REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1789 OF 2013

REBECCA ANN MAINA.....1ST CLAIMANT

MONICA NYAMBURA WAINAINA.....2ND CLAIMANT

JOSHUA PATRICK MACHARIA.....3RD CLAIMANT

VS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

RULING

Introduction

1. On 20th August 2013, the Claimants; Rebecca Ann Maina, Monica Nyambura Wainaina and Joshua Patrick Macharia received letters from the Respondent's Acting Deputy Vice Chancellor (APD), Prof. Victoria Wambui Ngumi asking them to show cause why disciplinary action should not be taken against them for failure to follow chain of command and to maintain confidentiality. The Claimants were required to respond within 7 days from the date of the letters.

2. The Claimants responded to the show cause letters on 23rd August 2013 denying all the allegations leveled against them. Prof. Ngumi then wrote to the Claimants on 1st November 2013 inviting them to attend a disciplinary hearing on 8th November 2013.

3. It is at this stage that the Claimants came to Court under Certificate of Urgency seeking orders to restrain the Respondent from proceeding with the disciplinary process on the ground that the said process amounted to a violation of their rights. The matter came before me on 6th November 2013 and I granted interim conservatory orders pending *inter partes* hearing of the Claimants' application. The parties filed written submissions which were highlighted by their respective Counsels on 20th January 2014.

The Claimants' Submissions

4. Senior Counsel, Dr. Kamau Kuria for the Claimants acknowledged the Respondent's right as an employer to discipline its employees. He however submitted that the disciplinary process instituted by the Respondent against the Claimants was in contravention of the Constitution, statute and the Claimants' terms of employment as contained in the Collective Bargaining Agreement, the Terms of Service for Non Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories dated July 2008 and respective contracts of employment.

5. With regard to the correct internal disciplinary procedure applicable in employment matters, Dr. Kuria referred the Court to the South African case of ***Samwu (OBO M. Abrahams and 106 Others) Vs City of Cape Town [2008] ZALC 28*** where the Labour Court of South Africa upheld the disciplinary procedure set out in the relevant Collective Bargaining Agreement.

6. Counsel further submitted that in exercising its right to discipline the Claimants as its employees, the Respondent was bound by Articles 35,41,47 and 50 of the Constitution as well as Section 63 of the Universities Act and the rules of natural justice at common law.

7. According to the Claimants, the conditions for a fair disciplinary hearing are as follows:

a. The employee is informed of the allegations made against them;

b. The employer furnishes the employee with a charge which sets out the alleged offence(s) with particulars;

c. The employer supplies to the employee copies of witness statements of those to testify against the employee at the hearing;

d. The employer supplies to the employee copies of all documents in its possession that may be prejudicial to the employee;

e. The employer invites the employee to a hearing and advises the employee of their right to be accompanied by two union representatives or advocate of their choice;

f. The employer gives the employee and their advocate an opportunity to put questions to the employee's accuser;

g. The employer gives the employee a chance to call witnesses in support of their case.

The Respondent's Submissions

8. Mr. Okeche for the Respondent submitted that following the suspension of Prof. Francis M. Njeruh, the Deputy Vice Chancellor (APD) the three Claimants were, on 15th August 2013 found in possession of two files which contained official University correspondence. According to the Respondent, the files had been smuggled out of the office of the suspended Deputy Vice Chancellor (APD). This was done without consultation with the Acting Deputy Vice Chancellor (APD).

9. On 20th August 2013, the Respondent commenced disciplinary proceedings against the three Claimants by issuing show cause letters. It was submitted on behalf of the Respondent that by issuing the Claimants with notices to show cause and subsequently inviting them to attend a disciplinary hearing, the Respondent was in compliance with Section 41 of the Employment Act, 2007, Clause 5.0 of the Collective Bargaining Agreement and Clause 6.1 of the Terms and Conditions of Service.

10. Mr. Okeche told the Court that the disciplinary hearing envisioned by Clause 6.1 of the Collective Bargaining Agreement and Section 41 of the Employment Act, 2007 is not meant to be a quasi-judicial process conducted with the formality and all the exigencies applicable in a court of law. The Claimants' demands for copies of witness statements, all documents deemed prejudicial to them and the presence of an advocate during the disciplinary hearing were therefore without basis.

Two Disciplinary Procedures?

11. The first issue for determination is whether there exists two sets of disciplinary procedures within the Respondent's internal disciplinary rules. It was submitted on behalf of the Claimants that the Collective Bargaining Agreement and the Terms and Conditions of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories establish two distinct disciplinary procedures;one for minor wrongs and another for serious wrongs and that the procedure for minor wrongs entitle an employee to receive a warning letter without appearing before a disciplinary panel.

12. For its part, the Respondent submitted that both the Collective Bargaining Agreement and the Terms and Conditions of Service do not distinguish between the procedure for termination of employment and the procedure for issuance of warning

letters. The issuance of warning letters, summary dismissal and termination of employment are all forms of disciplinary action that the employer is entitled to pursue at the conclusion of a disciplinary process. A warning is not an interim disciplinary measure but a final one based on the circumstances of the case.

13. Clause 5.1 of the Collective Bargaining Agreement and Clause 6.1 (a)(b) of the Terms and Conditions of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories provide as follows:

> ***So as not to prejudice the right of the employer to discipline an employee for misconduct and to safeguard the right of the employee to a fair trial/hearing:***
>
> > ***(a) An employee whose work or conduct is unsatisfactory or who otherwise commits a misconduct which in the opinion of the employer does not warrant summary dismissal shall be warned in writing.***
> >
> > ***(b) Before an employee is issued with a letter of warning, he/she shall be called upon in writing to explain the alleged offence and if he/she wishes, the employee shall be given the opportunity to make a verbal representation on the matter. The employee shall also have the right to be accompanied by not more than two (2) accredited Union representatives when making the verbal representations.***

14. The Claimants' complaint is that after receiving their respective responses to the show cause letters, the Respondent ought to have issued them with written warnings but instead went ahead to summon them for a disciplinary hearing. It is as if the Claimants had already arrived at the conclusion that the offences they were accused of were minor wrongs incapable of being escalated to a disciplinary hearing.

15. A reading of the disciplinary rules relevant to this case does not in my view disclose two disciplinary processes but rather different steps to be taken depending on the severity of the wrong complained of. The severity of the sentence to be meted on an errant employee does not take away the mandate of the employer to take the employee through the applicable disciplinary process. To that extent, I agree with Counsel for the Respondent that a warning and a termination are both final disciplinary actions taken by an employer pursuant to a complete disciplinary process.

Did the Disciplinary Process Amount to Constructive Dismissal?

16. It is the Claimants' case that the Respondent's action of instituting disciplinary proceedings against them amounts to constructive dismissal. The Respondent denies the Claimants' allegation in this regard and Counsel referred the Court to the case of ***Emmanuel Mutisya Solomon Vs Agility Logistics (Industrial Court Cause No 1448 of 2011)*** where Mbaru J defined constructive dismissal as:

> ***"a situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable***

for the employee to such an extent that the employee has no other option available but to resign."

17. The right of the employer to disciple employees as acknowledged by the Claimants remains firmly grounded and and I do not agree that institution of disciplinary proceedings by itself would amount to constructive dismissal.

Was the Disciplinary Process in Breach of Constitutional Provisions?

18. In his submissions, Dr. Kuria underscored the jurisdiction of the Court to interpret the Constitution as far as labour rights are concerned. The position of the Industrial Court as currently constituted with the same status as the High Court is now well settled. As held by Majanja J in the case of ***United States University (USIU) Vs Attorney General [2012] eKLR:***

> ***"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationship defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court."***

19. The jurisdiction of the Industrial Court to interpret the Constitution and to enforce the Bill of Rights in labour and employment matters is therefore not in doubt. It was submitted on behalf of the Claimants that the intended disciplinary action is in breach of Articles 35,41(1), 47 and 50 of the Constitution.

20. With regard to Article 41(1), Counsel for the Respondent made reference to the case of ***George Onyango Akuti Vs G4S Security Services [2013]eKLR*** where Radido J found that since the term *'unfair labour practices'* has not been defined by either the Constitution or statute, it is left to the courts to define and determine the scope, content and extent of what would constitute an unfair labour practice. According to the Respondent the Claimants had failed to demonstrate the unfair labour practices complained of.

21. The Respondent denies that the right to a fair disciplinary process under a contract of employment incorporates the requirements of Articles 35,47 and 50 of the Constitution. The Respondent thus submits that the right to a fair disciplinary process in an employment contract is regulated by Section 41 of the Employment Act, 2007.

22. Counsel referred the Court to the case of ***Joseph Mutuura Mberia & Another Vs Council of Jomo Kenyatta University of Agriculture and Technology [2013]eKLR*** where Mbaru J held that direct reliance on the fundamental rights contained in the Constitution is not permissible where the right in issue is regulated by statute. I hold a different view on this matter. To my mind, enforcement of rights must always be subjected to constitutional lenses and statute remains subservient to the Constitution at all times.

23. In submitting that the right to fair administrative action under Article 47 does not extend to employment decisions of a public sector employer, Counsel for the Respondent relied on the South African case of ***Chirwa Vs Transet & Another (2007) ZACC*** where Ngcobo J of the Constitutional Court held that there is no reason in principle why public sector employees would have more rights than private sector employees.

24. The decision in ***Chirwa Vs Transent & Another*** was upheld in ***R Booysen Vs South African Police Services & Another (Case No. C60/08-Labour Court of South Africa)*** where the Court held that there is no right to fair administrative action separate from the right to fair labour practices.

25. Closer home, the Court of Appeal in ***Kenya Revenue Authority Vs Menginya Salim (Civil Appeal No 108 of 2010)*** held that in taking disciplinary action against an employee a public body exercises its power under a contract of employment not its statutory power under an Act of Parliament.

26. I agree that disciplinary action against an employee is not an administrative action as defined in Article 47. In arriving at this conclusion, I am satisfied that Article 41 and the applicable labour laws provide adequate safeguards to an employee facing disciplinary action.

27. With respect to the right to information under Article 35, the Respondent submitted that this provision places an obligation on the State to publish information which is of public interest but does not regulate the employment relationship between employers and employees. The Respondent therefore sought to distinguish the case of ***Nairobi Law Monthly Vs Kenya Electricity Generating Company & 2 Others[2013]eKLR*** cited by Counsel for the Claimants.

28. I differ with the interpretation rendered by Counsel for the Respondent on account of Article 35 as it leaves out the right conferred by Sub Article (1)(b) on access to information held by another person which is required for the protection of a right or fundamental freedom. An employee facing disciplinary action faces a real danger of losing their job and source of livelihood and to say that they are not entitled to information in the employer's possession that would assist the employee in preparing their defence is to misread the Constitution. I need to add that in order to access the right under Article 35(1)(b), the employee must make a specific request for specific documents.

29. With regard to Article 50 my view is that the provisions therein relate to hearings before courts and tribunals and are not applicable to internal disciplinary proceedings at the workplace.

The Nature of Disciplinary Hearing

30. Dr. Kuria made extensive submissions on what the Claimants consider to be a fair disciplinary hearing and Mr. Okeche submitted that in initiating disciplinary proceedings, an employer does not exercise a quasi-judicial function.

31. Section 41 of the Employment Act, 2007 provides the procedure for handling of employee disciplinary cases 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.***

32. Further, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

33. In my considered opinion, Section 41 of the Employment Act, 2007 sets the threshold for procedural fairness. The practical application of the provisions of Section 41 at the work place will however take different formats depending on the nature of the offence and the institutional sophistication of the employer. Nevertheless, once a disciplinary process is called to question, the Court is expected to examine each case on its own merit but non compliance with any of the provisions of Section 41 of the Employment Act, 2007 renders any disciplinary action outrightly unfair.

34. I agree with Counsel for the Respondent that internal disciplinary proceedings are non judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.

When will the Court Intervene in a Disciplinary Process?

35. As held in the case of ***Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No 620 of 2013)*** the Industrial Court should not take over and exercise managerial prerogatives at the work place.

36. However, in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right. When the Claimants came before me, their boss Prof. Francis M. Njeruh had just been dismissed. Further, the Court took notice that since 15th August 2013, the Claimants had been transferred at a frequency that seemed somewhat abnormal.

37. Specifically, on 15th August 2013, the 1st Claimant was transferred to the Board of Postgraduate Studies then to the School of Architecture and Building Studies on 19th August 2013 and finally to the School of Health Sciences on 11th September 2013. The 2nd Claimant was transferred to the Human Resource Department on 15th August 2013 and then to the Department of Botany on 20th August 2013. The 3rd Claimant was transferred to Personnel Registry on 15th August 2013 and then to the Library on 19th September 2013.

38. Upon examination of these circumstances, I formed the opinion that the Claimants' fears were well grounded. I therefore granted interim restraining orders. The Court will not however hinder the Respondent's managerial prerogative to discipline its employees. The Claimants have admitted their involvement in the movement of some files from the University, which according to them contained Prof. Njeruh's personal documents but which the Respondent states contained official University documents.

39. I find that this is a matter meriting further inquiry by way of a disciplinary hearing which I now direct shall proceed. The disciplinary hearing shall be conducted in accordance with the parameters set out in this Ruling and in the intervening period, the Respondent must not act in any manner that may be construed as harassment to the Claimants.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2014

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY 2014

MATHEWS NDERI NDUMA

JUDGE

In the Presence of:

.....*Claimants*

.....***Respondent***

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