



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 61 OF 2018

BANKING, INSURANCE, AND FINANCE UNION (KENYA).....CLAIMANT

VERSUS

BANK OF INDIA.....1ST RESPONDENT

KENYA BANKERS ASSOCIATION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2019)

JUDGMENT

The claimant filed the statement of claim on 24.01.2018 and Tom O’Odero, the National Organising Secretary appeared on behalf of the claimant. The claimant prayed for judgment for:

- a) A declaration that all employees in the respondent bank shall retire at the age of 60 years and all the said employees may be allowed to opt to retire on attaining the age of 50 years with full retirement benefits as required by law.
- b) The retirement age read together with the duration of individual contracts as captured in appendix A of the recognition agreement is a negotiable item and should therefore be included as a negotiable item and should therefore be included as a negotiable clause in the collective bargaining agreement (CBA) for future negotiations between the claimant and the 2nd respondent.
- c) Costs of the suit.

The 1st respondent filed the memorandum of response on 21.02.2018 through Mahinda and Maina Company Advocates. The 1st respondent prayed that the claimant’s statement of claim be dismissed with costs, VAT and interest on costs at Court rates.

The 2nd respondent appointed J.N. Namasake & Company Advocates to act in the case.

The claimant opted to rely on the pleadings and documents on record. The 1st respondent called a witness. The 2nd respondent opted to rely on documents and pleadings. The parties consented to admission of documents in evidence as filed.

The evidence is that the claimant and the 1st respondent were in a trade dispute concluding in the conciliator’s recommendation dated 19.10.2017. The matter in dispute was thus, **“Failure or refusal to enhance the retirement age to 60 years for 1st respondent’s employees as is the practice in the industry for members of the Kenya Bankers Association (KBA).”** The claimant’s case as documented by the conciliator is as follows:

- a) The claimant and the 1st respondent are bound by the recognition agreement signed between the claimant and the KBA in 2000.
- b) The 1st respondent is a member of the KBA and is bound by the terms of the recognition agreement.
- c) The recognition agreement provides for negotiable items as well as non-negotiable items in Appendix A and B respectively. The recognition agreement in Appendix A provides for duration of individual contract as a negotiable item. The attempts by the claimant to negotiate retirement age under that clause has been opposed on account it is not part of duration of individual contract as a negotiable item under claims that it is a non-negotiable item.
- d) The claimant’s position is that the duration of an employee’s contract of service is an integral part of the terms and conditions of employment.

- e) The 1st respondent has unilaterally and in contravention of the parties' recognition agreement set the retirement age at 55 years.
- f) The Pensions Act and the National Social Security Fund Act gives an employee the option to retire at the age of 50 years voluntarily with full retirement benefits, an option denied to the 1st respondent's employees on account that the mandatory retirement age is 55 years.
- g) That almost all banks in Kenya had enhanced their retirement age to 60 years with an option for early retirement with full benefits upon attainment of 50 years of age.
- h) The enhanced age to 60 years is beneficial to employees because it increases the income for additional 5 years in employment, increases the NSSF or pension benefits, reduces the loan repayments, increases potential loan available due to increased repayment periods, and enhances tax waivers on provident funds after 60 years of age.
- i) It is discriminative for the 1st respondent to fix retirement age at 55 years while the other banks have fixed it at 60 years of age and that is against the Constitution of Kenya 2010, the Employment Act 2007, and the ILO convention No.111. The claimant urged that pegging the retirement age for Kenyan based employees at 55 years and those based in India at 60 years is also discriminative.
- j) The claimant urged that the employees of the 1st respondent be allowed to retire at 60 years of age with an option to retire upon attaining 50 years of age and with full retirement benefits as required by law.

The 1st respondent submitted to the conciliator as follows:

- a) The CBA and no law prescribed retirement age of 60 years. Thus there was no basis for the bank, the 1st respondent, to be compelled to fix 60 years of age for mandatory retirement.
- b) An employer in private sector like the 1st respondent may at its own discretion accept the retirement of its employees at the age of 50 years or extend the same beyond 55 years of age as its sole business decision and as management prerogative.
- c) Retirement age is linked to pension scheme which under the recognition agreement is a non-negotiable item.
- d) The 1st respondent is indeed a member of KBA but KBA had issued no directive or guidelines that member banks apply retirement age of 60 years and its is unconstitutional and discriminatory to single out the 1st respondent bank in that regard.
- e) There is no binding agreement or legal statute that compels the bank to apply the retirement age of 60 years as mandatory age of retirement

The conciliator found that the statutes invoked by the claimant did not apply, the CBA made no provision for specific age of retirement, and by practice and tradition most banks being members of KBA had voluntarily adopted age of 60 years as retirement age. For the 1st respondent's employees, the conciliator found that the applicable binding documents were the individual employees' letters of appointment and they were concluded with full knowledge that the retirement age was 55 years – and the management in its own discretion would extend the retirement age beyond 55 years of age or allow staff to retire at 50 years of age. The conciliator considered that provision in the recognition agreement that make duration of individual contracts negotiable was available for the claimant and 2nd respondent to negotiate an age of retirement that would apply to all banks being members of KBA, the 2nd respondent. The parties failed to agree upon the recommendation by the conciliator and the conciliator issued the certificate of unresolved dispute dated 17.01.2018 as the dispute had not been resolved per section 69 of the Labour Relations Act, 2007.

The Court has considered the pleadings, the evidence and the submissions filed for parties and makes findings as follows.

First, there is no dispute that the 1st respondent is a member of the 2nd respondent and the CBA and the recognition agreement between the claimant and the 2nd respondent is binding upon the 1st respondent.

Second, the CBA does not fix the age of mandatory retirement. There is no established basis to apply a practice on age of retirement of 60 years as applied by most banks against the 1st respondent. The Court returns that the 1st respondent is an autonomous employer bound only by the CBA and recognition agreement by reason of its membership in the 2nd respondent. The Court further returns that the practice on age of retirement of 60 years with an option by an employee to opt to retire at the age of 50 years as applied by other banks does not amount to a discriminatory practice when the 1st respondent does not apply the same practice because the 1st respondent is clearly an autonomous employer. There was no evidence that for the 1st respondent's employees working in Kenya, separate ages of mandatory retirement had been applied. The evidence was that staff in the 1st respondent's bank serving in India had different terms of service from those serving in Kenya. As was submitted for the 2nd respondent, for a global or international employer like the 1st respondent, difference in terms of service including age of retirement would be permissible and not amount to discrimination when uniquely applied to various states or national jurisdictions. Thus there was nothing wrong in the 1st respondent's staff working in India serving on different terms of service from those working in Kenya in circumstances that for those serving in Kenya, the Kenyan laws applied and for those in India, the law in India applied. The claimant did not establish a contractual, treaty or statutory provision that favoured the submission that an employer's staff in different states or jurisdictions would be entitled to similar treatment. Accordingly, the claimant's case based on discrimination or unfair treatment under Articles 27 and 41 of the Constitution and section 5 of the Employment Act, 2007 will fail.

Third, the Court further finds that the 1st respondent has instituted same policy on age of retirement for its unionisable and non-unionisable staff. The Human Resource Manual provides that the normal retirement age is 55 years for unionisable staff (clerical staff, sub staff or messengers) and non-unionisable staff – local officers; however with the consent of the bank, they can retire at any time after age of 50. The Manual further provides that the Executive Director, upon receipt of recommendation from the Chief Executive, Kenya Branches, may extend the retirement age for a maximum period of 3 years on the basis of satisfactory and unblemished record, performance or productivity - and that will be at the sole discretion of the bank. The Court considers that staff seconded from India would be on a term contract for the period of secondment and their service is governed by the terms of the secondment contract or agreement. To the extent that the 1st respondent has instituted similar terms on age of retirement for all its employees for the unionisable and non-unionisable staff in the Kenya Branches, the Court returns that the claimant has failed to establish discrimination.

Fourth, while making the finding that in the present case discrimination has not been established, the Court returns that the present case is clearly distinguishable from Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers –Versus- M.P. Shah Hospital [2018]eKLR where the Court found that the respondent had acted in discrimination of union members by agreeing in the CBA that they would retire at 55 to 57 years of age while in human resource policies the non-unionisable or management employees would retire at the age of 60 years. The Court held, **“It has been submitted for the respondent that by reason of the provision in the collective agreement that the members retire at 57 years of age, the same is incorporated in individual members’ contracts of service. That is true but it is at that point that the discriminatory or inequality element in the provision becomes apparent. Thus, employees eligible to join the union but fail to do so would be differently treated in that regard as the clause on retirement age will not apply to them but yet they will for all purposes be subjected to the purported respondent’s justifications for the differing retirement age between unionisable and management cadres. Thus simply to say the parties to the collective agreement had agreed does not in the opinion of the Court, amount to a reasonable justification for a varying retirement age between the unionisable and the management cadres. The Court considers that Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. In the present case, the claimant’s members being employees of the respondent have equal protection and equal benefit of section 5(2) of the Employment Act, 2007. Whereas the matter at hand does not relate to imposition of a disciplinary penalty or dismissal, the Court is guided that under section 46 (c) of the Act, it amounts to unfair reason to act against the employee on account of employee’s membership or proposed membership of a trade union. It is the Court’s view that the clause in the collective agreement that members of the trade union to normally retire at 57 years of age amounts to unequal treatment of the members as compared to the management cadre or the employees eligible to join the union but have not done so. The Court returns that such clause in the circumstances of this case is a clear contravention of the employer’s obligation in section 5(2) of the Employment Act, 2007 which provides, “(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.” The clause has an effect of treating differently and without any reasonable justification, the members of the union, the employees eligible to join the union but have not done so, and the employees in the management cadre. Thus the Court follows Belgain Linguistics (No.2) (1979 – 1980) 1 EHRR where it was held that for discrimination to be objectively justified it must be reasonable; assessed according to its aims and effects; considered against prevailing principles of normality in democratic societies; seen to pursue a legitimate aim; and established that there is a relationship of proportionality between the means employed and the aim sought (Discussed in Robin Allen & Rachel Crasnow, Employment Law & Human Rights, Oxford University Press,(2002) page 216). In the present case, the 57 years retirement clause would possibly discourage union membership and has been found to contravene Article 41 (1) and Article 27(1) of the Constitution in so far as section 5 (2) of the Employment Act, 2007 is contravened. The Court returns that the provision that the claimant’s members retire at 57 years of age amounts to a discrimination that cannot be objectively justified.”**

Fifth, duration of individual contracts is listed in Appendix A to the recognition agreement as a negotiable item. The claimant urges that in previous CBA negotiations there was resistance to negotiate the item on account that it was non-negotiable under Appendix B to the recognition agreement. The non-negotiable matters include all matters not listed in Appendix A and in particular social and sports activities; management methods; sickness benefits, pension and provident funds or gratuities. The respondent submits that age of retirement is provided for in the respective trust deeds on pension schemes and therefore it is not negotiable for the previous over 19 years. The Court considers that whether age of retirement is part of duration of individual contracts or part of pension and provident funds or gratuities is a matter which the claimant and the 2nd respondent will have to process within their dispute resolution mechanism because the matter as currently presented in the present suit has not been processed in that manner and it would be premature for the Court to decide the matter one way or the other. The Court finds that the issue of age of retirement being a negotiable or non-negotiable item under recognition agreement will need to be resolved between the trade union and the 2nd respondent accordingly.

Sixth, as submitted for the 2nd respondent, there was no trade dispute between the 2nd respondent and the claimant and the proper cause of action is for parties to negotiate retirement age in the ordinary course of CBA negotiation or within interpretation or amendment of the recognition agreement - if it is desired that a uniform age of retirement be upheld by all members of the 2nd respondent and to apply as may be agreed upon. In absence of such trade dispute between the claimant and 2nd respondent the Court returns that the Court is thereby precluded from interfering with the claimant’s and 2nd respondent’s chance to negotiate the point. The 2nd respondent was not party to the conciliation proceeding and any dispute in that regard between the claimant and 2nd respondent has not been established at all. As submitted for the 2nd respondent, the claimant and 2nd respondent are bound by Part VIII Labour Relations Act, 2007.

The Court has considered the parties’ continuing relationship and order that each party shall bear own costs of the suit.

In conclusion the claimant’s memorandum of claim is hereby dismissed with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 19th July, 2019.

BYRAM ONGAYA

JUDGE