts to use the mechanisms set out in the parties' recognition agreement did not resolve the termination of the Grievant.
18. To support its pleadings the Respondent called two witnesses, one the Human Resources Manager and the other, the Trainer, Operations.
19. The Human Resources Manager testified that the Grievant was informed in writing that he had failed in his tasks and skills and that unless he complied within two months he would be terminated. Further he stated that the Grievant expressed concern about being at the mercy of the Respondent were he to be promoted.
20. The witness also told the Court that the Grievant had been given 8 previous warnings and on 5 September 2011 he wrote a letter to the Grievant informing him that his services were being terminated and that the main reason for the termination was poor quality and performance of work and non completion of training requirements.
21. The Respondent's second witness testimony was more on the assessment and training employees were meant to undertake. I will refer to his testimony as may be material to my determination of the issues arising.

Issues arising for determination

22. The issues which arise from the parties' respective pleadings, testimony and submissions are whether the termination of the services of the Grievant was fair and if not appropriate remedies.

Whether the termination was fair

Procedural fairness

23. The Grievant's termination letter was very verbose. The reasons are stated as *work quality and performance, deliberate non completion of training requirements by failure to attend training sessions, non compliance with attempts to correct unacceptable behavior demonstrated by erratic work attendance and absenteeism compounded by questions relating to personal sincerity and integrity….. failure to perform routine duties as to answer work radios quickly…. 8 disciplinary notices… behavior not consistent with the company's corporate culture….* The letter indicated the Grievant was to be paid one month pay in lieu of notice in compliance with Clause 1-20(i) of the Collective Bargaining Agreement.
24. According to the termination letter, the Grievant was terminated because of poor work quality and performance and pursuant to clause 1-20(i) of the Collective Bargaining Agreement. The termination was to take effect immediately on 5 September 2011. The Grievant was to all intents and purposes summarily dismissed.
25. Section 41 of the Employment Act has outlined the essential requirements which an employer should comply with when terminating the services of an employee on the grounds of misconduct, poor performance and physical incapacity.
26. The essential requirements in brief are that the employer should explain to the employee in a language the employee understands the reasons for which the employer is contemplating terminating the services of the employee and hearing any representations to be made by the employee.
27. The employee is also entitled to be accompanied by a fellow employee or shop floor union representative and to be heard and his explanations considered. This is what is called procedural fairness in employment law and the rule of natural justice in administrative law. The rule is captured in the Latin maxim *audi alteram partem.*
28. Whether the Respondent complied with the requirements of procedural fairness is key question in this respect. I will not go into the details of warning letters prior to 2011 because some of them had expired and the main reasons given for the termination happened in late 2010 and 2011.
29. On 1 February 2011 the Respondent wrote to the Grievant informing him that he had failed his assessment and that he had been allowed to re-sit the assessment. The letter also informed the Grievant that if he did not meet the stipulated conditions his services would be determined. This letter was followed with meeting the next day on 2 February 2011.
30. The Grievant was given two months to complete his tasks and skills. A progression review meeting was held on 24 May 2011. The record of the meeting noted the Grievant had not completed his tasks.
31. To my mind this process was both an assessment of the Grievant's performance and disciplinary process. But there was no evidence that the Grievant's union was involved or copied in on the letter dated 1 February 2011 and or the meeting of 2 February 2011.
32. In my view, this course of action was not in compliance with the dictates of procedural fairness of section 41 of the Employment Act and provisions of the Collective Bargaining Agreement.

Substantive fairness

33. The Employment Act, 2007 has placed an onerous legal obligation upon employers in claims for unfair termination or wrongful dismissal. Section 43 of the Act requires the employer to prove the reasons for termination/dismissal, section 45 requires the employer to prove that the reasons are valid and fair reasons and section 47(5) of the Act expect the employer to justify the grounds for termination/dismissal.
34. The scheme created by the Employment Act is fundamentally different from that created by the Evidence Act and the Civil Procedure Rules bearing in mind that the Court is not strictly bound by the rules of evidence.

35. The question therefore is whether the Respondent herein has proved the reasons for dismissing the Grievant; that the reasons are valid and fair and lastly whether it has justified the grounds for dismissal.
36. To this end the Court's attention must turn to the termination letter dated 5 September 2011.
37. I have already mentioned that the termination letter was indeed verbose. The letter makes reference to ***work quality and performance, deliberate non completion of training requirements by failure to attend training sessions…non compliance with attempts to correct unacceptable behavior demonstrated by erratic work attendance and absenteeism…personal insincerity and integrity….failure to perform routine duties as to answer work radios…no less than 8 disciplinary notices…..in compliance with clause 1-20(i) of the Collective Bargaining Agreement….***
38. It is with this verbosity that I must now turn my discussion. But I need to say something about this type of letter and its contents.
39. For one the reasons given in the termination letter lack clarity and verge on vagueness and refer to what appear to have happened over a long period of time. Procedural fairness envisages informing an employee with clarity of the nature of charges he is facing and giving him an opportunity to state his case/respond.
40. Vague and numerous reasons such as in the present case can prejudice an employee in responding to the allegations. Some of the reasons relate to poor performance and some to misconduct.
41. It is also not possible for the Court to know how and whether the allegations were the subject of distinct disciplinary hearings, considering that they are mentioned in the termination letter itself.
42. In order to do justice to this case the Court must deal with the reasons separately.

Work quality and performance/deliberate non completion of training requirements

43. It is necessary for the Court to very briefly discuss what poor performance within the employment relationship connotes. This is because it is very easy to discern what a poor performance in a drama play is but not in the workplace. Many employers confuse poor performance with negligence, incapacity or misconduct.
44. Poor performance does not relate to an employee's behavior in the work place. Behaviour is addressed under misconduct in employment disciplinary process while poor performance examines whether the job which an employee is expected to perform is performed properly (ability).
45. Performance is therefore gauged on the basis of sufficient job output, acceptable quality, compliance with employer operating procedures, sufficient employee effort and ability to perform the job at the expected level.
46. According to the Respondent, the Claimant's work performance and non completion of tasks and skills spread over a long time.
47. The Grievant had been informed through letter dated 22 April 2003 that his performance was below average and an improvement was expected (Respondent Exh 10). On 25 May 2004 the Grievant was again warned, for absenteeism and unsatisfactory training performance (Respondent's Exh 11). On 15 February 2005 the Respondent wrote to the Grievant on his stagnation in his current job group then (Respondent Exh 12).The letter stated an agreement had been reached for Grievant to pursue his tasks and skills programme.
48. On 17 April 2008 the Respondent wrote to the Grievant to note that he had failed to comply with operator's progression scheme then in place. The Grievant had failed to complete his tasks and skills. The Respondent offered him a final chance (Respondent's Exh 12(a) and (b).
49. Assessment reports for the years 2007 and 2008 were also relied on. The assessments noted the Grievant was difficult to work with and weak in completing tasks and skills.
50. The 2008 assessment noted that the Grievant had not completed his tasks and skills since 2005 though his General Shift Supervisor gave him a score of 60% for practical job assessment. On tasks and skills the Grievant scored 0%.The Manager Process Operations noted that the Respondent should seriously consider whether the Grievant should continue in employment. Discussions were held and it was agreed the Grievant would be put on training (Respondents Exh 16).
51. It appears there was no improvement and on 17 April 2008 the Respondent wrote to the Grievant

expressing its dissatisfaction and offering the Grievant a final chance (Respondent's Exh 17).The Grievant did not comply with the agreement on completion of tasks and skills and on 4 December 2008 the Respondent issued him with a second warning letter (Respondent's Exh 20). He was given four weeks to complete the tasks and skills or face disciplinary action. There was a lull until 2010.

52. The Grievant was assessed on 7 December 2010, according to the letter dated 1 February 2011 and he scored only 31% out of the minimum pass mark of 60%. He was given 2 months to re-sit the assessment failure to which his services would be determined. The Grievant agreed to comply but did not, leading to termination in September 2011.
53. According to the Tasks and Skills assessment minutes of 9 February 2011 (Respondent's Exh 2) the Grievant had agreed to complete the tasks and skills in units 2700, 1400 and 1200. Against each item the number of days was assigned and the document signed by the respective parties. Respondent's second witness testified that the Grievant had completed hardware units 1100, 1200,1300,1400,1600 and 2700 but not the control system units.
54. On the other hand, the Grievant produced his assessment for tasks and skills which indicated that he had completed unit 1200 hardware, control and safeguarding systems between 17 January 2009 to 27 January 2009; unit 1400 between 2005 to 2009 and unit 2700 between 2004 to 2009 (Grievant's annexure TO 9).The Respondent's first witness admitted as much though he stated this was at a basic level.
55. The Respondent's first witness also testified that the meeting held on 2 February 2011 was to discuss the Grievant's individual performance and not a collective issue.
56. It was not the case of the Respondent that the Grievant was not meeting set standards of quality and quantity but that the Grievant was not taking and completing trainings to enable him meet set standards and quality. Again it was not argued the Grievant's poor performance was causing any operational problems but that the Respondent operates in a highly safety sensitive environment. This reasons were proved.

non compliance with attempts to correct unacceptable behavior demonstrated by erratic work attendance and absenteeism

57. These reasons majorly are issues of misconduct. The letter of termination is not clear on which dates the Grievant was absent or involved in erratic work attendance.
58. However from the documents relied on by the Respondent, the Grievant was served with a warning letter dated 25 May 2004 (Respondent's Exh 11) for absence without permission, a suspension letter dated 8 November 2006 (Respondent's Exh 13) for absence from work and a show cause letter dated 1 December 2009 (Respondent's Exh 22) for absence from duty without permission or other lawful cause. Because the Grievant did not respond, the Respondent wrote to him on 11 December 2009 informing him he would be deducted 15 days pay.
59. It is apparent that the Respondent sanctioned/penalized the Grievant for these absences and taken in isolation they would not be valid or fair reasons to terminate his services in 2011.

Personal insincerity and integrity

60. On 4 July 2000 the Grievant was issued with a warning letter (Respondent's Exh 9) because he had issued cheques which bounced on presentation. At the time the Respondent had a cheque cashing facility. The letter informed the Grievant that the Respondent was exercising leniency and instead of he would be given a first warning letter.
61. Again on its own this issue was resolved with the Grievant being warned. By virtue of clause 1.18 this warning letter was to be canceled by 4 July 2001.

Failure to perform routine tasks as to answer work radios

62. This issue was the subject of a disciplinary meeting on 5 June 2008 (Respondent's Exh 18). It was resolved that the Grievant be issued with a first warning letter and indeed he was issued with a warning letter dated 18 June 2008 (Respondent's Exh 19).
63. By virtue of clause 1.18 of the Collective Bargaining Agreement this warning was to be cancelled

by 18 June 2009.

8 disciplinary notices

64. I have in one way or another discussed the warning or disciplinary notices issued to the Grievant. Most of them stood cancelled after the lapse of one year after issue. The Respondent's first witness admitted in cross examination that a warning letter should be cancelled after one year but not removed from ones file.
65. However, the Respondent has sought to rely on them to prove the reasons for termination of the Grievant. It follows therefore that the Court needs to discuss the effect or significance of warning letters which stand cancelled or which have expired and which are relied on by an employer to terminate or prove the reasons for the termination of the services of an employee.
66. The Employment Act expects employers to keep records. However, I have not been able to come across any statutory provision dealing with a cancelled, lapsed or expired warning and what would be the legal significance/effect in relying on such warnings in an unfair dismissal complaint. The parties dealt with the issue in the Collective Bargaining Agreement. But the clause in the Collective Bargaining Agreement is not clear whether an employee whose warning has been cancelled should be treated as if he had a clean disciplinary record when found guilty of a subsequent misconduct.
67. In my estimation, although expired warnings may not be used as progressive steps ultimately leading to a dismissal, they may be used as aggravating circumstances once the employee has been found guilty of an offense and there is necessity to decide on an appropriate sanction such as whether to be lenient and or to dismiss the employee.
68. It is the duty of the employer to establish that cancelled warnings can be taken into account. The Respondent did no such thing.
69. As to whether the Respondent has proved the reasons for the termination, that the reasons are valid and fair and justified the grounds, it is my view that the Grievant was aware of the Respondent's rules and policies on completion of tasks and skills and that the tasks and skills had been consistently been applied by the Respondent to all employees.
70. The Respondent in my view has discharged the statutory obligation placed upon it by law. The termination of the Grievant was substantively fair.

Victimisation on basis of union activities

71. One of the grounds asserted to contest the fairness of the dismissal of the Grievant was that the Grievant was dismissed on the basis of his union position and activities. No sufficient evidence was placed before the Court to accept this assertion.

Appropriate relief

Reinstatement

72. Reinstatement is one of the primary remedies for unfair termination or wrongful dismissal. But an order of reinstatement is subject to the qualification outlined in section 12(3)(vii) of the Industrial Court Act. The Grievant was terminated on 5 September 2011. A trade dispute was reported to the Minister for Labour and the Conciliator appointed by the Minister recommended reinstatement on 18 January 2012. The Respondent did not accept the recommendation.
73. A contract of service is one which requires mutual trust and confidence. This is not a fit case to order reinstatement.

Compensation in lieu of foregone years to retirement and general damages

74. No contractual or legal basis or the amount being claimed was laid for these two prayers and they are dismissed.

Compensation

75. The equivalent of a number of months gross wages not exceeding a maximum of twelve months wages is another primary remedy. I have reached the conclusion the termination of the Grievant was procedurally unfair but the Respondent had good reasons to terminate the employment relationship.
76. Considering the thirteen factors set out in section 49(4) of the Employment Act, the report by the Conciliator and more particularly the circumstances in which the termination took place and the length of service of the Grievant, the equivalent of four months gross wages would be just in the circumstances of this case.

Costs

77. Costs don't follow the event in the Industrial Court unlike under the framework created by the Civil Procedure Act and Rules. The Claimant Union and the Respondent are social partners who are engaged in an ongoing relationship and therefore each party will bear its own costs.

Conclusion and Orders

78. In conclusion I do find, hold and declare that though the termination of the Grievant was substantively fair, it was not in accord with section 41 of the Employment Act and the Collective Bargaining Agreement and therefore procedurally unfair.
79. Consequently the Grievant is awarded

a. Four months gross wages compensation **Kshs 347,024/-.**

80. The prayers for reinstatement, compensation in lieu of foregone years to retirement and general damages are dismissed.

Delivered, dated and signed in open Court in Mombasa on this 8th day of November 2013.

Radido Stephen

Judge

Appearances

Mr. Olala Branch Secretary

Kenya Petroleum Oil Workers Unio for Grievant

Mr. Nduna, Senior Legal Officer

Federation of Kenya Employers for Respondent