



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.25 OF 2019

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITALS WORKERS.....CLAIMANT

VERSUS

TENWEK HOSPITAL BOARD OF MANAGEMENT.....RESPONDENT

JUDGEMENT

The claimant is a registered trade union representing employees in the domestic, hotels, education institutions and hospital sectors. The respondent is a mission hospital established under the Africa Gospel Church (AGC).

The claim is that the parties have a recognition agreement and a collective bargaining agreement (CBA) between the union and CHAK on behalf of the churches institution and the respondent has been implementing the CBA over the years.

In November, 2018 several employees were served with retirement letters at an average age of 55 years contrary to clause 17 of the CBA. The employees had not requested for early retirement.

Richard Kiprono Kimei born in 1962 and issued with letter of retirement dated 5th September, 2017;

Justina Chebii Molei born in 1962 and issued with letter of retirement dated 22nd November, 2017;

Beatrice Chelagat born in 1962 and issued with letter of retirement dated 22nd November, 2017;

Florence Chepchirchir Cheruiyot born in 1962 and issued with letter of retirement dated 22nd November, 2017;

Anna Chepng'eno Mutai born in 1962 and issued with letter of retirement dated 22nd November, 2017;

Richard Kipyegon Kikwai born in 1961 and issued with letter of retirement dated 7th March, 2016;

Paul Kibet Ruto born in 1962 and issued with letter of retirement dated 5th September, 2017; and

Mary Chemutai Bor born in 1961 and issued with letter of retirement dated 11th November, 2016.

All the grievants were aged 55 years and had 5 more years before retirement date.

The claim is also that the respondent refused to engage with the claimant to resolve the matter and thus a dispute was lodged with the Minister who appointed a conciliator but there was no agreement. The respondent is engaging in unfair labour practice.

The claim is that there be a declaration that the actions of the respondent in early retirement of the grievants is unfair and should pay them for the 5 years of early retirement, the payment of full terminal dues of;

a) Pending leave dues

- b) Leave allowances
- c) Public holidays worked
- d) 3 months' notice pay
- e) Gratuity at 28 days for each year worked
- f) Long service increment
- g) Certificate of service
- h) Maximum compensation for loss of employment
- i) Salary arrears
- j) Ex gratia payment

Richard Kiprono Kemei testified in support of the claimant's case that he was employed by the respondent in the year 1981 as a mason and became unionised under the claimant together with Florence Ngetich, Justina Chebii and Beatrice Ruto. The claimant had a CBA with the respondent covering the years 2016/2017 and the question of retirement age arose where the grievants employment was stopped before the due age at 60 years contrary to the terms of the CBA. He was retired at 55 years and had 5 more years to work and thus claim for payment difference of 5 years.

There was a CBA signed for and on behalf of the claimant by the Federation of Kenya Employers for 2015/2016 and which changed the retirement age to 60 years and the respondent was bound.

Defence

The defence is that there is no CBA between the parties as alleged. The parties were governed by the CBA for the years 2014/2015.

Two grievants Richard Kikwai and Ann Yegon were not members of the claimant as alleged and not bound by the CBA 2014/2014 or the 2015/2016. The claims relating to the two should be dismissed.

By virtue of clause 17 of the applicable CBA the grievants were served with retirement notice upon attaining age 55. Negotiations were hampered by the claimant in trying to insert a clause not agreed upon by the parties to change the retirement age.

By relying on clause 17 of a CBA not agreed upon for the year 2015/2016 the claimant is misleading the court. Clause 17 is not couched in mandatory terms and an employee can retire at age 50. The claims made should be dismissed.

Counter-claim

In counter-claim the respondent's case is that pending the negotiations and registration of the 2016/2017 CBA the parties were bound by the 2014/2015 CBA. The claimant fraudulently and irregularly inserted a clause 17 in the new CBA purporting to extend the retirement age from 55 to 60 years. Such fraud was committed knowing that such terms had not been agreed upon by the parties to the CBA. Such resulted into unfair labour practice.

Upon taking note of the fraud parties met and agreed on the apparent error sneaked into the CBA before registration. The claimant backtracked on the agreement to address the error hence the counter-claim.

The counter-claim is that an order be issued dismissing the claim and a declaration that clause 17 of the CBA 2016-2017 was fraudulently amended to increase the retirement age in an unfair labour practice and be held null and void. A declaration that the parties are bound by the terms of clause 17 in the 2014/2015 CBA and costs is met by the clamant.

Geoffrey Langat the Chief Executive Officer (CEO) of the respondent testified that he has authority to execute all documents fro and on behalf of the respondent. The grievants were properly retired from their employment with the responded and paid all their dues.

The parties herein are bound by CBA; each CBA is signed upon negotiations. The last CBA was registered on 15th November, 2017 and the grievants had been retired under the 2014/2015 CBA. The new CBA changed the retirement age from 55 to 60 years.

Doing negotiations, the retirement age was not an issue/item for negotiations but when the respondent got the final copy of the CBA it was discovered that there was a change on the retirement clause from 55 to 60 years yet there was no conclusion on the item of retirement age as it had not been part of the negotiations.

Mr Langat also testified that the parties held several meeting on the matter and the retirement age remains in dispute and not agreed upon.

At the close of the hearing both parties filed written submissions.

It is common cause that the parties have a recognition agreement and have negotiated CBA.

The contested CBA is the one for the period of 2016/2017 particularly with regard to clause 17 on the retirement age.

The CBA for the years 2016/2017 was registered on 15th November, 2017. The CBA at clause 29 covers the period of 1st January, 2016 and in force for 2 years meaning 31st December, 2018.

Pending the registration of the CBA as above, the respondent issued notices of retirement to several employees dated 22nd November, 2017 and 7th March, 2016 and 11th November, 2016.

Section 59 (5) of the Labour Relations Act, 2007 on enforcement of CBA is that

(5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

Therefore, before registration with the court, a CBA cannot take effect. the date of registration is important as even where parties have agreed to backdate the application, such backdating only take the legal force from the date of registration of the CBA with the court.

In this regard, the 15th of November, 2017 is crucial and important. The CBA covering the period from the year 2016 for 2 years got the force of law.

A CBA being a binding agreement between the parties can only be set aside where there is established fraud, forgery and or misrepresentation. It is similar to the principles applied in setting aside consent or a contract.

In **Flora N. Wasike versus Destimo Wamboko [1988] eKLR** the Court stated:

It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.

This is the principle applied in the case of **Social Service League, M.P. Shah Hospital versus Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers [2018] eKLR** that;

A collective agreement is a contractual agreement like any other left to party autonomy, save that it is underpinned by specific statutory provisions which if breached would render it or the offending clauses illegal.

Apart from the illegality, the normal legal principles in setting aside a contract would apply, and these include establishment that there was fraud or misrepresentation.

The respondent in counter-claim has alleged that there was fraud on the part of the claimant when registering the CBA for the period of 2016 for 2 years when there was insertion of clause 17 on the retirement age which changed the same from 55 years to 60 years and yet this was not part of the items for negotiations. The respondent further reported a dispute to the Minister on the matter and there is communication and evidence of several communications on the subject and a challenge to the insertion of clause 17 into the CBA.

The particulars of fraud are that the claimant caused the insertion of clause 17 with the intent of extending the retirement age from 55 years to 60 years that such act was irregular and was without notice or negotiations by the parties and the presentation of the CBA for 2016/2016 for registration was misleading to the court.

There is no reply to the counter-claim. The averments and claims made by the respondent are not challenged.

The claimant union made some effort in addressing the counter-claim in the written submissions, but the opportunity was lost where there was no reply to the same before pleadings closed.

The insertion of clause 17 to the CBA for the period of 2016/2017 therefore being in issue, the same addressed instantly by the respondent with a report to the Minister, this ought to have formed a good basis for negotiations in future CBAs and not applied unilaterally by the claimant by circumventing the process of registration to their advantage and without the involvement of the parties to the CBA and who include the respondent.

To change a CBA with regard to the retirement age without agreement of the parties or an order of the court is to act contrary to fair labour relations. such is to engage in unfair labour practice. the claimant cannot enjoy any rights in such a case. The changes to the subject CBA are irregular and unlawful.

The retirement notices for the grievants herein coming in the wake of the challenged CBA for the period 2016/2017, the same having been registered in contravention of fair labour practices, these retirement having taken effect and the due notices having issued shall apply the terms of the existing clause 17 under the CBA for the period of 2014/2015.

The grievants covered under the subject CBA and those not unionised should not suffer any disadvantage or prejudice.

Accordingly; the insertion of Clause 17 into the 2016/2017 CBA is hereby found irregularly and therefore unlawful; the claims made are found without good basis and are hereby dismissed; the counter-claim is hereby allowed to the extent that parties shall remain bound by clause 17 of the 2014/2015 CBA until a new CBA is negotiated and agreed upon and addressing the retirement age as an item for negotiation.

As parties are engaged under a recognition agreement, no orders to costs.

Delivered at Kericho this 31st day of January, 2020.

M. MBAR?

JUDGE

In the presence of: