



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 626 OF 2013

JAMES HEATHER HAYES CLAIMANT

VERSUS

AFRICAN MEDICAL AND RESEARCH

FOUNDATION (AMREF).....RESPONDENT

J U D G E M E N T

1. By a Memorandum of claim filed on 6th May, 2013, the Claimant pleaded among others that he was employed by the respondent in 1970 and on 7th February, 2011 provided with a service agreement contract by the respondent. Upon perusal of the said agreement the Claimant discovered that the respondent was attempting to change the terms of employment by offering him a shorter period of one year only which was plainly in breach of the respondents' own regulations which provided that Senior employees at Grade 7 would automatically be entitled to four year renewable contract as per clause 1.5.1 of the respondents human resource manual. The respondent however reassured the Claimant that at the expiry of the said one-year term granted to him, the respondent's new company, AMREF Flying Doctors would be up and running and the Claimant would be seconded to the new company. Relying fully on this assurance the Claimant executed the said service agreement.

2. In September, 2011 without consultation or any justifiable reason the respondent introduced a new clause being clause 9.2.2 of the Human Resource Policy and Procedure Manual providing for that the retirement age from employment of the respondent would hence forth be capped at 65 years and went further to provide that it was mandatory for all employees reaching that age to retire from employment of the respondent.

3. The Claimant's contract was scheduled to end in November, 2011 and he had a legitimate expectation that the respondent would enhance the period of his contract in tandem with the period stated in their HR Policy and Procedure Manual. This benefit having accrued became the Claimant's entitlement. The Claimant unaware of the said changes in the respondent's policy commenced the process of negotiations with the respondent's director General Finance and Audit as regards his contract.

4. On 27th October, 2011, hardly a month since the introduction of the retirement age policy, the Claimant was served with a letter terminating his service on grounds of age and the respondent suggesting it had activated provisions of clause 9.2.2 of the Respondent's HR Policies and Procedures.

5. The Claimant protested at the manner in which the respondent terminated his service but the respondent refused to heed the demands. The respondent on its part pleaded that the Claimant was appointed in 1970 to work as a pilot and rose through the ranks in his employment and pursuant to the terms of a written service agreement made on 1st November, 2010 between the Claimant and the respondent, he agreed inter alia that his period of employment would be for a year from the date of commencement of the agreement unless extended by mutual agreement in writing to be determined before the end of that period. According to the respondent, the Claimant accepted the one-year contract and served thereunder enjoying the benefits accruing therefrom and was estopped from challenging the same retrospectively.

6. The respondent further stated that the Claimant's contract was extended for a further period of 8 months beginning November, 2011 as in line with respondent's retirement policy applicable at the time, he would reach the retirement age of 65 years on 21st June, 2012.

7. The respondent denied it gave the Claimant assurances in respect of his contractual terms as alleged. There was no undue influence or misrepresentation as alleged and that all the terms applicable to the Claimant's employment were set out in his service agreement. Further, including the retirement age of 65 years in the HR Policy in 2011 was intended to clarify the position and that the HR policy was dynamic document that had been the subject of various reviews to improve the respondents HR Practices and Policies. The reviews were conducted with best practice and in compliance with the law as its objective and was not targeted to any individual alleged by the Claimant. The reviews were approved after consideration as the Claimant was aware having been a member of the Board.

8. The respondent further stated that the Claimant was duly notified of his impending retirement in accordance with the terms of respondent's policy. The allegations of unlawful termination and or constructive redundancy were all denied. The respondent further stated that the Claimant was not entitled to a five-year contract as alleged. He agreed to a one-year contract pursuant to which his employment continued until his date of retirement.

9. At the oral hearing the Claimant further stated that he worked for the respondent for forty-one years since 1971 and rose to become the aviation director. It was his evidence that over the years they had different forms of contract but towards the end he was given a letter of open-ended contract which governed employees. It was also his evidence that the HR Manual and Policy governed his contract and that the manual came into force in 2004. It superseded all previous manuals and policies. There was no contract or instrument signed after that date. It was further his evidence that he was at grade 7 as per the respondent's HR Manual and that grade 7 employees were on a fixed 4-year term contract.

10. In 2010 he was issued with a fresh contract to sign. The contract was for one year. He asked about the four-year contract and was told that there was a new company wholly owned by Amref which was intended to raise funds for the respondent and that he was advised he would be migrating to the new company hence there was no need for a 4-year contract. He therefore signed the new contract. He noted that the new contract made no reference to the previous contract and that there was no provision for grade 7 employees to be employed for one year. According to him he signed the contract in good faith considering his long-term service. It was further his evidence that the retirement age of 65 years was thereafter introduced by the Board and that it had not been there for a long time. The retirement age was introduced in 2011.

11. Subsequently he was given a contract extension to take him to retirement age. There was no prior discussion about it. It was the Claimant's view that the 2010 contract was a tool to get him out of the respondent as soon as possible. He however continued being paid his salary as per the five-year contract.

12. In cross-examination he stated that he worked continuously for 41 years and received all his entitlements. According to him the funds were not necessarily for retirement. It was a contingency fund in case Amref was not able to pay his salary and that they were allowed to cash the provident fund before retirement. He further stated that he signed several service agreements from 1970 to 2010. The last service agreement was in 1983. The contracts were for a fixed period and that between 1983 and 2010 he never signed any fixed period contract. He further during this period he never signed any 4 years contract. He however admitted signing a one-year contract. But stated that he was verbally promised he would enjoy all his benefits during the one -year contract. He further stated that there was a retirement age of 60 years but this was removed at some point by the Board.

13. He however conceded that he knew that at some age he would for some reason leave employment. According to him however 65 was not a reasonable retirement age. According to the Claimant HR policy overrode the manual and that if there was no contract one would abide by the manual.

14. In re-examination he stated that between 1983 and 2010 he was employed by the respondent despite having no contract and where there was no contract, re course would be made to the HR manual.

15. The respondent's witness Mr. Shadrack Kirui on his part stated that he was the human resource Manager of the respondent and that he recorded a witness statement on 25th January, 2018 which he sought to adopt as his evidence in chief. He also sought reliance on the supporting documents. He however sought clarification that at paragraph 7 of his witness statement, Amref had provident fund scheme where all staff were included except expatriates who had options for offshore pension schemes. The scheme was contributory and that the Claimant was paid his pension upon retirement.

16. In cross-examination he stated that the Claimant was employed from 1970 up to 2012 in various capacities. From 1983 to 2010 there were no contracts but there was an implied contract governing the period.

17. In 2010 there was harmonization of Amref and the Claimant was issued with a one-year contract to allow harmonization. According to the witness, there were documents governing the relationship between 1983 to 2010. He further stated that clause 3.8 of the HR Policy and Procedure Manual constituted part of the Claimants contract of employment and that the five-year term of the Claimant's contract was devolved from the manual. According to him the one-year contract terminated the four-year contract.

18. It was further his evidence that the one-year contract was inconsistent with the four-year contract and that a grade 7 employee could not get a one-year contract. It was his evidence that there were other one-year contracts for senior managers and that the one-year contract was in contemplation of the 65-year rule. According to him a contract can vary or change a policy in the HR Manual and that manuals were dynamic documents. The one- year contract issued to the Claimant had a probation clause but this could have been an error since most contracts were standard documents. It was his evidence that if there was inconsistency between the contract and HR Policy documents, the contract prevailed. He further stated that there was no loss of benefit because of the one -year contract.

19. Mr. Kirui further stated that though the Claimant was not a Board member, but he was a Senior Manager and knew which changes were being presented to the Board and that he knew retirement age was being introduced and was to be presented to the Board for ratification. The witness further stated that there was extension of the one -year contract for 8 months to align with the Claimants retirement.

20. In re-examination he stated that Amref Flying Doctor Service was wholly owned by Amref and that the Claimant was a pilot hence a major function of the Flying Doctor Service.

21. In his final submissions Dr. Kiplagat for the Claimant submitted in the main that the Claimant had absolutely no idea that a new retirement age of 65 was being introduced or that it had in fact been imposed as a term of his contract. The first time the Claimant became aware of the retirement age was on the 27th October, 2011 where he was issued with a 6 month notice purportedly ending on his 65th

birthday. The Claimant discovered at the trial that a decision had been made vide AMREF Board decision of 27th September, 2011 in terms that “ the committee approved the review of retirement age to 65 years with immediate effect.

22. Previously the same committee acknowledged that AMREF had removed the retirement age at 60 years in 2004 but no background was given why this was done. The Claimant had been working on the assumption that there was no retirement age and that his service was pegged to a 4-year renewable contract cycle and had planned his life accordingly.

23. Counsel further submitted that even if knowledge could be imputed on the basis of his disputed membership of the respondent's excom Senior Management team how would the rest of AMREF staff have become aware of this material change. According to Counsel, there was no evidence tabled or laid because it is that dissemination to AMREF employees generally that would have given notice of the change. Dr. Kiplagat therefore submitted that not having been notified to the Claimant the said retirement age could not apply to him retrospectively. Counsel further submitted that the introduction of the 65-year retirement age was material change in the Claimant's contract of employment and required a written consent of both parties for the change to be operationalized.

24. Regarding the one -year contract, counsel submitted that the reason the Claimant signed the same was clearly on a representation made by the respondent regarding reorganization of AMREF. It was the Claimant's case that he broke his four -year contract in order to transition to the new entity which would then issue him with a succession 4-year contract under the AMREF HR Policy and Procedures Manual for persons his grade. According to Counsel it was clear that the Claimant by reason of the respondent's manual was entitled to a 4 -year contract given his grade and could not be offered a one- year contract. The language in the manual was mandatory. The manual said employees at grade 7-8 would hold four-year renewable contracts. The Manual did not import of permissive language of may . By purporting to terminate the Claimant's 4-year contract and replacing this with a 1-year contract the respondent took away a vested benefit and an entitlement.

25. Ms Watende for the respondent on her part submitted that the retirement age was lawful and consistent with the respondents HR policy and that the policy Claimant relies on to assert all his rights as alleged actually contains retirement age. The Claimant's arguments were therefore contradictory. He could not rely on parts of the same document and disregard some.

26. According to Counsel, the respondent had proved that the Claimant was a member of the Provident Fund and it could not be true that he assumed he would continue working indefinitely and this corroborates the respondent's evidence that the retirement age of 60 had previously been removed and subsequently by the same process, years later a retirement age was reintroduced increasing the same by 5 years. Ms. Wetende submitted that the Claimant was paid his pension dues after his retirement. He could not therefore retain the said benefits and lawfully claim that his contract ended otherwise than retirement.

27. According to Counsel. the signing of the one- year contract by the Claimant meant that his contract could have been terminated at the expiry thereof but instead continued to work on extensions until his retirement. He could not go back and claim an entitlement to a 4 -year contract when he agreed to a one- year contract. It should be noted that the Claimant did not challenge the 1 - year contract at the time but instead served thereunder and on an extension that took him to his retirement age.

28. Ms. Wetende further submitted that the claims of undue influence in the signing of the contract were misplaced and, in any event, not proved. Counsel further submitted that the retirement age of 65 years applied across the board and was not targeted at the Claimant. This was confirmed by the fact that it was set out in the HR policy which applied across the Board.

29. According to Counsel the Claimant was not declared redundant but his employment ended on account of him having attained the set retirement age.

30. Having summarized as above, the pleadings, evidence and submissions by counsel for either party, the issues which seem to me to be decided in the dispute is whether the Claimant being a grade 7 employee as per the respondents HR Manual could validly be issued with a one year contract, second whether the Claimant was aware and indeed knew that he was supposed to retire upon attainment of 65 years, whether by retiring the Claimant at the age of 65 years the respondent unfairly terminated his contract and finally what would be the appropriate order to make in either case.

31. It was not disputed that the Claimant was a grade 7 employee. Clause 1.5.1 of the respondent's HR policy and procedures manual, 2011 provided that regular staff would be offered 2-year renewable contracts while Senior Management will hold 4 years renewable contract.

32. From the record of documents filed by the respondent together with response to the claim, there are exhibited two-year contracts from 1970 through to 1983.

33. Between 1983 to 2010 there was no written contract between the parties herein however it was not in dispute that during the said period the Claimant was retained on implied contracts and that in the year 2000 there was a revision of contract placing the Claimant and Senior Officers on 4-year renewable contracts.

34. On 1st November, 2010 in spite of the fact that the Claimant was a grade 7 employee, he was issued and he accepted a one-year contract which was to terminate around 1st November, 2011. On 27th October, 2011, the respondent wrote to the Claimant informing him that his contract which was to expire by and October, 2011 would be renewed for 8 months in line with the respondent's policy on retirement age which had been fixed at 65 years. The Claimant was due to attain the age of 65 on 21st June, 2012. This letter according to its contents was written as a result of the discussion between the Claimant and the respondent's Director General.

35. From the document attached to the respondent's memorandum of response, the decision to settle the retirement age at 65 years was reached 27th September, 2011 in South Africa during a meeting of the Respondent's Human Resources Committee. This was when the Claimant's one -year contract was running.

36. I have perused documents by both parties but I have unfortunately not come across the Claimant's immediate response to the letter dated 27th October, 2011. If there was one but I never identified it, would be regretted but I would take excuse in the voluminous document's filed by the parties.

37. However the Court has come across the letter dated 28th March, 2012 by the Claimant to Mrs. Nancy Muriuki, Director Human Resources in which he regretted lack of change in the respondent's stance with regard to his retirement package. The Claimant informed Mrs. Kirui of his intention to institute legal proceedings unless immediate good faith engagements were ordered with a view to reaching an amicable settlement with regard to his retirement package commensurate with the years he had worked for the respondent.

38. In his pleadings and at the trial the Claimant alleged that he signed the one-year contract in good faith and on representation by the respondent that he would be issued with a 4-year contract as per the HR Policy Manual when the new sister Company Amref Flying Doctor Service became fully operational. The letter dated 28th March, 2012 by the Claimant referred to earlier was more concerned about the his retirement package than the fact that he was issued with a contract not commensurate to his grade and the letter further did not allude to the alleged representation over a 4 year contract once the respondent's sister company was up and running.

39. Clause 1.5.1 of the respondents HR Policy and Procedures Manual, 2011 states that: -

“ Senior Management staff in grade 7-8 will hold 4 years renewable contract”.

Concise Oxford English dictionary defines the noun “will” as follows

“expressing future tense, expressly a strong intention or assertion about future, expressing request, desire, consent or willingness, expressing probability to or expectation about something.”

40. In contradistinction, the noun shall is defined as

“expressing strong assertion or intention, expressing an instruction or command.”

41. From the definition of the two nouns it would seem that the word “will” is more permissive and “shall” is mandatory. This therefore implies that the use of the word “will” in Clause 1.5.1 of the respondent's HR Manual does not make it mandatory that under no circumstance can a grade 7 employee be offered a contract less than four years. The reasonable interpretation is that such contract will be offered but subject to reasonable circumstances permitting. There was therefore nothing wrong in offering the Claimant a one-year contract in view of the fact that he was about to retire as per the respondent's revised HR Manual and Policy.

42. This brings me to the second issue of whether the Claimant was aware that he ought to retire at age 65. The Claimant did not deny that he was a member of the respondent's Provident Fund. In fact, he was a member and a contributor and indeed drew his dues upon retirement. The Fund Members handbook refers to normal retirement date as the 60th birthday of a member.

43. The Fund could not have arbitrarily plucked the age 60 and put it as the retirement age without any background information. It would beat logic for a Fund to pay an employee who is still in active employment his or her full retirement benefit.

44. It was common ground between the parties that there was once a retirement age at 60 years but this was for some unexplained reasons removed it was later in 2011 reintroduced but enhanced to 65 years.

45. No employment can be perpetual. Human beings as they advance in age naturally slow down and become unable to perform with same energy the tasks they used to perform when younger. It is for this reason that a time for retirement is an essential moment in an employment contract. The fact that it was not specifically mentioned in the Claimants contract or engagement does not mean it never existed and further the fact that it was not specifically brought to the Claimant's attention is immaterial.

46. In any event the Claimant and indeed the respondent have conceded that between 1983 and 2010 there were no formal contracts governing the relationship between the parties and that the operative document was the HR Policy Manual.

47. In this manual was the necessary animal called retirement age. It would therefore be pedantic and lacking in candour for the Claimant to assert the was not aware there was retirement age.

48. To this extent the Court finds and holds that the Claimant contract of employment with the respondent was terminated an account of retirement hence no finding of unfair termination can be made. The claim is therefore found unsuccessful and is hereby dismissed.

49. On the issue of costs, the Court will order that each party bears their own costs due to the fact that the Claimant served the respondent for over fifty years and the respondent was even still willing to offer him consultancy service after he retired. That meant they enjoyed cordial relationship.

50. It is the Court's view that the Claimant moving the Court to seek clarity over the dispute was in good faith.

51. It is so ordered.

Dated at Nairobi this 13th day of March, 2020

Abuodha Jorum Nelson

Judge

Delivered this 13th day of March, 2020

Byram Ongaya

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.