REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO E 287 OF 2021

DAVID ITHAU WAMBUA.....CLAIMANT

VERSUS

AGA KHAN UNIVERSITY HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. The claim before me is one of unlawful termination of employment. The Claimant alleges that the Respondent unfairly terminated his employment on account of alleged poor performance and misinformation about co-employees. The Claimant disputes these accusations. Consequently, he prays for the various reliefs as more specifically set out in the Memorandum of Claim.

2. The claim is resisted by the Respondent. It is the Respondent's position that the parties lawfully separated. Therefore, the suit is misconceived and ought to be dismissed.

Claimant's Case

3. The Claimant pleads that he was engaged by the Respondent on 14th December 2017 in the position of Business Development Manager. It is the Claimant's case that he served

the Respondent in this position until 21st October 2020 when his contract was terminated.

4. The Claimant states that the termination of his employment was unlawful. Prior to the decision to terminate his contract, the Claimant avers that the Respondent exposed him to harsh and degrading treatment in an effort to either force the Claimant into resigning or negatively affect his performance. It is the Claimant's case that he did not fall for this trap. The Claimant states that he continued to discharge his duties diligently and satisfactorily despite the challenging work environment.

5. Just before the decision to terminate his contract, the Claimant states that the Respondent accused him of giving incorrect information about his colleagues. However, the accusation was not substantiated. In the Claimant's view, the accusation was false.

6. The Claimant argues that the Respondent's accusations against him relating to poor performance were despite the fact that the Claimant had been rated as one of the best performing employees of the Respondent. In the Claimant's view, the accusations of poor performance leveled against him were a smokescreen to justify the unfair termination of his employment.

7. It is the Claimant's case that the Respondent set its junior employees against him in a bid to impede the discharge of his duties. For instance, it is alleged that despite the Claimant's complaints about his junior sabotaging field transport, the Respondent refused to address this issue. Further, it is

indicated that the Respondent approved study leave for a junior member of staff working under the Claimant without consulting the Claimant in contravention of the Respondent's policies. According to the Claimant, these were acts of insubordination against him.

8. The Claimant states that instead of addressing the issues that he had raised regarding insubordination, the Respondent issued him with a letter of warning dated 3rd July 2019. That the said letter was premised on false accusations against the Claimant. That even after it was demonstrated that the warning letter was based on a false premise, the Respondent's management neither apologized for issuing the letter nor withdrew it.

9. The Claimant also asserts that he was exposed to several incidents of undue harassment by his immediate supervisor and lodged a complaint with the Respondent about these matters. However, the complaint was neither investigated nor remedied. Instead, the Respondent's management accused the Claimant of making false accusations against co-employees and eventually used this as a reason to terminate the Claimant's employment.

10. The Claimant also accuses the Respondent of discriminating against him. This accusation is premised on alleged differential treatment of the Claimant on account of biased handling of performance reviews and complaints against co-employees. The Claimant also contends that he was paid a lower salary as compared to co-employees undertaking work of equal value.

11. The Claimant asserts that his performance review for the year 2018 yielded satisfactory results in line with the Respondent's performance evaluation matrix. That surprisingly and despite the satisfactory performance, the Respondent put the Claimant on a performance improvement plan (PIP). It is the Claimant's case that his performance having been rated as "competent" did not require him to be placed on PIP. That the Respondent's policy did not require employees rated as "competent" to be placed on PIP.

12. The Claimant asserts that the Respondent eventually terminated his contract despite the Claimant being one of the best performing employees. Yet, employees whose performance was much poorer than the Claimant's were retained in employment.

13. It is the Claimant's case that termination of his contract of service violated the law and the Respondent's policies. The decision to terminate his employment lacked both substantive and procedural fairness.

14. The Claimant asserts that he was not given a chance to be heard in response to the accusations against him. He states that he was condemned unheard in violation of his right to fair administrative action.

15. The Claimant also mentions that on his release from employment, the Respondent improperly computed his terminal dues. As a result, the amount paid to him on account of his exit salary was understated.

Respondent's Case

16. The Respondent admits that it engaged the Claimant as a Business Development and Operations Manager but clarifies that this was from 14th June 2018. Prior to this, the Claimant had been serving on probationary terms.

17. It is the Respondent's case that it indeed terminated the Claimant's employment on 21st October 2020. However, the Respondent asserts that the termination was for fair reason and in line with fair procedure as stipulated under the *Employment Act*.

18. The Respondent states that the reasons why it terminated the Claimant's employment were set out in the letter of termination issued to him on 21st October 2020. These included: failure to sign a performance improvement plan dated 4th November 2019; and sharing incorrect and misleading information relating to colleagues. It was the Respondent's case that in view of the matters alluded to in the letter of termination, the management of the Respondent found the Claimant mismatched with the Respondent's objectives on the smooth management of its operations. As a result, a decision was taken to terminate his employment.

19. The Respondent states that before his termination, the Claimant was afforded the opportunity of meeting the Respondent's Regional Human Resource Director a couple of times. During these sessions, issues touching on the Claimant's conduct and performance were discussed. Therefore, it is incorrect for the Claimant to insinuate that the separation of the parties was without regard for due process.

20. It is the Respondent's case that the Claimant failed to perform his duties in line with the set performance minimums prompting the Respondent to issue him with a warning on 3rd July 2019. Besides, the Claimant had made several claims against fellow employees which were later demonstrated to have been false, unsubstantiated and made in bad faith.

21. It is the Respondent's case that the only reason it sought to place the Claimant on PIP was because of his dismal performance. The Respondent states that matters of the Claimant's underperformance had been brought to his attention severally including through his immediate supervisor who had pointed out areas for improvement. That however, the Claimant snubbed attempts to spur his improvement by refusing to sign the PIP.

22. The Respondent denies that the Claimant was subjected to discriminatory treatment as alleged. It denies that the Claimant was a victim of degrading and inhumane treatment. The Respondent reiterates the fact that it is an equal opportunity employer that treats employees from all races equally.

23. It is the Respondent's case that the Claimant had a strained working relation with co-employees in his department. That this made it difficult for the employees to co-relate thereby affecting smooth operations of the Respondent.

24. In relation to differential salary, the Respondent states that at his interview, the Claimant had asked for less salary than he was eventually paid. Further, it is the Respondent's case that the Claimant's salary was commensurate to his job grade. By

this, the Respondent insinuates that the Claimant's claims of differential pay are unfounded.

25. The Respondent admits that the Claimant's performance rating in 2018 was "competent". However, it is contended that immediately after this rating, the Claimant's performance plummeted necessitating the decision to place him on PIP in 2019.

26. The Respondent denies that the Claimant's performance was necessarily excellent as averred by the Claimant. In the Respondent's view, other factors contributed to the overall good performance of the Claimant's docket. These included: availability of modern equipment in the centres run by the Claimant; the centres having less or no rental overheads; the centres being in locations that were generally busy; and the centres benefitting from accreditation to the National Hospital Insurance Fund (NHIF) scheme.

27. It was the Respondent's case that absent these factors, the Claimant's performance was overall poor. For instance, there were delays by the Claimant in undertaking tasks in centres under him, there was failure to update his supervisors and there was general absence of diligence on his part.

28. The Respondent admits receiving the Claimant's complaints. However, the Respondent states that its investigations showed that the complaints lacked merit, were based on falsehoods and were unnecessarily conflict-ridden. That as a matter of fact, the Claimant admitted to making false accusations against his co-employees.

29. Although the Respondent acknowledges that the provisions on performance improvement in its manual as quoted by the Claimant are correct, it is the Respondent's position that the Claimant's drop in performance was drastic. This necessitated the taking of immediate steps to place the Claimant on PIP.

30. The Respondent concedes that the Claimant's annual performance review having been undertaken at the close of 2018, his next review was due at the close of December 2019 since most of the review targets were annual. However, the Respondent argues that because it undertakes continuous employee evaluation, it was entitled to act immediately in November 2019 and place the Claimant on PIP when it realized that he had dropped in performance.

31. The Respondent states that placing of employees on PIP only required the approval of the performance monitoring committee where the employee's rating had been marked "fair/marginal/needs improvement" during the annual reviews. By this, the Respondent insinuates that the Claimant's case did not require the committee's approval.

32. The Respondent states that staff salaries were marginally and temporarily stepped down due to the effects of Covid 19. The Respondent contends that members of staff agreed to these cuts and were continuously advised of any changes in this respect. That the Claimant's dues were paid in line with the policy on reduced salary which was still in force.

Issues for Determination

33. The court record does not contain a list of agreed issues. It would appear that the parties elected to frame their individual issues at the stage of submissions.

34. The submissions on record suggest that the common issues for determination are the following:-

    a) *Whether the Claimant's employment was terminated for lawful or valid reason and in accordance with fair procedure.*

    b) *Whether the Claimant is entitled to the reliefs sought.*

35. Besides the above issues, the question relating to discriminatory treatment of the Claimant appears to have occupied the trial quite substantially. Although the Claimant has not expressly flagged it as an issue for determination in the list of issues in his submissions, the Respondent has.

36. In his submissions, the Claimant raises the issue of violation of his right to fair labour practices. This right is fairly wide and incapable of precise boundaries. In a sense, it does extend to cover the question of discrimination at the workplace. I will therefore consider these matters in this decision.

Analysis

37. The law on termination of employment contemplates that a contract of service may be terminated for a variety of reasons. Of interest to the current case is termination of the contract on account of poor performance. This ground is provided for under section 41 of the *Employment Act*.

38. Poor performance usually contemplates a scenario where an employee is unable to execute the mandate that is assigned to him to the expectations of the employer. Ordinarily, the employer's goals must be practicably achievable. Usually, underperformance will be inferred where an employee is unable to meet the minimum standards of performance that are generally expected across board in the industry or sector where the employer is operating.

39. The question of performance usually arises where the employer has set targets to be achieved by an employee within a fixed timeframe. The employee's attention must have been drawn to these targets. At the end of the appointed time, the parties will jointly review the employee's performance to gauge whether he has met the targets that had been set. Good labour practice demands that the social partners discuss and agree on: the performance goals; the instruments by which the goals will be measured; and the timeframe for delivery on the targets.

40. The case before me revolves around the Claimant's performance. The Respondent accuses the Claimant of failure to discharge his duties to the expected standards, a matter that led to the eventual separation of the parties.

41. I have considered the evidence on record on the issue. That the parties had set performance targets is not in dispute. The initial set of these targets is to be found in document number 4 in the Claimant's list of documents (the Claimant's job description form). These included: opening of new clinics; ensuring increased patient satisfaction; ensuring increased

revenue for the Respondent among others. Many activities were to go into ensuring that these targets are realized.

42. From the record, the Respondent has developed a performance measurement tool for evaluating the performance of its employees. This is the Performance Appraisal Procedure Manual (PAP Manual) appearing as document number 5 in the Claimant's list of documents. The document provides a detailed methodology for conducting performance evaluation for the Respondent's employees. It also has a rating mechanism. The Claimant admits that the tool was shared with him. As a matter of fact, he relies on the tool to advance his case.

43. The parties agree that the Claimant's performance was evaluated at the close of 2018 in line with the PAP Manual. According to the evidence on record, after the appraisal the Claimant was rated "competent".

44. Under clause 5.7 of the PAP Manual, an employee who is rated "fair/marginal/unsatisfactory/needs development" ought to have his assessment submitted to a Performance Review Committee where the employee's supervisor has to provide reasons for the rating. The committee has the final say on the rating.

45. Under clause 6.9 of the PAP Manual, if the employee's fair/marginal/unsatisfactory rating is upheld, he is to be placed on a Performance Improvement Plan (PIP). Such employee is to be monitored closely for performance improvement.

46. I understand this to be the procedure required under the clause as it provides as follows:-

> *''Departmental heads will need to ensure that a formal performance improvement plan is prepared <u>for employees rated at this level</u> based on development needs/performance gaps indentified and closely monitored for performance improvement.''* Emphasis added.

47. The clause requires that the PIP be prepared for only those employees whose rating has been finalized. As seen at clause 5.7, the Performance Review Committee makes the final decision on an employee's rating in this respect. Consequently, the process of PIP can only progress after the decision by the Performance Review Committee to uphold an employee's performance as "fair/marginal/unsatisfactory/needs development".

48. Under clause 6.9.2 of the Manual, employees on PIP are to be reviewed mid-year in the year next following to assess their progress. These employees are to be placed on probation during the period of performance improvement. Under clause 5.10 of the Manual, employees with persistent performance deficiencies may be placed on a quarterly performance review programme. However, the process must be fully documented.

49. Although clause 2 of the PAP Manual recognizes that performance evaluation is a continuous process, it does not contemplate a scenario where supervisors will place non performing employees on PIP without following the procedure set out in the Manual. In my view, the data collected by

supervisors on individual employee performance can only be used for one of the formal evaluation processes provided for in the Manual.

50. As indicated above the Claimant's performance review at the close of 2018 rated him as "competent". Essentially and in accordance with clause 6.9 of the Respondent's PAP Manual, this meant that the Claimant was not required to be placed under a PIP.

51. The record shows that in November 2019, the Claimant's supervisor sought to place him under PIP. The reason for this attempt is indicated as the sudden drop in performance by the Claimant. It is indicated that the Claimant resisted this attempt and refused to sign the PIP.

52. The Respondent concedes that having been reviewed in December 2018, the Claimant's next annual performance review was ordinarily expected to have happened at the close of December 2019. However, due to the sudden drop in his performance, it became necessary to evaluate him earlier.

53. According to the Respondent, because performance review is a continuous process, the Respondent was entitled to handle the matter in the manner it did. In the Respondent's view, sporadic performance reviews would in any event be in the spirit of the PAP Manual to the extent that they support continuous evaluation of employees.

54. I do not doubt that performance review of employees needs to be continuous. As a matter of fact, the PAP Manual appears to contemplate annual, semi-annual and quarterly performance

evaluations as appropriate. However, I do not think that the process should be haphazard. It ought to be undertaken in a way that is predictable, consistent and fair to employees.

55. The Respondent was undoubtedly entitled to review the performance of the Claimant. However, it was bound to do so within its own rules. If the Claimant's performance in 2019 had suddenly dropped to unsatisfactory levels as asserted by the Respondent, the procedure required the Claimant's supervisor to evaluate the Claimant and present a performance evaluation report on him to the Performance Review Committee which was to ratify the rating before the Claimant was placed on PIP.

56. There is no evidence that the Claimant was subjected to fresh performance evaluation after the 2018 evaluation which had rated him "competent". There is no evidence that a performance evaluation report was prepared and presented to the Performance Review Committee for approval prior to the decision to place the Claimant on PIP in November 2019. It is indicated that attempts to evaluate the Claimant for 2019 which was to happen in early 2020 aborted after the parties failed to agree on the attendees at the review session.

57. The Claimant resisted the attempt to sign the November 2019 PIP because it had been issued in contravention of the Respondent's PAP Manual. Having regard to my observations in the foregoing parts of this decision, I think that the Claimant was entitled to resist this attempt to the extent that it was being executed outside the existing evaluation procedures.

58. That the Respondent may have had valid reason to require the Claimant to be placed under PIP for erratic performance after the 2018 performance evaluation may as well be the case. If the various email correspondence produced in evidence by the Respondent are anything to go by, it appears that the Claimant was struggling to meet some of his targets for 2019. There is evidence of delay in meeting a number of deadlines. There is evidence of intervention by the Respondent's management in matters that the Claimant was apparently required to be handling. This is exemplified in the various email exchanges between the Respondent's management and the Claimant dated 21st June 2019, 1st, 2nd & 26th July 2019, 19th & 28th October 2019, 15th November 2019 to mention but a few.

59. Although the Claimant asserts that he maintained exemplary performance from the time he joined the Respondent to the point of his exit, I note that the question of poor performance that resulted in his dismissal revolves around the period between January 2019 and November 2019. Therefore, evidence of good performance that relates to 2018 may be of little value to the dispute. Further, although the Claimant argues that the growth in earnings before tax in 2019 for his cluster is evidence of good performance, it is noteworthy that increased revenue streams were not the sole performance indicators under his job description. There were other factors that he was to be reviewed on as well. In this respect, the Respondent was entitled to rate the Claimant's performance on the various issues captured in the email exchanges referred to above.

60. Notwithstanding *prima facie* evidence of wanting performance by the Claimant in 2019, the Respondent was not entitled to address the issue in an arbitrary manner. The Respondent was duty bound to process the placement of the Claimant on PIP in accordance with its PAP Manual.

61. Section 41 of the *Employment Act* requires an employer who wishes to terminate an employee's contract on account of poor performance to afford the employee the right to be heard on the issue. This procedure contemplates a disciplinary hearing.

62. The employee is expected to be notified of the charge of poor performance against him and allowed a chance to respond to it. It is at this moment that the employee will be able to account for his failure to deliver on the tasks assigned to him by the employer.

63. The Claimant states that he was denied the right to be heard before he was pushed out of employment. At paragraph 39 of his written witness statement which he adopted on oath, the Claimant states that he was not given the opportunity to be heard on any of the allegations and complaints leveled against him.

64. From the evidence on record, I understand the Respondent as suggesting that the Claimant was granted the chance to be heard through the various meetings that the Respondent's management had with the Claimant. I do not think that this is what the law contemplates. In any event, the Respondent's own rules contemplate a hearing before the employee is discharged. This requirement can be inferred from clause 5.4 in the Respondent's Employee Discipline Procedure Manual

appearing as document 15 on the Claimant's list of documents.

65. Issues that the Claimant was accused of including: failure to follow instructions from his supervisor; failure to sign the PIP; insubordination; failure to keep deadlines; and lowering staff productivity through unnecessary antagonism and misinformation are all major infractions that impact on the overall performance of staff including the Claimant and which should have been handled in the manner provided for under the above clause in the Respondent's Employee Discipline Procedure Manual. It is at this forum that the Claimant would have been given an opportunity to give the explanations he gave during his testimony in court suggesting that the delays in meeting his targets were attributable to factors outside his control.

66. Importantly, section 43 of the *Employment Act* obligates the employer to demonstrate that termination of an employee's contract was executed in accordance with fair procedure. This requires that the employer demonstrates that he afforded the employee a hearing at a disciplinary session.

67. From the evidence on record, I do not understand the Respondent as having discharged this obligation. There is no evidence on record that prior to issuing the letter dated 21st October 2020 by which the Claimant's contract of service was terminated, the Respondent convened a disciplinary session at which the accusations against the Claimant were addressed. This was procedurally improper (see ***Naima Khamis v Oxford***

University Press (E.A) Ltd [2017] eKLR and ***Moki Muithya v Kitui Flour Mills Limited [2021] eKLR***).

68. Although the Respondent suggests that a formal disciplinary session was not practicable having regard to the Claimant's conduct, this was no justification to dispense with a disciplinary session altogether. In my view, the Respondent was still obligated to make attempts at convening the session. In the premises, I find that the decision to terminate the Claimant's employment on account of poor performance was procedurally unfair.

69. The other issue that has arisen relates to whether the Claimant was subjected to discriminatory treatment. The basis for this assertion by the Claimant was that even though he had been rated highly on performance in comparison to other employees, his employment was terminated whilst the other employees continued to serve. To be able to establish this ground, it was necessary to provide comparative data on performance of the other employees that the Claimant referred to. This data was not provided.

70. In respect of differential treatment on account of salary perks, the Claimant suggested that co-employees working in the same band were being paid higher salaries compared to his. In response, the Respondent provided data accounting for the disparities. Some of the employees in the Claimant's band had served the Respondent longer than the Claimant and had benefited from salary increments over time. One had served the Respondent as a consultant for some while before the

Claimant joined the institution. He was therefore drawing higher salary on account of longevity of service.

71. Other employees in the band were earning much less than the Claimant. It was the Respondent's evidence that notwithstanding these variables, the salaries for these staff were all within the same job band. And that the variances were on account of factors other than discriminatory treatment as asserted by the Claimant.

72. The explanation by the Respondent in this respect was not challenged by the Claimant. I find the explanation offered as a reasonable account for the apparent variances in the salaries of the officers mentioned. I do not find evidence of discrimination that is proscribed under section 5 of the *Employment Act*.

73. The Claimant has also alluded to biased processing of his complaint as evidence of discrimination against him. However, there is no covert evidence that the Claimant's complaint was rejected because of the desire to accord other employees preferential treatment. On the contrary, there is evidence that the Claimant's complaint was subjected to some form of internal investigations that cast aspersions on the accuracy of some of the information that the Claimant supplied. This position appears from the report by the Respondent's Regional Director, Human Resource at page 50 of the Respondent's bundle of documents.

74. It may be correct that the Claimant's complaint was not processed in the manner contemplated under the Respondent's Harassment Policy. However, this alone is not

evidence that the flawed handling of the complaint was motivated by the desire to treat the Claimant differentially. In the face of this report and having regard to the fact that the Claimant did not rebut its contents, I am reluctant to attribute the rejection of the Claimant's complaint on the alleged prejudice by the Respondent against him.

75. On the question of violation of the Claimant's constitutional right to fair labour practices, I am inclined to consider the dispute before me as an ordinary employment dispute in respect of which there are sufficient alternative remedies provided under the *Employment Act*. I would therefore avoid attempting to resolve the dispute through invoking the *Constitution*. In taking this position I find support in the doctrine of avoidance as discussed by Mativo J in ***KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR)***. The court, quoting with approval other decisions expressed itself on the matter as follows:-

> *''Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights..''*

76. Whilst acknowledging that the Respondent's failure to uphold section 41 of the *Employment Act* may have infringed on the Claimant's right to fair labour practice, I elect to deal with the question under the prevailing statutory framework on employment without wading into the realm of *the Constitution.*

After all, the disputants appear to acknowledge the primacy of the *Employment Act* in this respect by expressly premising their respective cases on the provisions of the Act.

77. Finally, I am now called upon to determine the remedies that the parties are entitled to. In this respect, I will consider the provisions of the *Employment Act* generally and section 49 of the Act specifically.

78. I begin with examining whether the Claimant is entitled to claim the amount withheld by the Respondent on account of salary reduction in reaction to the economic strain caused by Covid 19. Section 17 of the *Employment Act* obligates the employer to pay to the employee the entire amount of wages earned. That notwithstanding, section 19 of the Act recognizes that there are instances when the employer may make lawful deductions from an employee's wage.

79. However and as a matter of fact, the law appears to bar an employer from making deductions to the employee's salary that are intended for the benefit of the employer except where the deductions are in settlement of some recognized liability. Section 19(1)(g) and (h) of the Act provides as follows:-

> *''Notwithstanding section 17(1), an employer may deduct from the wages of his employee: any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages; an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the*

employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section."

80. The above provisions deal with salary deductions. This presupposes a scenario where the employee's salary remains unchanged but the employer makes deductions from it.

81. Salary deductions are distinct from salary reduction. In the latter instance, the employee's salary is in fact stepped down.

82. Section 10 (1) & (2) of the *Employment Act* specify the elements of a written contract of service that must be included in the written instrument evidencing the contract. These include the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits.

83. Section 10(5) of the Act appears to recognize the possibility of the parties to a written employment contract changing some of the elements mentioned above. It provides as follows:-

''Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

84. Having regard to the foregoing, it is my considered view that parties to an employment contract can lawfully agree to step down the salary that is payable under the contract so long as they consult on the matter and the employer reduces the arrangement into writing. Further, the employer must notify the employee in writing of having implemented the agreed changes. The only bar to such change is if the proposed

reduction has the effect of reducing the salary to below the minimum wage that is set under a Wage Order.

85. On 13th August 2020, the Claimant signed authority to the Respondent to extend the period during which his salary had been reduced in order to manage the effects of Covid 19. This authority was produced in evidence by the Respondent. The authority referred to earlier authority given by the Claimant on 7th May 2020 in respect of the same matter. The Claimant produced the latter instrument as document number 20 in his list of documents.

86. There was no suggestion that the Claimant signed the consent under duress, mistake, undue influence or misrepresentation of material facts. Indeed no such plea was made by him.

87. In law an agreement of this nature constitutes a contract between the parties. Unless successfully assailed on the usual grounds for setting aside a contract, the agreement is binding on the parties. The court cannot replace it with its own perceptions of what it considers just in the circumstances. To do so will be tantamount to rewriting the contract between the parties, a matter that the law frowns upon (see ***Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR***).

88. Having regard to the foregoing, it is my view that the parties to this action entered into a binding agreement through which the Claimant's salary was temporarily reduced for an agreed duration. At the time of his termination, the period of temporary reduction of the Claimant's salary was still running.

89. Consequently, the Respondent was entitled to compute the payments it made to the Claimant whilst factoring in the reduced salary. Absent evidence of fraud, mistake, undue influence or misrepresentation of material facts in relation to the agreement, this court is unable to issue orders restoring the parties to their pre 7th May 2020 position.

90. The Claimant has prayed for reinstatement to his previous employment. In the alternate, he prays for re-engagement and or redeployment.

91. The Respondent is vehemently opposed to the prayer. According to the Respondent, the relation between the parties that preceded their separation does not permit for an order for reinstatement of the Claimant. The parties are said to be simply incompatible.

92. Section 49 of the *Employment Act* empowers this court to order reinstatement of employees back to their positions where termination of employment has been declared unlawful. This power is reiterated under section 12 of the *Employment and Labour Relations Court Act* that deals with the jurisdiction of the court.

93. Despite this power, the law places a rider on granting the remedy. In considering whether to grant the remedy the court is called upon to consider, inter alia, the following:-

    a) *The wishes of the employee;*
    b) *The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;*

c) *The practicability of recommending reinstatement or re-engagement;*

d) *The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.*

94. As a general rule, reinstatement and or re-engagement of an employee is considered as a remedy of last resort. It only issues in exceptional circumstances (see ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR***).

95. In the case before me, I have taken note of the strained relation between the Claimant and a couple of co-employees that he was interacting with at the Respondent institution. I also take note of the Respondent's resoluteness not to have the Claimant back into its rank and file. I have considered the fact that the Respondent went out of its way to dig up the employment history of the Claimant and has reached the firm conclusion that he is incompatible with its vision and goals.

96. Taking these factors into consideration, I do not think that it will make sense to order the parties to continue working together. Such order will only fuel an already strained relation between the parties. Consequently, I decline to issue an order for the reinstatement or re-engagement or deployment of the Claimant.

97. In lieu of reinstatement, I award the Claimant compensation for unfair termination that is equivalent to his gross salary for a period of five (5) months, that is to say, Ksh. 1,522,500/=. In

making this award, I have considered the short duration that the parties had related.

98. The award is subject to the applicable statutory deductions.

99. I award the Claimant interest at court rates from the date of this judgment.

100. Costs are granted to the Claimant.

Summary of the Award

a) The Respondent's decision to terminate the Claimant's employment is declared procedurally unfair.
b) The court declines to order refund of the money retained by the Respondent from the Claimant on account of reduced salary.
c) The court declines to order reinstatement or re-engagement and or re-deployment of the Claimant.
d) In lieu of reinstatement, I award the Claimant compensation for unfair termination that is equivalent to his gross salary for a period of five (5) months, that is to say, Ksh. 1,522,500/=.
e) The award is subject to the applicable statutory deductions.
f) I award the Claimant interest at court rates from the date of this judgment.
g) Costs to the Claimant.

Dated, signed and delivered on the 27th day of April, 2023

B. O. M. MANANI
JUDGE

In the presence of:

…… for the Claimant

……for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI