Ragen v Boehringer Ingelheim Kenya Scientific Office (Cause E543 of 2023) [2024] KEELRC 13493 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13493 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E543 OF 2023

SC RUTTO, J

DECEMBER 20, 2024

BETWEEN

NICHOLAS ONG'OR RAGEN ..... CLAIMANT

AND

BOEHRINGER INGELHEIM KENYA SCIENTIFIC OFFICE ..... RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent as a medical representative with effect from 1st March 2018 until 2nd December 2022 when his services were prematurely terminated. According to the Claimant, he was a diligent and faithful employee and continued to serve with the same spirit and dedication until his termination without any just cause.

2. The Claimant contends that the Respondent's decision to charge him for unsatisfactory performance on challenges beyond his job description and control was unfair. Consequently, the Claimant prays for a declaration that his termination was both substantively and procedurally unfair and unlawful as well as an award of Kshs 1,852,555.80 for unfair termination. He has further sought to be awarded the costs of the suit.

3. The Respondent has countered the Claim through its Memorandum of Response dated 13th December 2023, in which it has denied the Claimant's assertions that he was a diligent employee and that he was terminated without a just cause. The Respondent has further denied that it acted unfairly as it had a valid reason for terminating the Claimant for poor performance and that it followed due process. On this account, the Respondent has asked the court to dismiss the claim with costs.

4. During the trial which took place on 1st July 2024, both sides called oral evidence in support of their respective cases.

Claimant's Case

5. The Claimant testified in support of his case and for starters, he sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the list and bundle of documents filed alongside his Claim as exhibits before court.

6. It was the Claimant's evidence that as a medical representative, his responsibilities included the sale and marketing of the products; Actilyse, Pradaxa and Spiriva. According to the Claimant, the sale and marketing of the products did not have any challenges until late 2019 when he observed that clients and potential clients had started recommending their patients to alternative products to the ones he was promoting.

7. That specifically, the clients had started recommending Bayer Schering Pharma's Xarelto, a product in the same category as the Respondent's Pradaxa, but three times cheaper, making it an economical alternative to their patients.

   He raised these concerns with his then Line Manager and the management at large during various meetings regarding the sale and market viability of Pradaxa.

8. The Claimant averred that this resulted in a cross-functional meeting held in January 2020 between himself and other departments including Marketing, Market Access, Key Accounts and Sales to discuss the challenges facing the sale of Pradaxa. Part of the outcome of the cross-functional meeting was the formation of the 'Pradaxa Revitalization Plan,' an initiative whose focus was to deal with the challenges facing Pradaxa. That through the initiative, monthly meetings were held to review the performance of Pradaxa in the market.

9. From the meetings, it was observed that the pricing of Pradaxa against other products in the same category was an issue with the then Market Access Manager acknowledging that the Respondent could not compete with other pharmaceutical companies who had significantly lowered the prices of their products. However, any suggestion of price reduction was not favoured by the Respondent due to profitability.

10. The Claimant further averred that the advent of COVID-19 in 2020 caused a further decline in the sales of the Respondent's Pradaxa, due to the economic crisis at the time, with the market preferring cheaper alternatives.

11. He further stated that in 2021 when AstraZeneca, another competing pharmaceutical company, rolled out the Africa Pumua Initiative, in which Symbicort, a product in the same category as the Respondent's Spiriva, was being sold at Kshs. 740 (for a month's dosage) against the Respondent's price of Kshs. 10, 000 for a monthly dosage of Spiriva. As such, the price for a month's dosage of the Respondent's Spiriva was 10 times or equal to the price of 10 months dosage of AstraZeneca's Symbicort.

12. He further averred that in 2021, there was a reshuffle of the Respondent's management team, with his then Product Manager being promoted to a senior position in Germany. That at the time of departing, the Product Manager had initiated a price reduction process for Pradaxa and Spiriva, an idea abandoned at the management level after he departed from the Nairobi Office.

13. The Claimant further stated that they held a meeting on 17th May 2021, to review the trend and performance of Pradaxa and Spiriva from quarter one of the years 2020 -2022. In the meeting, the prices of the Respondent's Pradaxa and Spiriva were compared to those of other companies including AstraZeneca's Symbicort and Bayer Schering Pharma's Xarelto.

14. The outcome of the comparison was that the Respondent's Pradaxa price ranged from thrice to ten times the price of Bayer Schering Pharma's Xarelto.

15. That the Respondent's pricing of Spiriva was also found to be higher than AstraZeneca's Symbicort whereby the cheapest Symbicort dosage was selling at Kshs. 746 while the Respondent's cheapest Spiriva was at Kshs.6,780.

16. The Claimant averred that part of the recommendations from the meeting included:

    a. Access to assist with price for the two brands as HCP's (Healthcare Professionals) were switching patients to Symbicort and Xarelto due to the price challenge.

    b. Access and Marketing to join some of the local webinars to have a feel of the market responses and feedback from the HCP's.

    c. To competitively bid in RFQ's (Request for Quotes) and tenders.

    d. FuE's (Follow up Emails) for Spiriva outdated/not loaded onto Veeva.

    e. Share with speakers' new data on Pradaxa.

17. It was the Claimant's testimony that despite this resolution, there was no action from the departments of Access or Marketing or management to review the prices of Pradaxa and Spiriva and the products continued to struggle in the market.

18. That in April 2022, he was put under a Performance Improvement Plan (PIP) for a period of three months ending in July 2022 for the unsatisfactory performance in sales of the two products. Notwithstanding his performance, the PIP period was extended for another three months ending on 31st October 2022.

19. It was the Claimant's contention that there was no explanation for the extension of the PIP until he raised concerns with the Respondent's management decision.

20. Despite the Respondent's management clarifying that the extension was due to unsatisfactory performance, especially on the sale of Pradaxa and Spiriva and promising to allocate more resources in dealing with the challenges facing the two products, no follow up action was conducted.

21. He continuously demonstrated his efforts in trying to improve the sales of the products as recognized by his line manager in his performance reports for July, September, and October 2022.

22. Upon the end of the PIP period, he was issued a Final Warning Letter by the Respondent on 1st November 2022.

23. On 2nd November 2022, he reverted, giving the history of the challenges the products had faced since 2020 and further clarifying that despite various meetings and resolutions, there had been no support from the management or other departments especially on the price reduction issue.

24. On 14th November 2022, the Respondent's management held a meeting to carry out a restructure of territories and products to be marketed in the year, 2023.

25. In the said meeting, the Respondent's management relegated Pradaxa and Spiriva for marketing in 2023. Soon after, on 24th November 2022, he was given a letter of transfer from Nairobi to Kisumu by the Respondent which he accepted.

26. Subsequently, he was issued with a notice to attend a disciplinary meeting scheduled for 1st December 2022 for charges of unsatisfactory performance, which he attended.

27. On 2nd December 2022, he was issued with a termination letter for unsatisfactory performance.

28. The Claimant averred that on 5th December 2022, he wrote an email to the Respondent's management raising concerns about the process leading to the disciplinary meeting especially the fact that the committee did not demonstrate how the Respondent's management had supported him against the concerns he had raised on Pradaxa and Spiriva.

29. He also expressed concerns with the charges against him, as the challenges facing the products were beyond him especially on the pricing issue. He further raised concerns about how his out of station business travel requests had been handled by the Respondent's management who had failed to approve them despite several reminders.

30. That further, his car battery broke down in 2022, and his requests to use Uber services to carry out his work while awaiting the replacement of the car battery were not approved causing him great inconvenience. That as a sale representative, he was not allowed to use public transport.

31. The Claimant stated that despite raising these concerns about the disciplinary committee meeting, the Respondent's management contrary to the standard operating procedures failed to respond to his email.

Respondent's Case

32. The Respondent called oral evidence through Ms. Daphne Openda who testified as RW1. She started by identifying herself as the Respondent's Human Resource Business Partner. Equally, she adopted her witness statement to constitute her evidence in chief and proceeded to produce the list and bundle of documents filed on behalf of the Respondent as exhibits before court.

33. It was RW1's evidence that as part of his duties, the Claimant was required to, among others, do the following:

    i. Achieve sales & market share objectives by maximizing the number of appropriate patients that receive Boehringer Ingelheim products;

    ii. Promote the Respondent's products to health care professionals & execute sales account plans, based on the local activity/expert engagement plan being accountable for maximizing the number of appropriate patients that receive Boehringer Ingelheim's products by creating added value to the key stakeholders;

    iii. Define and execute flawless aligned sales account plans, based on the local activity/expert engagement plan; and

    iv. Position himself as a true expert and reference in Pharma, based on therapeutic areas and key products of the company.

34. According to RW1, the Claimant underperformed on and/or failed to deliver on his agreed sales responsibilities, in comparison to his colleagues who were distributing the same products for the Respondent.

35. She is aware that the Claimant was placed on a PIP due to unsatisfactory performance for a period of three months from 14th March 2022 to 15th July 2022.

36. That the Claimant was made aware of his areas of improvement in particular the performance on his sales and GTM performance.

37. It was RW1's testimony that the Claimant's performance was monitored and periodic reviews were done on or before the fourth day of every month, and he was provided with feedback regarding his sales and GTM performance during the PIP process.

38. She is aware that upon the lapse of the three months on 15th July 2022, the Claimant's performance was rated and he had only a score of 49% against the expected score of 100% for the sales target.

39. Following discussions with the Claimant and agreed targets, the Respondent informed the Claimant that the PIP period would be extended by a further three months to allow him to improve his performance.

40. At the conclusion of the PIP, it was clear that the Claimant's sales were still low and his GTM performance was poor which facts were communicated to him. She is aware that the Claimant raised issues justifying his poor performance via email which were considered by the Respondent throughout the PIP process.

41. That subsequently, the Respondent issued the Claimant with a final warning letter regarding his poor performance. The Claimant responded to the warning letter by email wherein he laid out his case as to the factors contributing to his negative performance.

42. RW1 averred that the Respondent considered the representations made by the Claimant and summoned him to attend a hearing. The invitation to the hearing was received by the Claimant via email and he requested for an adjournment to 2nd December 2022.

43. RW1 further averred that at the hearing, the Claimant was duly given an opportunity to be accompanied by witnesses.

44. That during the hearing; the Claimant was reminded of the charges of poor performance that he was facing and the severity thereof; was granted an opportunity to orally respond to the allegations leveled against him, which he did, and the Respondent advised him that his explanations would be considered; and he was asked questions by the committee and he confirmed that he had not met his set and agreed targets.

45. After the hearing, the Respondent retired and considered the Claimant's explanations but did not find any merit in the same. Accordingly, by a letter dated 2nd December 2022, the Respondent terminated the Claimant's employment.

46. It was RW1's evidence that in terminating the Claimant, the Respondent cited the reason of unsatisfactory performance on the part of the Claimant and paid his terminal dues.

47. According to RW1, it is not true that the pricing of the Respondent's medical products, which is a business decision, contributed to the failure of the Respondent to meet his set and agreed targets. It was her contention that the Claimant's colleagues were attaining their targets with the same products.

48. She is aware that the Claimant attempted to contact the Respondent after his termination to provide justification for his poor performance. This was considered by the Respondent and found to be a repeat of his representations before the committee.

49. In RW1's view, there were plausible reasons for the termination of the Claimant's employment and the termination was fair, equitable and lawful after following due process.

Submissions

50. The Claimant submitted that poor sales of the Respondent's products were not related to his performance as an employee. To this end, he urged that the Respondent be estopped from asserting that the same was related to his role as a medical representative.

51. The Claimant further submitted that pricing was not his function and the best he could do was to report to the Respondent's management as envisaged in his Job Profile which required that he gives feedback on competitive intelligence and other information from the market.

52. It was the Claimant's further submission that it was unlawful for the Respondent to place him under a PIP for issues that were beyond his control and using the same as a tool of chastising him instead of using it as an opportunity to address challenges facing the products.

53. The Claimant further posited that having identified pricing as the main challenge facing Pradaxa and Spiriva, the Respondent lacked a valid reason for placing him under a PIP and eventually terminating his employment.

54. Referencing the case of *Grace Gacheri Muriithi vs Kenya Literature Bureau (Cause 44 of 2011)* (2012) KEELRC 135 (KLR) (12 October 2012), it was the Claimant's position that the pricing issue was an unresolved grievance as the Respondent's management never acted on it.

55. It was the Claimant's view that the remarks made by his Line Manager in the Performance Improvement Tracking Form and monthly post-comment reviews depict a picture of a diligent employee who had worked hard to ensure that the monthly objectives of the Respondent were met.

56. According to the Claimant, the Respondent therefore lacked a valid and fair reason related to his conduct, capability or compatibility; or based on the operational requirements of the employer, to terminate his employment.

57. The Claimant further submitted that the procedure adopted by the Respondent violated tenets of fair administrative action and fair procedure that guide termination of employment as envisaged under Article 47 of *the Constitution* of Kenya and Section 45 of the *Employment Act*.

58. On its part, the Respondent submitted that the Claimant's targets were holistic for both sale targets and GTM indicators. The Claimant was categorical that the Claimant failed to meet both GTM Key Performance Indicators (KPIs) as shown in the Performance Tracking Form and sales targets as admitted in cross-examination.

59. With respect to the pricing of its products, the Respondent posited that the quality, efficacy and superiority of its products has always been directly linked to their price points, as the products are originator brands a factor the Claimant was aware of from the time he signed the Employment Agreement.

60. In the same vein, the Respondent submitted that actions regarding pricing strategies and marketing of its products are primarily key strategic decisions that are made by the Respondent's global office and leadership team at their discretion.

61. According to the Respondent, there is no basis for comparison of prices or strategies with competitors as each company strategy is different for different reasons as the Respondent's products are of different quality in comparison the competitor's cited products.

62. In the Respondent's view, it had a valid reason for terminating the Claimant's employment for poor performance. In support of its submissions, the Respondent placed reliance on the case of Nalma Khamis vs Oxford University Press (E.A) Ltd [2017] eKLR.

63. As to the requirement for procedural fairness, the Respondent submitted that it had complied with Section 41 of the *Employment Act* after the end of the PIP.

64. The Respondent maintained that the Claimant was terminated due to poor performance after a lawful PIP process.

Analysis and Determination

65. Upon considering the pleadings, the evidentiary material before me and the rival submissions, I have singled out the following issues for determination: -

    i. Whether the Respondent has proved that it had a justifiable cause to terminate the Claimant's employment on account of unsatisfactory performance.

    ii. Whether the Claimant's termination was in accordance with fair procedure.

    iii. Is the Claimant entitled to the reliefs sought?

Justifiable cause?

66. Pursuant to Sections 43 and 45 (2) (a) and (b) of the *Employment Act* (Act) an employer is required to prove that it had a justified reason to warrant termination of an employee's services. Fundamentally, this entails proof of the reasons which occasioned the termination of an employee's contract of employment. It is also worth mentioning that such reasons ought to be fair, valid and related to the employee's conduct, capacity; or compatibility or based on the employer's operational requirements.

67. In the instant case, the Claimant was terminated from employment on account of unsatisfactory performance. At the outset, it is worth pointing out that the Claimant's performance was based on the Sales and GTM KPIs.

68. It is common ground that in his role as a medical representative, the Claimant was responsible for marketing the Respondent's Actilyse, Pradaxa and Spiriva.

69. It is the Claimant's case that the Respondent's management failed to act on the issues he had raised with respect to the pricing of the said products as they were only concerned about profitability. According to the Claimant, the issue of pricing was beyond him.

70. In his evidence, the Claimant traced the challenges he encountered in marketing the aforementioned products to 2019. With respect to Pradaxa, the Claimant averred that the Respondent's clients and potential clients had started recommending alternative products to their patients. In this regard, the Claimant cited Bayer Schering Pharma's Xarelto, a product he averred is in the same category as the Respondent's Pradaxa, but three times cheaper, making it an economical alternative to patients.

71. The Claimant averred that he raised this issue with his then line manager leading to an initiative called "Pradaxa Revitalization Plan".

72. The Claimant further cited the rolling out of Symbicort by AstraZeneca, a product in the same category as the Respondent's Spiriva and which was being sold at Kshs. 740 for a month's dosage against the Respondent's price of Kshs. 10,000 for a monthly dosage of Spiriva.

73. According to the Claimant, the Respondent's Product Manager who had initiated a price reduction process for Pradaxa and Spiriva was promoted to a senior position in Germany hence the idea of price reduction was abandoned at the management level upon the exit of the Product Manager from the Nairobi office.

74. Disputing the Claimant's assertions, the Respondent has averred that its business decision on pricing its medical products did not interfere with the Claimant's responsibility of marketing and selling its products and the attainment of his set and agreed targets. In this regard, the Respondent asserts that the Claimant's colleagues who were marketing the same products were meeting their targets.

75. On his part, the Claimant stated that his colleague's good performance was attributable to the tenders she had won. Notably, this position was not controverted by the Respondent.

76. In support of his case, the Claimant exhibited copies of minutes of a meeting held on 17th May 2021. One of the agenda items at the said meeting was to discuss the trend of Pradaxa and Spiriva and achievement in quarter one 2020 to 2022.

77. From the said minutes, it is apparent that the performance of the two products was on a downward trajectory. In this regard, the performance of Spiriva in quarter 1 of 2022 was 659 compared to quarter 1 of 2021 which was at 791 and quarter 1 of 2020 which was at 1,453.

78. With respect to Pradaxa, the performance in 2021 was 2,074 compared to the performance in 2020 which was 2,888. And in terms of quarterly performance, the figures for quarter 1 of 2020 stand at 978 whereas quarter 1 of 2021 reflects a performance of 563 and as for quarter 1 of 2022, the performance dipped further to 368.

79. It is worth pointing out that the Respondent did not dispute the data as presented by the Claimant. In the absence of contradictory evidence, the court presumes the data to be factual.

80. It is also evident from the minutes of 17th May 2021 that the areas of support were identified. From the record, there is no evidence proving that the proposals were actualized in order to boost the performance of the two products in the market.

81. In light of the foregoing, I am inclined to agree with the Claimant that his performance with respect to the sale of the products in question was influenced by extraneous factors that were beyond his control.

82. Indeed, this is further confirmed by the fact that in its meeting on 14th November 2022, the Respondent restructured its territories and products to be marketed in 2023. In this regard, Pradaxa and Spiriva are missing from the new promo grid. As such, the Respondent was in essence confirming the Claimant's assertions that the two products were struggling in the market and not competing effectively.

83. All in all, it is my finding that the Respondent has not proved that it was justified in terminating the Claimant's employment based on his performance with respect to his Sales target.

84. With respect to the Claimant's GTM targets, he was required to achieve a minimum of 85%.

85. From the record, the Claimant did not achieve his GTM KPIs at the end of the PIP period. It is worth noting that the Claimant has not addressed his performance with respect to GTM KPIs and has overly focused on his Sales target and the reason why did not achieve the same. As such, there is no explanation from his end as to why he did not achieve his GTM KPIs.

86. Notably, in the email of 25th July 2022, the Claimant was reminded by his line manager that the programme did not only look at and address Sales performance but also GTM performance.

87. In view of the foregoing, I am led to conclude that in as much as the Claimant had a valid reason for not achieving his Sales target, the same cannot be said for his GTM targets. For that reason, the Respondent was justified in terminating the Claimant's employment on account of unsatisfactory performance.

Fair procedure?

88. Pursuant to the *Employment Act*, an employer is required to prove that it subjected an employee to a fair process prior to terminating his or her employment. That is the general requirement under Section 45(2) (c).

89. The specific requirements of a fair process are to be found under Section 41 of the Act. Specifically, an employer is required to notify the employee of the reasons for which it is considering termination of his or her employment contract. The employer is further obliged to give the employee an opportunity to make representations in his or her defense and in so doing, he or she is entitled to be accompanied by a fellow employee or shop floor union representative of his or her own choice.

90. From the record, the Claimant was placed on a PIP which was to start on 4th April 2022. Upon review on 15th July 2022, the PIP was extended for another three months.

91. The Claimant was issued with a Final Warning letter dated 1st November 2022 in which he was informed that he had failed to achieve the set and agreed monthly targets and that if he failed to correct his performance within the month of October, he would be liable for disciplinary action.

92. The Claimant vide his email of 2nd November 2022, responded to the warning letter. I must point out that being a sanction, it follows that the Claimant was not required to respond to the warning letter. As it is, the warning was merely communicating the Respondent's decision with respect to the Claimant's performance.

93. Subsequent to the Final Warning, the Respondent issued the Claimant with an undated Notice to attend a disciplinary hearing which was scheduled to take place on 28th November 2022.

94. Notably, there is no evidence on record that prior to the disciplinary hearing, the Claimant was required to show cause why his employment should not be terminated on account of unsatisfactory performance. The show cause letter or notice to show cause should have outlined the allegations or charges against the Claimant and also requested him to respond within a reasonable time.

95. I say so bearing in mind that the Respondent's letter of 2nd November 2022 being a Final Warning, did not require the Claimant's response. In any event, a warning letter is in itself a sanction or penalty which should be preceded by a disciplinary process.

96. Seemingly, the Respondent treated the Final Warning letter as a notice to show cause and the Claimant's email of 2nd November 2022 as a response thereto. Why do I say so? In the opening paragraph of the invitation to the disciplinary hearing, the Respondent states: "We received and reviewed your email regarding the reasons that led to your unsatisfactory performance. On further consultation with members of the management, the reasons for unsatisfactory performance have been found to be insufficient and require further inquiry."

97. Needless to say, this was erroneous. Being a warning letter, it could not meet the standards expected of a show cause notice primarily because a warning letter is a sanction as I have already stated herein.

98. On this issue, the court adopts the determination in the case of Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) in which the learned Judge observed that beyond having an evaluation measure, and before termination on the

ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses. The learned Judge proceeded to hold that in the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again, and in the presence of an employee of their choice, the reasons for termination shared with the employee.

99. Therefore, it is evident that in this case, the Respondent skipped a critical procedure in terminating the Claimant's employment on grounds of unsatisfactory performance.

100. Ultimately the process applied was flawed and was not in accordance with the spirit of Section 41 of the Act.

Reliefs?

101. As the Court has found that the Respondent albeit proving that it had a valid and fair reason to terminate the Claimant's employment on account of his performance applied a flawed process, the Court will award him compensatory damages equivalent to two (2) months of his gross salary. This award takes into consideration the length of the employment relationship and the Claimant's contribution to the termination of his employment.

Orders

102. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent in the following manner:

    a. The Claimant is awarded compensatory damages in the sum of Kshs 308,759.30 being equivalent to two (2) months of his gross salary.

    b. Interest shall apply on the award in (a) above at court rates from the date of Judgment until payment in full.

    c. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Mogeni

For the Respondent Ms. Wangila

Court Assistant Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of

Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE