



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1895 of 2011

KENYA JOCKEY AND BETTING WORKERS UNIONCLAIMANT

VERSUS

KENBOOK MAKERS (2002) LIMITED.....RESPONDENT

ISSUE IN DISPUTE: EMPLOYER'S FAILURE TO PAY TERMINAL BENEFITS TO ALICE NDANU

RULING

The facts of this case are clear and not contested. The grievant was employed by the Respondent in October 2002 and resigned in February 2011 after having taken unpaid leave from 6th December 2010. She was paid her terminal benefits but was not paid gratuity which is what is claimed in this dispute. The Claimant reported a dispute to the Minister for Labour but the conciliator appointed by the Minister was unable to resolve the dispute and advised the parties to come to court. The Claim is for Kshs. 172,000/= being service pay at the rate of 26 days per completed years of service. The Grievant's last salary was Kshs. 21,500. The Claimant admits not giving the required notice and pleads that the equivalent amount be recovered from her terminal benefits.

The issue for determination by this court is only whether the Grievant is entitled to the gratuity as claimed. The Respondent contends that since she resigned she is not entitled to the same as the parties collective bargaining agreement only contemplates payment of gratuity where an employee's services have been terminated and not where she has resigned.

It is important to reproduce the relevant paragraphs of the collective bargaining agreement. These are paragraphs 11(a) and (b), 9(f) and 20. They are reproduced below.

“(a) After the completion of the probationary period, employment shall be terminable by either party by two month's notice or pay in lieu. Provided the company has the right to dismiss an Employee summarily for gross misconduct or other lawful cause.

(b) Incase of any employee being terminated from the employment without wrongful cause the employee will be entitled to terminal benefits under Clause No. 9 (f) and Clause No. 20.

Clause No. 9(f)

In the event of an employee being declared redundant he/she shall be entitled to:

1. The normal notice or pay in lieu of notice as defined in the Agreement.

2. **Pro-rata leave and a leave allowance entitlements in accordance with Agreement.**
3. **Payment of wages, overtime and any other remuneration which may be due to him calculated up to the date on which he/she ceases work**
4. **Severance pay shall be paid on the following basis.**

On completion of:

1st and up to including seven years continuous service 24 days for each completed year of service. Eight years and up to including fourteen years of continuous service. Twenty six days pay for each completed year of service. Employees with fifteen years continuous service and over thirty days pay for each completed year of service.

Retirement

The normal retirement age from the service shall be 50 years of age. The employer may at his own discretion allow an employee to continue in service after attaining the retirement age. An employee ceasing employment on retirement shall be entitled to service gratuity of 30 days salary for every completed year of service with the employer.”

I am inclined to agree with the argument of Mr. Barr that the collective bargaining agreement only contemplates payment of gratuity in a situation where the employee is terminated by the employer and seems to be silent on a situation where the employee resigns. The court cannot read into the agreement what is not expressly provided for. This is a matter for negotiation by the parties.

The Claimant has referred the court to section 35(5) of the Employment Act. This section is not relevant as it has not been alleged that the Claimant was not a member of NSSF or another gratuity scheme to entitle her to service pas within the provisions of this section.

It is noted that the Grievant resigned without giving the relevant notice, a fact that is the subject of the counter claim. There is no evidence that any demand for payment of the notice was made before the counter claim was filed. It would appear that this is a demand that was made only because the grievant filed the claim. Although it is admitted by the Claimant union, they are asking that the amount should be recovered from the terminal benefits payable to the Grievant. Having paid the Grievant her terminal benefits without as much as making reference to the notice, it would be unfair to make her pay now only because she filed a claim against the Respondent. This would be tantamount to punishing her for making a claim against her employer.

For the foregoing reasons, both the claim by the Claimant Union and the Respondents counterclaim are dismissed. There shall be no orders for costs.

Orders accordingly

Dated at Nairobi the 4th day of September 2012.

Read in open court and signed on 5th September 2012.

Hon. Lady Justice M. Onyango

JUDGE