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COURT OF APPEAL: DISCIPLINARY HEARING MINUTES MUST PROVIDE A CLEAR RECORD OF THE CASE AGAINST AN EMPLOYEE AND THE PROCEEDINGS

Consolidated Bank of Kenya Limited v Njuguna (Civil Appeal 274 of 2020) [2026] KECA 1386 (KLR)

1. Background

1.1. The Respondent was employed by the Appellant, Consolidated Bank of Kenya Limited, in 2009 and rose through the ranks to become a credit officer, earning a gross salary of Kshs. 1,558,044 per annum.

1.2. On 20th June 2014, the Bank summarily dismissed him for failing to protect the bank's interests by allowing the irregular transfer of funds from a customer's USD accounts to other accounts.

1.3. Prior to his dismissal, on 21st May, 2014, the Respondent received a Show Cause Letter requiring him to respond to allegations of malpractice by 4 pm the following day. He submitted a written response on 22nd May 2014 to the Human Resource manager. On the same day, he received an email inviting him to a disciplinary hearing scheduled for 11:30am on 23rd May 2014.

1.4. The Respondent challenged the fairness and lawfulness of his dismissal contending that:

a) the composition of the disciplinary committee was conflicted because its chairman, who was the Patron and Head of Treasury, was familiar with the directors of the customer whose accounts were the subject of the disciplinary proceedings and had also participated in the impugned transactions. He therefore questioned the chairman's impartiality, which he considered prejudicial to him and contrary to the rules of natural justice and fair procedure;

b) he was dismissed for allegedly authorizing a fund transfer without approval from the Acting Head of Credit.

c) clause 10.4 of the Bank's Human Resource Policies and Procedures Manual provided that the Chief Executive Officer was the person mandated to warn, suspend or terminate his employment. However, the Head of Human Resources acted outside her mandate by signing the summary dismissal letter dated 20 June 2014, contrary to the advice of the Acting Chief Executive Officer.

1.5. On its part, the Appellant argued that:

a) its Credit Policy provided that committing the Bank to a transaction without proper authority constituted a serious breach of discipline.

b) following a tip-off from a member of staff, its Internal Audit Department investigated irregularities in the management of accounts at the Harambee Avenue Branch between September 2013 and May 2014. The investigations established that most of the transactions resulted in unauthorised overdrawn positions in customers' accounts, contrary to the Respondent's job description and the Bank's Credit Policy.

c) the Respondent was issued with a Show Cause Letter setting out the allegations against him and identifying the affected accounts. The letter informed him that his actions amounted to gross misconduct and gave him an opportunity to respond to the allegations.

d) the Respondent's response to the Show Cause Letter was unsatisfactory. Therefore, the Bank convened a disciplinary hearing on 23 May 2014. During the hearing, the Respondent made several admissions, and the disciplinary committee reviewed the evidence before it.

e) the disciplinary committee found that the Respondent's authorization had assisted the customer to get away with the Bank's money and that his actions were not intended to protect the Bank's interests but to assist the customer to avoid paying the amounts owed to the Bank. The committee therefore recommended his summary dismissal.

f) the Chief Executive Officer reviewed the disciplinary committee's recommendations and noted that the Respondent was aware of his duty to report fraud, breaches of procedure and other irregularities, following which the Bank terminated his employment.

g) the summary dismissal letter informed the Respondent of the reasons for the termination of his employment and the resulting exposure of the Bank to possible financial loss. It also set out his terminal dues, which were subsequently paid, and he was issued with a certificate of service.

h) the disciplinary process complied with the Bank's Human Resource Policy and the Employment Act.

i) the Respondent did not raise any objection regarding the alleged conflict of interest during the disciplinary hearing.

j) the fact that the summary dismissal letter was signed by the Head of Human Resources did not negate the lawfulness of the termination process.

1.6. The ELRC found that the Respondent's dismissal was unfair on the following grounds:

a) although the minutes of the disciplinary hearing did not indicate that the Respondent had objected to the composition of the disciplinary committee, they were recorded in prose, and it was therefore unclear whether the allegations against him had been put to him and what his responses to those allegations had been.

b) the Respondent's response regarding the overdrawn account of the customer was not recorded in the relevant part of the disciplinary hearing minutes.

c) it was unclear from the disciplinary hearing minutes whether the Appellant had established valid reasons for dismissing the Respondent; and

d) the Appellant had contravened its Human Resource Policies and Procedures Manual by having the Respondent's Show Cause Letter and dismissal letter signed by the Head of Human Resources.

1.7. Consequently, the ELRC awarded the Respondent six months' salary as compensation for unfair termination and one month's salary in lieu of notice, together with costs and interest at court rates from the date of judgment.

1.8. Aggrieved by the decision of the ELRC, the Appellant lodged an appeal with the Court of Appeal. The Respondent also filed a cross-appeal on the grounds that:

a) the ELRC had erred by awarding him one month's salary in lieu of notice instead of the three months' salary provided for under his contract of employment.

b) having found that his dismissal was unfair and contrary to clause 10.4 of the Appellant's Human Resource Policies and Procedures Manual, the ELRC ought to have ordered his reinstatement or re-engagement without loss of benefits.

c) the ELRC had erred in awarding him six months' salary as compensation for unfair termination instead of the maximum award of twelve months' salary.

d) in the alternative to reinstatement or re-engagement, he was entitled to payment of his full salary from the date of his dismissal.

2. Court of Appeal's Determination

2.1. The Court of Appeal upheld the ELRC's finding that the Respondent's dismissal was unfair. In reaching this conclusion, the Court held as follows on the issue of the disciplinary record/minutes:

a) upon reviewing the disciplinary hearing report, which was recorded in prose, it was evident that, from the outset of the disciplinary hearing, there was a lack of clarity regarding the particulars or details of the case against the Respondent. The Respondent disputed the particulars of the allegations set out in the Show Cause Letter, while the disciplinary panel equally disputed the account given by the Respondent

b) the Respondent's account was not detailed in the disciplinary hearing report. In addition, the report did not explain how the variance between the disciplinary panel and the Respondent regarding the allegations against him was resolved, if it was addressed at all. The Court therefore agreed with the ELRC that the actions or omissions complained of against the Respondent remained unclear during the disciplinary hearing.

c) although the Appellant had provided evidence on its loan processing procedures, the Court found that this evidence did not, in any material respect, undermine the ELRC's finding that, at the time of the disciplinary hearing, the particulars of the case against the Respondent, in terms of the actions or omissions complained of, lacked clarity.

d) section 43 of the Employment Act requires an employer, in any claim arising from the termination of a contract of employment, to prove the reason or reasons for the termination, failing which the termination is deemed unfair within the meaning of section 45. The reason or reasons for termination are the matters that the employer, at the time of termination, genuinely believed to exist and which caused the employer to terminate the employee's services. The Court found that, since the particulars of the allegations against the Respondent were unclear to both the disciplinary panel and the Respondent at the disciplinary hearing, the ensuing dismissal could not have been founded on reasons that the Appellant genuinely believed to exist.

e) clause 10.4 of the Appellant's Human Resource Policies and Procedures Manual provided that, where a breach warranted a final warning, suspension, termination or dismissal, a recommendation was to be made to the Chief Executive Officer for approval or guidance before any action was taken. It further provided that termination and dismissal letters for officers were to be signed by the Chief Executive Officer, while the Head of

Human Resources was to sign such letters for unionisable employees.

f) the undisputed evidence was that the Chief Executive Officer had approved that the Respondent should resign. However, the Head of Human Resources subsequently issued and signed the letter summarily dismissing the Respondent. The letter did not state that it had been issued under the authority of, or signed on behalf of, the Chief Executive Officer. The Court therefore found that the Head of Human Resources had issued the letter in her own capacity and in complete disregard of the express role and authority of the Chief Executive Officer under clause 10.4 of the Human Resource Manual.

g) section 45(2)(c) of the Employment Act provides that a termination is unfair where the employer fails to prove that the employment was terminated in accordance with fair procedure. The Court further noted that, under section 45(5)(a), one of the considerations in determining whether it was just and equitable for an employer to terminate an employee's employment is the procedure adopted by the employer in reaching the decision to dismiss, communicating that decision to the employee and handling any appeal against the decision. The Court found that the procedure adopted by the Appellant breached clause 10.4 of its Human Resource Manual and was therefore unfair, rendering the dismissal unfair and unlawful to that extent.

h) Accordingly, the Court found that the ELRC had not misdirected itself in holding that the actions or omissions complained of against the Respondent were unclear at the time of, and throughout, the disciplinary hearing. The ELRC had therefore correctly found the dismissal to be unfair because the reasons for dismissal had not been shown to exist at the time of the disciplinary hearing and the Chief Executive Officer had not signed the dismissal letter as required under the Human Resource Manual.

2.2. On the question whether the ELRC erred in awarding the Respondent six months' salary as compensation for unfair termination, the Court declined to interfere with the award. It noted that the Respondent had not demonstrated that the ELRC had failed to exercised its discretion under section 49 of the Employment Act. In particular, the Court considered the circumstances of the case, including the fact that the Respondent had served approximately five years before dismissal, the lack of evidence that his prospects of securing comparable employment had diminished, the constrained relationship between the parties in the sensitive banking enterprise, the absence of aggravating factors on the part of the Appellant and the Respondent's failure to demonstrate the steps he had taken to mitigate his grievances. The Court therefore upheld the award of six months' salary as compensation for unfair dismissal.

2.3. On the question of payment in lieu of notice, the Court held that the Respondent's contract of employment entitled either party to terminate the employment relationship by giving three months' written notice or payment in lieu of notice. Since the Respondent's summary dismissal had been found to be unfair, the Court held that he was entitled, under section 49(1)(a) of the Employment Act, to the notice pay provided for under his contract. The Court therefore set aside the ELRC's award of one month's salary in lieu of notice and substituted it with an award of three months' salary. The Appellate court also rejected the Appellant's reliance on section 44 of the Employment Act to justify dismissal without notice, holding that the provision could not apply where the summary dismissal had been found to be unfair.

2.4. On the question of reinstatement, the Court held that section 12(3)(vii) of the

Employment and Labour Relations Court Act limits reinstatement to a period of three years from the date of dismissal. Since the Respondent had been dismissed on 20 June 2014 and the ELRC delivered its judgment on 21 May 2020, approximately five years and eleven months later, the statutory period within which reinstatement could be ordered had already lapsed. The ELRC was therefore barred from granting the remedy. The Court further noted that the Respondent had neither demonstrated the existence of exceptional circumstances that would warrant reinstatement nor addressed the practicability of reinstatement, as contemplated under section 49 of the Employment Act.

2.5. On the Respondent's alternative claim for payment of salary for the unexpired term of his contract, the Court noted that the ELRC had not made a determination on this prayer. However, the Court found that nothing turned on that omission. Once the Respondent's contract of employment was terminated, and in the absence of any good reason attributable to the Appellant that prevented him from moving on to other gainful activities and mitigating his loss, a claim for lost earnings arising from the dismissal was unsustainable and would amount to unjust enrichment. The Court further noted that the Respondent had not identified any contractual or statutory provision that entitled him to payment of salary for the period following his dismissal.

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