



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2188 OF 2014

STEPHEN MUREITH NDUNGU.....CLAIMANT

VERSUS

KENYA FORESTRY RESEARCH INSTITUTE.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant is still employee of the respondent having been employed since 1988. He started as a Technical Trainee and rose the ranks to position of Assistant Research Scientist KEFR, RF8. He holds a Bachelor of Science Degree in forestry but he is currently undertaking a Masters of Science in forestry. On 1.6.2011, the respondent implemented a new career Progression Guidelines (Scheme of Service) under which he should have been placed under job grade RF9 and his salary increased automatically. However, the claimant contents that he was denied his right to promotion to higher salary under the new scheme of service despite several letters of reminder. He therefore brought this suit seeking the following orders:

- a. A declaration that the actions of the Respondent against the Claimant are discriminatory and infringe the Claimants labour rights.
- b. An order compelling the Respondent to pay the Claimant the Kshs.268,732.00 being salary arrears owed to the Claimant as tabulated from 1st June 2011, when the Scheme of Service came to effect to 31st October 2014.
- c. An order compelling the Respondent to place the claimant in the correct job group which is RF 9.
- d. An order directing the Respondent to effect the an immediate pay rise in relation to the claimants rightful job grade in line and with the strength of the Scheme of Service of 1st June 2011, and which pay raise should be reflected on the Claimant's pay slip forthwith.
- e. Any other relief that this Honourable Court may deem fit and just to grant.
- f. Cost of the suit.

2. The respondent has admitted that the claimant was employed by her in 1988 as a Technical Staff Trainee and rose the ranks to the position of Assistant Research Scientist – KEFRI RF8. She further admits that she implemented new schemes of service from 1.6.2011 but averred that the claimant was not advanced to the higher grade of Research Scientist II RF9 because he lacked the required Masters degree in Science for him to serve in the higher position. The respondent further averred that the failure to provide for job Grade RF8 (Assistant Research (Assistant Research Scientist) as the entry level for graduates in the new scheme of service was an error and a taskforce has since been appointed to review the schemes of service to address that erroneous omission and the respondent's Board in its 97th meeting held on 8.12.2014 passed an Addendum to the new schemes of service which required that the entry level for graduates shall be Assistant Research Scientist RF 8. The respondent therefore denied any wrong doing in failing to advance the claimant from Assistant Research Scientist Job Grade RF8 to Research Scientist II RF 9 and prayed for the suit to be dismissed with costs.

3. The main issue for determination herein is whether after the implementation of a new schemes of service on 1.6.2011, the respondent placed the claimant in the correct job Grade. The suit was heard on 7.5.2018 when the claimant testified as Cw1 and Ms Janet Wambui, respondent's HR officer testified for the defence as Rw1.

Thereafter, counsel for both parties filed written submissions.

Claimant's Case

4. Cw1 testified that in 2017 he was employed by the respondent on 1.7.1988 starting as Technical Trainee. In 1996 he attained a Diploma and he got promoted to the position of Technologist. In 2008, he attained Bsc Degree in Forestry and in 2010 he was promoted to the position of Assistant Research Scientist Job Grade 8.

5. Cw1 further testified that on 1.6.2011 the respondent effected a new schemes of Service under which all the serving officers were to adopt the scheme and convert o the new grading structure and designation even if they lacked the requisite minimum experience subject to the attainment of the requisite qualifications. He contended that his post of Assistant Research Scientist Grade RF 8 was scrapped under the new scheme of service for the Scientific cadre and the lowest entry post was Research Scientist II Job Grade RF 9. He therefore contended that he ought to have been placed under the post of Research Scientist II Job Grade RF 9 under the new scheme of service but that was not done.

6. However, Cw1 contended that all his colleagues in the scrapped job Grade 8 were converted to Research Scientist II Job Grade RF 9 and got salary increase but he was retained in the scrapped post alone without any salary increase. He contended that the action by the respondent is not only discriminatory but it has also denied him income even after further studies and acquisition of the requisite qualifications. He prayed for the reliefs sought in her suit including salary arrears arising from the denial of the salary for Job Grade RF 9.

7. On cross examination Cw1 maintained that under clause 1.5. of the new scheme of service, he automatically placed under grade RF 9 as Research Scientist officer II. He contended that for a new appointee to join as Research Scientist II, he must possess Masters degree under the new scheme but a serving officer did not need to have that qualification but he was required to pursue the same. He further contended that he registered for and obtained Masters degree in February 2018 and thereby qualified for a promotion to Job Grade RF 10.

Defence Case

8. Rw1 admitted that Cw1 was employed by the respondent in 1988 and rose the ranks to the current position of Assistant Research Scientist – KEFRI RF8. She further admitted that the respondent implemented new schemes of service on 1.6.2011 but the claimant was not advanced to the higher grade of Research Scientist II Grade RF 9 because he lacked the required Masters degree in science. She further testified that the management realized that the entry point for graduates, that is, Assistant Research Scientist Grade RF 8 was erroneously omitted from the new scheme of service and constituted a Taskforce to review the schemes of service to address the concerns raised. The Taskforce completed the review and presented its report to the respondent's Board of Management on 8.12.2014. The report recommended for introduction of the post of Assistant Research Scientist RF 8 as the entry level for graduates processing Bachelor of Science Degree in Forestry among other related fields and also Sociology from a recognized institution. The Board resolved that the said position had been erroneously omitted and adopted the report by the Taskforce. Consequently the claimant was retained in the position of Assistant Research Scientist II Grade RF 8 with the corresponding salary.

9. On cross examination Rw1 admitted that the recommendations by the Taskforce was forwarded to the parent Ministry for approval but the same is yet to get the required approval. She however denied that the position of Assistant Research Scientist RF 8 under which the claimant is retained is obsolete and further denied that the claimant has not lost any benefit. She concluded by alleging that a new scheme of service is about to be released.

Analysis and Determination

10. After careful consideration of the evidence and the submissions presented by both parties, it is not in dispute that on 1.6.2011, the respondent implemented new schemes of service. There is also no dispute that under the new schemes of service, there was a reorganization of the establishment in respect of which the serving officers were to be converted and aligned. There is further no dispute that under the new scheme of service for scientific cadre, the hitherto position of Assistant Research Scientist RF 8 was scraped and the lowest position was raised to Research Scientist II Grade RF 9. Finally, it is a fact that the claimant who hitherto served as Assistant Research Scientist, Grade RF 8, was never advanced to Research Scientist II Grade RF 9 but instead he was retained in he same position he was serving under the retired schemes of service. The issues for determination are:

- a. Whether the respondent's schemes of service form part of the claimant's contract of service;
- b. Whether failure to advance the claimant to the position of Research Scientist II RF 9 was discriminatory, unlawful and violation of his labour rights.
- c. Whether the claimant is entitled to the reliefs sought.

New Scheme of Service

11. The schemes of Service implemented by the respondent on 1.6.2011 constituted new terms of service for the respondent's employees. They were a culmination of consultation between the respondent and her employees which received the approval of the parent Ministry. The new terms were not just guidelines but they formed part and parcel of the employees' respective contracts on the effective date. The respondent and the employees therefore were thenceforth bound by the new schemes of service including new pay unless the employee opted out voluntarily.

12. The schemes of service provided in clause 1.2 and 1.9 that:

“1.2. the schemes of service will be administered by the KEFRI Board of Management. In administering the schemes the Board of Management will ensure that provision of the scheme are strictly adhered to for fair and equitable treatment of staff.

1.9. The schemes of service will become operational with effect from 1st June 2011 and they supercede any other existing. On implementation, all serving officers will automatically convert to the respective scheme of service.”

13. From the foregoing clauses of the schemes of service, the employer had no choice but to implement the respective schemes of service on all the serving officers on the effective date. In this case therefore, the respondent was bound to effect the new scheme on the claimant as binding terms of service.

Discriminatory failure to advance the claimant to Job Grade RF9

14. Under clause 21 of the scheme of services for Research Scientist under which the claimant fell, the lowest level was Research Scientist II Job Grade KEFRI 9 while the highest was Director/Chief Executive Officer, KEFRI 15. The clause set out the job description and the qualification including Bachelor of Science Degree in Forestry and related disciplines, Masters Degree in the said disciplines and computer literacy.

15. Clause 1.5 of the schemes of service provided as follows in respect of serving officer:

“Serving officers will adopt and convert as appropriate to the new grading structure and designations provided in the schemes even if one may not be in possession of the requisite minimum qualifications and/or experience specified for the present grade. However, for advancement to higher grades, the officers will be required to obtain requisite qualifications and experience.”

16. Flowing from the foregoing clause read with clause 1.9 aforesaid, it is clear that the adoption and conversion of all the serving officer of the respondent was automatic whether or not the officer possessed the minimum qualifications and experience. The only obligation given to the unqualified officers was that they were bound to undergo the necessary training to acquire the requisite minimum qualifications.

17. In this case, the claimant admitted that he lacked the Masters Degree required for appointment to serve as Research Scientist II but he produced result slips to show that he registered for Masters course in Forestry in 2013 and attained the Master Degree in February 2018. After considering all the material presented to the court, I have formed the opinion that the claimant has proved on a balance of probability that he automatically adopted and converted to the new scheme of service for Research Scientist effective 1.6.2011 as provided under clause 1.5 and 1.9 of the Schemes of Service implemented on the even date. His rightful post became Research Scientist II Job Grade KEFRI 9 effective 1.6.2011 and the respondent had no option. It was therefore unlawful and discriminatory for the respondent to, unilaterally and without consent of the claimant, suspend or fail to effect the new scheme of service applicable to the claimant's contract of service. The respondent's Board of Management had a duty and not an option to implement the schemes of service to all the serving officers.

Reliefs

18. In view of the foregoing, I grant the prayers sought by the claimant. I begin by making declaration that the failure by the respondent to convert and advance the claimant to the post of Research Scientist II effective 1.6.2011 was discriminatory and infringed the claimant's labour rights. In my view, there was no basis in law or under the schemes of service for the respondent to act as she did against the claimant. Secondly, I direct the respondent to place the claimant in his correct Job Grade, that is Research Scientist I KEFRI 9 retrospectively from 1.6.2011 in line with clause 1.9 of the schemes of service implemented on 1.6.2011. Thirdly, I direct the respondent to pay the claimant Kshs.1,175,704.00 being his salary arrears as at 4.6.2018 plus any further arrears which will accrue from that date.

Conclusion and Disposition

19. For the reason that the respondent has unlawfully and in a discriminatory manner failed to place the claimant in his rightful position under the 2011 schemes of service, I enter judgment in his favour in the following terms:

- a. The respondent is directed to place the claimant in the post of Research Scientist II Job Grade KEFRI 9 effective 1.6.2011.
- b. The claimant is awarded his salary arrears for the position of Research Scientist II Job Group 9 retrospectively from 1.6.2011 less what he has erroneously and unlawfully been paid as Assistant Researcher Scientist Job Grade KEFRI 8.
- c. The respondent is directed to pay Kshs.1,175,704.00 salary arrears plus any further arrears that will accrue the said date less statutory deductions.
- d. The claimant will have costs and interest at court rates from tod

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE