REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 402 OF 2018

KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL

INSTITUTIONS & ALLIED WORKERS.....CLAIMANT

VERSUS

M.P.SHAH HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th June, 2018)

JUDGMENT

The claimant filed the statement of claim on 21.03.2018 through J.D. Oduor & Company Advocates. The claimant prayed for an order of stay, staying the decision of the respondent to retire the claimant's members at the age of fifty seven (57) years.

The claimant filed an application together with the filing of the statement of claim seeking a temporary order that pending the hearing of the suit the respondent is directed to stop retiring the union members upon attaining 57 years of age.

The respondent opposed the application by filing the replying affidavit of Falguni Chudasama, the respondent's head of human resources. The affidavit was filed on 30.04.2018 through Iseme Kamau & Maema Advocates.

On 03.05.2017 the parties recorded a consent thus, "**By consent of the parties the only issue for determination is whether the retirement age is 57 or 60 years and by further consent judgment to follow the filing of submissions on that issue.**" Submissions were filed for both parties hence this judgment.

It is not in dispute that in 2015 the parties signed a collective agreement effective 01.04.2015 to remain in force for 2 years. Under clause 21 of the agreement, the agreed retirement age for all unionisable employees was 57 years of age. Under clause 32 of the agreement, the collective agreement was to remain in force until the parties signed and negotiated the next collective agreement. The next collective agreement was signed on 13.04.2018 and registered by the Court on 21.05.2018. At clause 21 of the new collective agreement the parties agreed to retain the retirement age for unionisable staff at 57 years of age. By reason of the collective agreements, the Court returns that at all material times the agreed retirement age for the respondent's unionisable employees is upon attaining 57 years of age. By reason of the provisions of section 59 of the Labour Relations Act, 2007 the collective agreements bind the respondent as well as the respondent's unionisable employees being members of the claimant trade union.

It is not in dispute that the management employees in the respondent's service retire upon attainment of 60 years of age and as per the respondent's applicable policies. Further it is not in dispute that there is no constitutional or statutory provision prescribing the mandatory or normal retirement age for service in private sector.

The claimant's case is that the provision that the unionisable employees retire at 57 years of age is discriminatory in view of the respondent's management employees retiring at 60 years of age.

The Court has considered the parties' respective pleadings and submissions.

It is submitted for the claimant that section 5(2) of the Employment Act, 2007 provides, **"(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.**" Further ILO Recommendation No. 162 provides for equal opportunity and treatment of all persons and prevents discrimination in employment on account of age.

For the respondent it is submitted that section 5(3)(b) of the Employment Act, 2007 provides thus, **"(3) It is not discrimination to-(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job**". Thus, by virtue of the very nature of the

roles and the functions held by the management staff, it is the inherent nature of their jobs that they enjoy a higher retirement age than unionisable employees because:

a) Under respondent's Employee Handbook management employees excludes all staff carrying out manual work and who are covered by the CBA.

b) The management staff have specialised skills and technical expertise and are not easily replaceable. For sound succession management, the retirement at age 60 for management cadre permits replacement after due grooming of the existing employees.

c) Unionisable employees perform manual work and their productivity reduces substantially with aging.

d) Thus it is not discrimination to peg the retirement age for unionisable staff and the management staff at different levels.

e) The claimant has failed to establish discrimination upon grounds set out in Article 27(4) of the Constitution of Kenya 2010 namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, religion and disability.

f) In **Kenya Tea Growers Association –Versus- Kenya Plantation & Agricultural Workers Union Civil Appeal No. 207 of 2017**, (Visram, Karanja & Koome JJ.A) the Court held that the learned trial Judge had no basis for reviewing the retirement age as had been agreed to by the parties in the previous collective bargaining agreement.

The Court has considered the submissions made for the parties and makes findings as follows:

1) Section 5(3) (a) of the Employment Act provides that no employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. The Court finds that under the section, age as a ground for discrimination in employment is not proscribed. Further, whereas Article 27 (4) lists age as a proscribed ground for discrimination, the provision is clearly directed at the state thus, "**27. (4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**" The Court considers that the Sub-Article is directed at the state and as a general rule the provision may not be invoked as applying to discrimination by an employer in private sector. Indeed, in employment law, age has been invoked as a positive discrimination ground such as Part VII of the Employment Act, 2007 on protection of children and prohibiting employment of children in the specified circumstances.

2) The Court has considered 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.**"It is the Court's opinion that under the section, it is conceivable that an employee can establish a case for discrimination on account of age calculated to deny equality of opportunity to the employee on account of age.

3) The Court has considered the respondent's submission that section 5(3)(b) of the Employment Act, 2007 provides thus, **"(3) It is not discrimination to-(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job**". The emerging issue is whether in the instant case the respondent has established inherent requirements of the job performed by the trade union members and the management cadre on the other and therefore justified the variance in the retirement age. The Court returns that as submitted for the claimant, the respondent has not by way of evidence showed that first, the unionisable staff perform manual work exclusively; secondly, the performance of manual work diminishes their productivity upon attainment of age of 58 to 60 years; and that the management cadre will achieve better succession management when they retire at 60 years of age. The Court returns that there was no evidence to establish all these factors advanced for the respondent as grounds for variance in the retirement age.

4) 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 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 Presss, (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.

5) The Court considers that variance in normal or mandatory retirement age for unionisable staff and the management employees on the other hand as in the circumstances of this case is a policy or practice that does not amount to promotion of equal opportunity in employment.

6) Going to the point that the parties have agreed on retirement age at 57 years for all collective agreements so far concluded between the parties, it is the claimant's case that the latest agreement had taken too long to conclude because the respondent had been reluctant to accept and act upon the statutory conciliator's recommendation on the issue. Exhibit AN1 on the supporting affidavit are the recommendations on the collective bargaining agreement negotiations. The conciliator observes that a comprehensive consideration of the provisions of the Code of Regulations and the East African Community Protocol all tend to provide for between 50 to 60 years of mandatory retirement age. The conciliator further states, "**It should be recalled that all human beings irrespective of race, creed or sex have the right to pursue both their material well being and spiritual development in conditions of freedom and dignity of economic security and equal opportunity. To have two sets of retirement for unionisable and management staff would fit in the definition of discrimination which constitutes a violation of rights enunciated by the Universal Declaration on Human Rights. In order to be in compliance with the best practices and in particular the ILO Convention number 111 on Discrimination (Employment and Occupation) I recommend the uniform retirement age of 60 years for all employees except that parties consider the inclusion of an early retirement clause to cater for both sides so that an employee who feels like exiting before the retirement age ranging between 50 – 60 years. This subject to the nature of work and as well as the medical and physical capacity of the employee.**" The Court has considered those recommendations and returns that much as the parties have signed a collective agreement stipulating 57 years of age as normal or mandatory retirement age for claimant's members, the signing and conclusion cannot have been of free will of the claimant and even if it was, the provision is in breach of the cited statutory provision against discrimination and the respondent's obligation to promote equality of opportunity in its employment policies and practices. Such provision in a collective agreement will therefore be amenable to challenge as unconstitutional or unlawful.

7) The further and final issue is therefore whether parties would be allowed to escape their own agreement on retirement age. It was held in **National Bank of Kenya Ltd –Versus- Pipeplastick Samkolit (K) Ltd and Another (2001)eKLR**, that a court of law cannot re-write a contract between the parties and parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. The Court has found that the clause in the collective agreement that union members in the respondent's employment retire at 57 years of age contravenes section 5(2) of the Employment Act, 2007 in so far it advances that there be different normal retirement age for the members of the union, possibly the employees eligible to join the union but have not done so, and the employees in the management cadre. As the agreement in its operation contravenes the section but yet it is capable of being implemented in compliance with the section if the collective agreement is renegotiated or other respondent's policies are reviewed, the Court considers that it will meet the ends of justice if the prayers sought are granted with orders that the order remains in place until the respondent institutes or negotiates normal retirement age for its employees that is in line with provisions and obligations as provided for in section 5 (2) of the Employment Act, 2007. Unless the respondent establishes reasonable justification for variance in the normal retirement age of its employees in various cadres, it will now be open for the respondent and the claimant to negotiate in line with the provisions of the section, or, the respondent to institute such appropriate policies.

8) It is not for the Court to rewrite the agreement between the parties, but the Court may stay the operation of the impugned provision of the collective agreement pending the respondent's compliance with the statutory provision in issue. As submitted for the respondent and as per the holding in **Kenya Tea Growers Association –Versus- Kenya Plantation & Agricultural Workers Union Civil Appeal No. 207 of 2017** the Court will not review the normal retirement age as agreed between the parties but the agreement having been found offensive of section 5 (2) of the Employment Act, 2007, the parties will be given an opportunity to review the same either by the respondent changing its relevant policy as it affects the management cadre or by parties renegotiating the clause in the collective agreement as appropriate. The Court considers that the cited conciliator's recommendations constitute a good advisory to the parties towards compliance with the final orders in this judgment.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) An order of stay, staying the decision and parties' agreement in the collective agreement that the respondent to retire the claimant's members upon attaining the age of 57 years and until the respondent institutes change in policy or renegotiates normal retirement age for its employees that is in line with provisions and respondent's obligations as provided for in section 5 (2) of the Employment Act, 2007.

b) Until order (a) above is satisfied, the provision in the collective agreement that the respondent retires the claimant's members upon attaining 57 years of age is hereby stayed and the members will retire at the age of 60 years.

c) Each party to bear own costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 8th June, 2018.**

BYRAM ONGAYA

JUDGE