



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 634 OF 2019

BANKING, INSURANCE & FINANCE UNION.....CLAIMANT

v

GUARDIAN BANK LIMITED.....RESPONDENT

RULING

1. Rose Nyambura (Grievant) was offered employment by First National Finance Bank Ltd on 1 November 1996.
2. On 20 February 2001, Guardian Bank Ltd (Respondent) wrote to the Grievant to inform her that as a result of the Respondent taking over the First National Finance Bank Ltd, her services would be continued on the same terms and conditions as were applicable to other employees of the Respondent. The Grievant accepted the offer.
3. On 21 June 2019, the Respondent notified the Grievant that she would be retired on 30 September 2019 upon reaching the retirement age of 55 years.
4. The Grievant consulted the Banking, Insurance & Finance Union (the Union) of which she was a member and on 25 September 2019, the Union moved the Court seeking orders
 1. ...
 2. **THAT** this Honourable Court be pleased to issue interim ex parte orders restraining the Respondent herein from prematurely and unlawfully retiring Ms. Rose Nyambura Gichohi before attaining the normal retirement age of sixty (60) years until the hearing and determination of this application inter partes.
 3. **THAT** the Honourable Court do issue orders compelling the Respondent to cancel the retirement notice already issued to Ms Rose Nyambura Gichohi until this application is disposed of.
 4. **THAT** the Honourable Court do award costs of this application to the Claimant.
5. On 25 September 2019, the Duty Court directed the Union to serve the application for hearing the next day.
6. The Respondent did not attend Court on 26 September 2019 and the Court allowed order 2 of the motion pending *inter partes* hearing on 9 October 2019.
7. The Respondent filed a replying affidavit sworn by its Human Resources Manager in opposition to the application and the Court took oral submissions as scheduled.
8. The Court has considered all the material placed before it including the submissions.
9. It is not in dispute that the retirement age under the contract the Grievant had with the First National Finance Bank Ltd was 60 years. It was also not disputed that the collective bargaining agreement between the Union and Kenya Bankers Association of which the Respondent is a member has not set out a retirement age.
10. When the Respondent took over the First National Finance Bank Ltd, it expressly offered to continue the Grievant's employment, but on terms and conditions of service applicable to its other staff.
11. Consequently, the Court finds that the terms and conditions of employment agreed between the Grievant and the First National Finance

Bank Ltd and more so on retirement age of 60 years did not continue or survive beyond 20 February 2001 when the Respondent offered the Grievant new terms and conditions of service.

12. Clause 23.0 of the Respondent's Policy on Human Resources filed in Court provide for retirement on the attainment of 55 years, but with a sole discretion on the Human Resources Committee deciding whether to re-employ the retired employee on contract if the employee was part of senior management II, but not beyond 70 years.

13. The Union did not place before the Court any evidence that the Grievant was part of senior management II to be eligible for re-employment, and even if that evidence was present, the Respondent had sole discretion to consider re-employment. There was no suggestion that there was an unfair exercise of discretion.

14. In any case, even if it had been demonstrated that the Respondent had unfairly exercised the discretion, the re-employment would in the context of clause 23.0 constitute a fresh contract.

15. The Court finds that the Union has failed to show a *prima facie* case to warrant the grant of the interdicts sought at the interlocutory stage.

Conclusion and Orders

16. The consequence of the foregoing is that the Court finds no merit in the application dated 25 September 2019 and orders it dismissed with no order as to costs.

17. Since the Grievant served past the retirement age on the strength of a Court order, any remuneration paid beyond that date should not be recovered from her.

Delivered, dated and signed in Nairobi on this 1st day of November 2019.

Radido Stephen

Judge

Appearances

For Union/Grievant Mr. Odero, Organising Secretary

For Respondent Mr. Mutua instructed by Mutua Waweru & Co. Advocates

Court Assistant Lindsey