



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2092 OF 2015

SAMS PETER ACHIENG OUKOCLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTERESPONDENT

JUDGEMENT

1. The Claimant employed by the Respondent as a Principal Institute Pharmacist and was promoted vide letter of 5th July, 2004. In October, 2014 the Claimant applied for a loan with his bank and the Respondent assured the bank that the retirement age for the Claimant was at 65 years. By letter dated 29th May, 2015 the Respondent issued the Claimant stating that his retirement age was 60 years and that he should go on retirement with effect from 1st December, 2014. Such letter contradicted the government circular Number PO.1/19A of 6th August, 2003 which reviewed the compulsory retirement age of research scientists in research institutions and other related institutions from 55 years to 65 years.

2. By letter dated 15th July, 2015 the Claimant made an appeal against the decision to retire him on age grounds. There was no response by the Respondent and the Claimant reported to the union. By letter dated 9th November, 2015 the Respondent stated that the Claimant fell under the category of employees whose retirement age is 60 years. This implied that the Claimant was not a research scientist but was a holder of a technical and administrative or support position and which was contrary to assignments given to him. On 1st March, 2014 the Claimant had been appointed as member of the Health Quality Management Systems Project committee of the Kenya Bureau of Standards for 3 years; the Claimant is member of WHO on professionals based on his research work with the Respondent and published; the Claimant has worked as at the research laboratory for the University of Ghent in collaboration with the respondent; the Claimant is a research student in his PhD studies at the ITROMID graduate Program run jointly with the respondent; the Claimant is undertaking research in pharmaceutical production, clinical research in drug research; and is undertaking research in science in collaboration with international partners in collaboration with the respondent.

3. The claim is also that the Claimant entered into financial engagement based on the assonance that his retirement age is 65 years but the Respondent has now unlawfully threatened termination of his employment which will deprive the Claimant rights and privileges of an employee without recourse and due procedures. Such termination should be stopped by an order of the Court as it is illegal and will violate the claimant's rights.

4. The Claimant is seeking a declaration that his compulsory retirement at 60 years be found illegal, null and void; that the Respondent be stopped from interfering with the claimant's benefits on grounds of compulsory retirement at 60 years; and the Claimant be reinstated back to his previous job and position without loss of salary, allowances and other privileges; and in the alternative the Claimant be paid his

salaries and allowances until the retirement age; payment of compensation for unfair and wrongful termination of employment; general damages for discrimination and violation of constitutional right to employment; and costs.

5. In evidence, the Claimant testified that upon employment by the Respondent he worked diligently. By circular issued by the Cabinet Secretary dated 6th August, 2003 his retirement age effectively changed to 65 years. The Claimant at the time of trial he was 60 years of age and by letter dated 8th October, 2014 the Respondent confirmed to his bank, Bank of Africa that the Claimant would retire at 65 years and was thus given a bank loan. Thereafter the Respondent has issued a letter of retirement based on age at 60 years.

6. The Claimant also testified that he is a researcher in terms of the government circular and has been allocated duties by the Respondent as such. That as a Pharmacist he graduated from the Kenya medical Training with a Diploma in Pharmacy and was based at Kenyatta National Hospital as a Pharmacist Technologist and when the Respondent was set up he was employed as such. The letter of appointment was not as a researcher but pharmacist working under researchers and supervised by a Doctor at the Centre for Clinical Research. He furthered his education to become Principal Pharmacist. He is licenced by the Pharmacists and Dentists Board a body that regulates registration in Pharmacy.

7. That the Respondent has two retirement regimes, one for research scientists who retire at 65 years and the rest retire at 65 years. The Respondent has a pharmacy where the Claimant was based. The duties were to issue drugs as prescribed. The letter of employment describes the Claimant as a Principal Pharmacist. There is no other appointment save for this one.

Defence

8. In defence, the respondent's case is that the Respondent as a state corporation is established under the Science, Technology and Innovation, 2013 and with responsibility to carry out health research.

9. The defence is also that on 6th May, 1985 the Claimant was offered employment by the Respondent for the position of Technologist III. In this regard the respondent's letter of 8th October, 2014 to Bank of Africa is signed by a person without the Respondent director authority. The 6 months retirement notice for retirement is lawful and take into account the claimant's age at 60 years. The Claimant as not employed in the category of a Research Scientist set out under the government circular of 6th August, 2003. Such did not change the claimant's employment status with the Respondent in terms of his retirement age.

10. The defence is also that the Respondent job categories are that of administrative support staff; technical staff; and research scientists and the Claimant does not fall under the research scientists. His position and his duties do not render him to retire at 65 years like the staff under the category of research scientists. All duties assigned to the Claimant were administrative or technical. The Respondent has therefore followed the law in the notice to retire the Claimant and the orders sought cannot issue as this would be contrary to policy and circular issued by the government to the Respondent and the letter of appointment for the claimant.

11. In evidence the Respondent witness was Joab Benson Ochieng who testified that at the Acting Assistant Director of human resource for the Respondent he has all the claimant's work records. Upon employment of the claimant, he was issued with a letter of appointment from 1st April, 1985 as a Technologist III in pharmaceuticals. He was promoted to Principal Pharmacist which has remained his designation to date. Of the 3 cadres of employees, the Claimant is not part of the researchers, his is a technical administrative staff not subject to retirement at 65 years as alleged. At his position, the Claimant is due for retirement at 60 years. Before retirement the Claimant was issued with 6 months' notice which he has challenged but such is a requirement based on the employment, the law and terms of employment. The claimant's role was to support research work but such did not make him a researcher.

Determination

12. The Claimant was employed by the Respondent vide letter of appointment dated 6th May, 1985 to the position of *Technologist III (Technician)*. The Claimant has also confirmed that he was promoted to the position of *Principal Institute Pharmacist* from 5th July, 2004.

13. The Claimant has relied on the government circular of 6th August, 2003 to assert that he was a researcher and his retirement age changed from 60 to 65 years. The circular states;

... REVIEW OF THE RETIREMENT AGE FOR RESEARCH SCIENTISTS IN THE RESEARCH INSTITUTE AND OTHER RELATED INSTITUTIONS

It has come to the attention of Government that there has recently been an exodus of research scientists from the research institutions to public universities due to a number of factors including the fact that public universities have an enhanced retirement age.

... in order to ensure parity of treatment between scientists in public universities and those working in research institutions and to stabilise the retention of research scientists in the institutions, it has been decided that the current compulsory retirement age of 55 years for scientists in research institutes be enhanced to 65 years and that voluntary retirement be increased from 50 to 55 years.

14. The Claimant has therefore challenged his retirement notice on the grounds that he was a research scientist based on duties allocated to him and should not be retired at 60 years but at 65 years and he is now 60 years at the time of filing suit. That the Respondent by letter of 8th August, 2014 to bank of Africa confirmed that the Claimant was due to retire at 65 years and as such, this was to acknowledge the retirement age and upon which the Claimant was advanced a bank loan.

15. An employment contract or a contract of service is defined as;

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

16. Essentially it is the agreement between the employer and employee setting out the position and terms and conditions of employment. On 6th May, 1985 the Respondent offered the Claimant the position of Technologist and at clause 9, it was a condition that the Claimant would be bound by the Respondent work place regulations in force and which were subject to amendments from time to time as required. The Claimant was also to be issued with a comprehensive terms and conditions of service under clause 13. On 21st May, 1985 the Claimant accepted his appointment. The Claimant was then promoted to Principal Pharmacists.

17. Under the repealed Employment Act, Cap 226 the law provided that any changes to an employment contract had to be changed in writing and issued to the employee. Even under the current Employment Act, 2007 section 13 provides that;

13. Statement of changes (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

18. Therefore, where the claimant's employment were to change from that of Principal Pharmacist to a Research Scientist or any other position, such had to be in writing as the letter of appointment was in writing. The duties and responsibilities allocated to the Claimant cannot for the requirements set out under section 13 of the Employment Act to warrant an inference that his employment changed from that of Principal Pharmacist to the that of Research Scientist. The letter to the Bank of Africa a third party to the employment relationship cannot also change the terms and conditions of employment however

couched such a letter is. To construe such a letter as changing a fundamental term of employment would be to negate the very law upon which the employment of the Claimant is relied upon. Such cannot form a good basis to infer changes to the employment relationship. Even where the Respondent letter were to be taken as giving information about the claimant's age, such letter of 8th August, 2014 is not to the Claimant but to a third party.

19. I find the claimant's employment with the Respondent is specific and not the nature of employment addressed in the Government circular of 6th August, 2003 and which relates to Research Scientists. Where duties of a research nature were allocated to the claimant, where the Claimant was sent to address research related responsibilities, such did not change his employment status with the respondent. The retirement age for the Claimant on the position held is 60 years. Such is a lawful retirement age as the only enhanced retirement age vide the government circular only addressed persons employed as Research Scientists and the Claimant was not one such officer.

Remedies

20. On the claim for payment of due salaries until retirement age, on the claimant's admission that he is 60 years, notice of retirement issued, the claim is dealt. Upon filing suit, the Claimant has enjoyed interim orders. I take it all salaries due for time worked have been dully paid. Such should suffice. There is no loss to the Respondent as they have enjoyed he labours of the Claimant for time served as held in **Reuvel Waithaka Gitahi and Others versus Kenya Revenue Authority [2014] eKLR**. An employee who has worked over an extended period of time due to interim orders should be paid for such time and the employer has not incurred any loss or damage as there is offer for labour by the employee.

21. On the claim for compensation for unfair termination, on the finding that the Claimant was due to retire as a Principal Pharmacist and not as a Research Scientist, the notice to retire is lawful and appropriate. There is termination of employment by age and thus lawful. No compensation is due.

22. On the claim for damages for discrimination and violation of constitutional rights to employment, I find no evidence in this regard however, where an employee cites discrimination at work, such should not be literally treated as discrimination against any employee directly or indirectly is a serious violation. In this regard, the Claimant reliance on the facts that he was due for retirement at 65 years and not 60 having been addressed as above, I find no aspect of discrimination against him as his employment with the Respondent was for a specific position whose retirement age is given at 60 years. It can therefore not be discriminatory against the Claimant to be retired at such age. The Claimant cannot find justification that he was not treated as a Research Scientist as he was not appointed as one such officer of the respondent.

Accordingly, the claim is hereby dismissed. Each party to bear own costs.

Dated and delivered in open Court at Nairobi this 6th day of April, 2017

M. MBARU

JUDGE

In the presence of:

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