



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 806 OF 2011

(Before Hon. Justice Mathews N. Nduma)

AGNES WACHU WAMAE & 104 OTHERSCLAIMANTS

=VERSUS=

BARCLAYS BANK OF KENYA.....RESPONDENT

J U D G M E N T

1. The Suit was filed by Agnes Wachu Wamae, the 1st Claimant and 104 others seeking re-evaluation and award of exit packages to the 105 Claimants following a declaration of redundancy pursuant to a circular No. 07/2010 dated 24th December, 2010 issued to the Claimants by the Managing Director in which the Claimants were informed alongside all other Bank Staff that the Bank “due to pressure on margins, had embarked on a bank wide cost review exercise reviewing all key cost items in the Bank, including staff costs.”

2. That by a circular No. 2/2011 dated 18th January, 2011 the Managing Director of the Respondent informed the Claimants that the planned restructuring programme had to be completed before the end of January, 2011 and in the same circular informed the Claimants that:-

i. This is not an early retirement scheme but rather a process that affects employees whose roles are likely to change as a result of realignment to improve productivity. An exit package will be paid to affected colleagues.

ii. Details of the exit package are available from the HR Department and affected colleagues will be advised during their one on one discussion with their line manager.

3. It is the Claimants case, that this was a termination in terms of section 2 and 40 of the Employment Act, 2007 which is –

Section 2

“Loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job, or occupation and loss of employment.”

4. That on 19th January, 2011 exit package letters were made available to the Claimants by the HR Department indicating the lumpsum amounts payable to them without a detailed computation sheet on how the amounts given were arrived at.

5. The Claimants while honestly believing that the Respondent had computed their benefits properly and in accordance with the Employment Act, accepted the payments that were offered to them by the Respondent.

6. The Claimants requested severally for detailed computation by the Respondent to no avail, but subsequently, HR Department provided an Exit Terms document containing 15 terms. The term which aggrieved the Claimants was stated as follows:-

“Payment of exit package at one and a half months’ pay for each completed year of service – prorata, up to a maximum of 24 months (emphasis mine).

The controversial document dated 18th April, 2011 was produced by the Claimants and marked exhibit ‘c’.

The sample of written letters by the Claimants accepting to exit the bank upon payment of “a month’s consolidated pay in lieu of Notice and payment of Exit package less Tax” was produced and marked exhibit ‘1”

7. The Claimants contend that upon subsequent and proper calculation of their expected exit packages, the Claimants found out that as at respective dates of leaving the Banks service, the bank had not computed and paid to them their correct amounts that were due to them as a result of –

“Fraudulent misrepresentation, concealment and/or non-disclosure of material facts, thereby resulting in them being paid reduced amounts, contrary to the Employment Act and the Law, which action was illegal, null and void.”

8. The particulars of fraud, illegality and concealment are set out under paragraph 11 of the Memorandum of Claim as follows:-

- a. Failed to disclose all the applicable factors and method of computation of the exit package.
- b. Failed to avail to the Claimants detailed computations on how the exit package was arrived at but only indicating the lumpsum amounts that were due to the Claimants.
- c. Failed to inform the Claimants that the exit package that were offered to them was comprised of one and a half months pay for each year worked upto a maximum of 16 years worked (equivalent to a maximum of 24 months pay.)
- d. Failed to inform the Claimants that the Employment Act did provide for an exit package on account of redundancy for each completed year of service.
- e. Misled the Claimants who were terminated by sending to them circulars misleading them that their terminal dues will be calculated in accordance with the law.
- f. Failed to publish to the Claimants a detailed exit package terms that would be used in computing the claimants’ terminal dues.
- g. Failed to inform the Claimants in time that the exit package that were offered to them were computed upto a maximum of 16 years worked contrary to the law but instead simply informed the Claimants on the lumpsum amounts payable.

9. The Claimants state that the Respondent disregarded the provision of section 40(1)(g) of the Employment Act which provides that:-

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;

.....

.....

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service. “

10. It is the Claimants case that:-

i. It was lawful for the Respondent to pay an amount above the 15 days salary, in this case, each Claimant got an equivalent of one and a half (1.5) months salary; but was unlawful to cap the number of completed years of service to sixteen 16 (equivalent to a maximum of 24 months pay) in total disregard of the large disparity in the period of service rendered by each respective employee to the Respondent.

11. That as a result of that capping, all the persons who had served for less than 16 years were paid for non existent 16 years of service; those who had served to 16 years were paid in accordance with the law, their full and lawful dues, but however those who had served for more than 16 years of service in which category all the Claimants belonged were discriminated against, were deceived to accept packages calculated in violation of the Law and were disintitled proper payment of severance pay in accordance with section 40 of the Employment Act, 2007.

12. The Claimants have computed and set out the severance pay each one of them was lawfully entitled to in the statement of claim and attachments thereto and pray the court to award them accordingly, less the amount already paid to them. The unpaid special damages were stated to be 301,855,477.

13. The Claimant also claim under paragraph 7 of the statement of claim full leave entitlement for the year 2011 acknowledging that they were paid prorata for the days served in 2011. They also claim interest and costs.

Defence

14. In their Memorandum of Response, the Respondent denies the reliefs sought by the Claimants in its entirety and avers that the amounts paid to each one of the Claimants was in excess of the terminal dues a redundant employee is entitled to in terms of section 40 of the

Employment Act, 2007 and the comprehensive package given did not discriminate or deprive any Claimant of his/her entitlement under the law. That each and every Claimant signed a discharge certificate in full acceptance of the package paid and in confirmation that none of the Claimants had any further claim against the Respondent arising from the redundancy.

15. That the Claimants were liable to pay outstanding loans with the bank, which were offset against the exit package. Furthermore, all terminal benefits, including payment in lieu of leave was paid out to the Claimants.

16. The Respondent prays that the suit be dismissed with costs.

Determination

17. It is important to note that in a ruling dated 13th March 2014, Hon. Lady Justice Maureen Onyango, set aside previous proceedings before Hon. Kosgei J and Abuodha J and a consent recorded by the parties on 1st July, 2011 and directed that the suit to be heard denovo.

18. I was seized of the matter pursuant to this ruling and proceeded to hear oral testimony by Godfrey Wafula Wasike (CW 1) the 1st Claimant and Vasilas Odhiambo (RW 1) the Head of Employment Relations for Barclays Bank from 24th October, 2016.

19. The parties closed their respective cases and filed written submissions on 25th April, 2018 and 28th May, 2018 respectively.

Determination

20. The issues for determination are as follows:-

- i. Are the Claimants entitled to severance pay calculated at every completed year of service at whatever rate it is computed at?
- ii. Are the Claimants entitled to payment of the full annual leave entitlement in respect of the year 2011.
- iii. From what time should interest be calculated in the event of an award in this matter.

Issue (i) and (iii)

21. The court will deal with issues (i) and (iii) together. The fact of redundancy declared by the Respondent in respect of the Claimants is not in dispute.

22. The package already paid to the Claimants and manner of computation is also not in dispute. The issues in dispute is basically whether the Respondent is at liberty to grant an exit package in terms of section 40(g) of the Employment Act, 2007 at whatever higher rate, than the statutory minimum of 15 days salary for each completed year of service and disregard the number of years served by each of the employees declared redundant.

23. In the present case, the Respondent at its own discretion granted the Claimants one and a half (1.5) months' salary for each completed year of service and also used its discretion to cap the number of completed years payable to each of the Claimants to 16 years.

24. The result of this discretion by the Respondent disadvantaged all the employees who had served more than 16 years in that –

- a. All employees who had served for less than 16 years got paid severance pay for more years than they had served.
- b. All employees who had served for 16 years got their full entitlement but
- c. All employees who had served for more than 16 years did not get severance pay for the years they had served the Respondent above 16 years.

25. Upon a careful analysis of the provision of section 40 (g) of the Employment Act, 2007 and the facts of the case, the court has arrived at the following conclusion of law and fact;

- a. The provisions of section 40 of the Employment Act are couched in mandatory terms.
- b. An employer is at liberty to pay severance pay at a rate greater than 15 days salary for each completed year of service.
- c. An employer is not at liberty to arbitrarily cap the number of years of service in respect of which the determined rate of payment is to be applied for the reason that, such a move as happened in this case –
 - i. Benefited unjustly employees who had served for less than 16 years.
 - ii. Employees who had served 16 years got their full dues.

iii. Employees who had served more than 16 years were deprived of their lawful entitlement by fact of long service.

26. The decision and action by the Respondent amounted to discrimination of employees (the Claimants) in terms of section 5 (3) of the Employment Act, 2007 which provides –

“(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —

(a)

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

27. It is without a doubt that all employees who had worked for more than 16 years, some even up to 40 years were deprived of large amounts to which they were lawfully entitled by fact of their long service.

28. The many years they had given to the Respondent were treated casually, in total disregard of the service, blood and sweat they had over those years given to the Respondent. It is apparent the well earned entitlement was curtailed to supplement those who had offered less service.

29. It is without a doubt that the three categories of employees were treated differently.

30. Discrimination at the work place is also prohibited under Article 41(1) of the constitution of Kenya, 2010 which guarantees every person the right to fair Labour practices by employees including a right to fair remuneration and to reasonable working conditions.

31. Fair remuneration and reasonable working conditions extend up to and including the time of termination of employment as in this case.

32. Though discrimination is not defined in the Employment Act, and in our constitution, it is well defined in the ILO Convention No.11 – convention concerning Discrimination in respect of Employment and occupation, 1958 to include –

“Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment” under Article 1(b) thereof.

33. It is the courts considered decision that the conduct by the Respondent in the matter fell within this definition of discrimination prohibited by our law.

34. Accordingly, the Claimants have succeeded in this limb of the claim and each one of them is awarded as set out in the statement of claim.

35. Payment of this award is payable with interest at court rates from the date of the exit of all Claimants, which was 31st January, 2011.

Issue ii

36. With regard to whether or not the Claimants were entitled to payment in lieu of leave in respect of the year 2011, clearly the exit date of the Claimants was 31st January, 2011. They have already been paid prorata in lieu of leave up to 31st January, 2011 and are not entitled to payment in lieu of full annual leave for the year 2011. This claim has no merit and is dismissed.

37. In the final analysis, judgment is entered in favour of 105 Claimants against the Respondent as follows:-

a. Payment at one and a half (1.5) months salary for each completed year of service by each one of the Claimants, as set out in the statement of claim and annexures thereto within 30 days of this judgment.

b. The Claims for payment in lieu of leave for the year 2011 are dismissed.

c. The awards in (a) above are payable with interest at court rates from 31st January, 2011, the date of exit to payment in full.

d. The Respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 12th day of October , 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 26th day of October , 2018

Maureen Onyango

Judge

Appearances:-

Mr. Koceyo for Claimant

Mr. Mogere for Respondent

Daniel Ngumbi : Court Clerk