



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 192 OF 2013

MOSES KAUNDA MORO.....CLAIMANT

VS

CMC MOTORS GROUP LTD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 8th February 2013, the Claimant sued the Respondent for unfair termination of employment and failure to pay employee dues. The Respondent filed a Memorandum of Defence on 28th May 2013 and the matter proceeded for hearing on 30th September 2013 with Mr. Kamotho appearing for the Claimant and Mr. Orina for the Respondent. The Claimant testified on his own behalf and the Respondent did not call any witnesses. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 15th March 2000 in the position of Quality Controller Supervisor 3 at a monthly salary of Kshs. 18,000. The Claimant was promoted and his salary progressively increased to Kshs. 46,440 as at the time he left the Respondent's employment.

3. On 26th July 2012, the Claimant received a letter from the Respondent's Group Human Resources Manager requiring him to show cause why disciplinary action should not be taken against him on allegations of negligence in the performance of his duties as Quality Controller specifically; failing to confirm replacement of an air filter in a Government motor vehicle registration number GKA 325Y.

4. On 30th July 2012, the Claimant responded to the show cause letter and denied any negligence in the performance of his duties. The Claimant's response was accepted by the Respondent and the show cause letter dated 26th July 2012 was revoked vide the Respondent's letter dated 31st July 2012.

5. The Claimant continued working until 29th August 2012 when he received a letter summarily dismissing him from the Respondent's employment on allegations of taking customer vehicles to private garages while on road tests.

6. It was the Claimant's case that the termination of his employment by way of summary dismissal was unlawful and unjustifiable. He was not afforded an opportunity to be heard and

there were no lawful grounds for his summary dismissal.

7. The Claimant prays for:

- a. A declaration that his summary dismissal was unprocedural, unfair and unlawful
- b. House allowance
- c. One month's salary in lieu of notice.....Kshs. 46,400
- d. Punitive and aggravated damages
- e. 12 months' salary in compensation for unfair termination.....557,280
- f. Costs and interest
- g. Any other relief the Court may deem just to grant

8. In his written submissions, the Claimant introduced a new claim for service pay.

The Respondent's Case

9. In its Memorandum of Defence, the Respondent stated that the Claimant fundamentally breached his obligations to the Respondent by grossly misconducting himself in the performance of his duties and thus rendered himself liable to summarily dismissal.

10. With respect to the letter dated 31st July 2012, the Respondent averred that the show cause letter was revoked to allow for further investigations. This did not however mean that the Respondent had accepted the Claimant's explanation. It was the Respondent's case that the Claimant's summary dismissal was lawful and justifiable.

Findings and Determination

11. The main issue for determination in this case is whether the termination of the Claimant's employment was fair, lawful and justifiable. Section 45 (2) of the Employment Act, 2007 provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

***(i) related to the employees conduct, capacity or
compatibility or***

(ii) based on the operational requirements of the employer and that

***(c) that the employment was terminated in accordance with fair
procedure.***

12. In the case of ***Walter Ogal Anuro Vs Teachers Service Commission [2013]eKLR*** this Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

13. The Claimant in this case was issued with a show cause letter on 26th July 2012 on allegations of failure to confirm replacement of an air filter in a Government motor vehicle registration number GKA 325Y. The Claimant made his response on 30th July 2012, in which he

outlined in detail the laid down procedure for receiving and repairing motor vehicles at the Respondent Company and his role in the chain. He sought to show that he had played his role as best as it was humanly possible.

14. It would appear that the Respondent was satisfied with the Claimant's explanation because on 31st July 2012, the Respondent's Group Human Resources Manager wrote to the Claimant revoking the show cause letter dated 26th July 2012. In its Memorandum of Defence, the Respondent stated that this was done to allow for further investigations. There was however no evidence of any further investigations on this particular issue.

15. When the Claimant was subsequently summarily dismissed on 29th August 2012, the reason given by the Respondent for the dismissal was that the Claimant had been diverting the Respondent's customers' motor vehicles to private garages. There was no mention of the earlier charge regarding the air filter for motor vehicle registration number GKA 325Y and the Court found no nexus between this charge and the allegation that led to the Claimant's summary dismissal.

16. With respect to the latter charge, apart from a general allegation, there were no particulars on the motor vehicles diverted, the dates when this was done or the private garages involved. In view of the foregoing, I find that the Respondent failed to establish a valid reason for the termination of the Claimant's employment as required under Section 45(2) of the Employment Act, 2007. Put another way, there was no substantive justification for the termination of the Claimant's employment by way of summary dismissal.

17. I will now deal with the procedure adopted by the Respondent in effecting the dismissal. The standard procedure for handling cases of misconduct, poor performance and physical incapacity is set out in Section 41 of the Employment Act, 2007 as follows:

41. (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

18. Further, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules which are easily accessible to all the employees. In the written submissions filed on behalf of the Respondent, some form of a disciplinary meeting was alluded to. However, from the Claimant's testimony as recorded by the Court, the Claimant was questioned on the issue of the air filter for motor vehicle registration number GKA 325Y by one of the Respondent's Managers, a Mr. Kamau. He was not asked about the charge of taking motor vehicles to private garages.

19. The Court found no evidence that the Claimant was subjected to either the disciplinary procedure set out in Section 41 of the Employment Act, 2007 or the Respondent's internal disciplinary procedural rules. I therefore find the procedure adopted by the Respondent in summarily dismissing the Claimant irregular.

20. Overall, the Court finds the termination of the Claimant's employment unfair for want of both substantive justification and procedural fairness and awards him the equivalent of twelve (12)

months' salary in compensation. He is also entitled to one month's salary in lieu of notice.

21. In the body of the Memorandum of Claim, the Claimant claimed house allowance. However, in the letter of appointment and subsequent letters on salary review, there was no reference to the Claimant's salary being a basic salary exclusive of house allowance or any other allowance. The Court therefore came to the conclusion that the Claimant was on a consolidated salary throughout the entire period of his employment with the Respondent. The claim for house allowance therefore fails and is dismissed.

22. The claim for punitive and aggravated damages was not proved and is also dismissed. The claim for service pay which was introduced in final submissions is not payable as the Claimant was a member of a pension scheme as provided under 35(6) of the Employment Act, 2007.

23. The final effect of this award is as follows:

- a. 12 months' salary in compensation for unfair termination...Kshs. 557,280
- b. One month's salary in lieu of notice.....46,440
- Total.....603,720**

I award the costs of this case to the Claimant. This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF DECEMBER 201

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*