



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 6 OF 2012
(Originally Nairobi Cause No. 481 of 2011)

MARTIN WEKESA WAMALWA

CLAIMANT

v

BARROW & GRUNDY (UKUNDA) LTD

RESPONDENT

RULING

1. On 28 June 2013 the Court delivered judgment in favour of the Claimant for the total sum of Kshs 51,250/- being underpayments and one month pay in lieu of notice after finding his termination unfair.
2. The Claimant was not satisfied with the award and on 20 September 2013 he filed a Motion application seeking a review or setting aside of the judgment and further that he be granted leave to amend the Memorandum of Claim to include a prayer for '*damages for unlawful dismissal and termination*'. The motion was supported by the Claimant's affidavit sworn on 16 September 2013.
3. I heard the parties on the motion on 6 November 2013 and reserved ruling to 13 December 2013 which was subsequently declared a public holiday, thus the parties were informed through the Cause list that the ruling would be delivered on 19 December 2013. I have considered both parties affidavits and submissions.
4. The mandate to review its orders is given to the Court by section 16 of the Industrial Court Act and rule 32 of the Industrial Court (Procedure) Rules, 2010. I will deal with each issue raised by the Claimant bearing in mind the said statutory provisions.

Compensation

5. I will deal with this issue under damages for unfair termination.

Costs

6. In his submissions, the Claimant stated that the Court did not award him costs though he had incurred costs for accommodation, subsistence, transport and court charges all totalling Kshs 37,000/-.
7. In the judgment, I made an order that there would be no order as to costs.
8. In the Industrial Court, costs do not follow the event like under the Civil Procedure Act and Rules. Section 12(4) of the Industrial Court Act empowers the Court to make such order as to costs as the Court considers just.
9. Award of costs is therefore discretionary and having exercised my discretion, it is not open to me

to review the exercise of the discretion. The exercise of the discretion should be challenged in the Court of Appeal.

Failure to award arrears from 2009

10. The Claimant had sought arrears for housing, call allowance, travelling, credit airtime and leave travelling allowances.
11. The Court rejected most of the Claimant's arrears claim because it found and held that clause 2 of the employment contract dated 1 August 2010 was not retrospective. This issue was discussed at length in paragraphs 23 to 33 of the judgment.
12. The Court made determinations of both fact and law. The options available to the Claimant on the findings of law are an appeal. Strictly speaking, he can also bring himself within the confines of rule 32 on review, if he satisfies the criteria set out therein.
13. In the submissions, the Claimant stated that the award was against section 9(2) and 10(5) of the Employment Act. The sections deal with drawing up of contracts of service by employers and revision of particulars of contract when changes occur. The sections do not assist/support the present application for review/setting aside of the judgment.
14. Considering that the Court discussed the question of effective date of terms and conditions of the Claimant's contract, it is not open to the Court to review its findings in this regard.

Award of pay in lieu of Notice of Kshs 15,000/-

15. The Claimant further seeks review of the award of pay in lieu of notice from Kshs 15,000/- to Kshs 22,500/- which was his gross monthly wages. The gross salary of the Claimant included remunerative and non remunerative payments.
16. The Claimant did not make out any statutory or contractual basis for an award of pay in lieu of notice based on the gross monthly wages rather than the practice of basing it on basic salary.

Damages for unfair termination

17. The Claimant did not seek damages for unfair termination in his Memorandum of Claim. On 11 February 2013, the Claimant filed a Supplementary Response to Defence but no mention was made of damages for unfair termination. In the submissions filed on 29 May 2013 he submitted that he should be awarded compensation for unfair termination.
18. Section 49 of the Employment Act has provided the remedies for wrongful dismissal/unfair termination. The equivalent of a number of months wages not exceeding twelve months gross wages is one of the three primary remedies. It is a discretionary remedy though and the Claimant has not demonstrated why the Court should review its decision not to award him damages/compensation.

Amendment of Memorandum of Claim

19. This particular prayer is misplaced and in any case the Court has no power to order an amendment of pleadings after delivery of judgment.

Conclusion

20. The upshot of the foregoing is that the Claimant has failed to meet the threshold for review outlined in rule 32 of the Industrial Court (Procedure) Rules 2010 or to give sufficient reasons for the setting aside of the judgment and the motion application is dismissed with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 19th day of December 2013.

Radido Stephen

Judge

Appearances

Claimant

in person

Mr. Esuchi Advocate

for Respondent