



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO. 35 OF 2017

PETER O MAGERO.....CLAIMANT

v

BOARD OF GOVERNORS, ST. AUGUSTINE

SOYSAMBU SECONDARY SCHOOL.....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

RULING

1. The Claimant instituted legal proceedings against the Respondents on 2 May 2017 and he identified the issues in dispute as

- a. Unlawful/unfair dismissal from employment and removal from the register of teachers.
- b. Non-payment of salary during interdiction.
- c. Inordinate delay in responding to the Claimant's appeal.
- d. Non-payment of terminal dues and compensatory damages.
- e. reinstatement of the Claimant to his previous position without loss of rank/promotion or benefits.

2. Upon service of the pleadings, the Respondents filed a Statement of Defence and a Notice of Preliminary Objection on 26 July 2017.

3. The objection was taken on 25 September 2017, and it is the subject of this ruling.

The objection

4. The objection by the Respondents is that

- a) The Claimant's claim herein is statutorily time barred and grossly offends the mandatory provisions of Section 90 of the Employment Act No. 11 of 2007; b) The Honourable Court has no jurisdiction to hear and determine the Claim.

The pleadings

5. The pertinent paragraphs of the Statement of Claim are

11. That in the month of **April 2012**, the Claimant received a letter dated **26th April, 2012** communicating a decision by the 2nd Respondent dismissing him from employment and deregistering him as a teacher.

12. THAT on the **18th May, 2012** the Claimant appealed to the 2nd Respondent's appeal tribunal but to date the appeal has never been considered neither has he received any communication from them.

13. The Claimant avers that the decision by the commission to terminate his employment and deregister him from the register of teachers was unfair, unlawful and against the provisions of the Employment Act, the tenets of Fair Labour Practices, the Principles of Natural Justice and the Constitution of Kenya; in that

Submissions

6. Based on the pleaded date of dismissal, the Respondents contend that the cause of action being agitated by the Claimant is caught up by the 3 year limitation provision of section 90 of the Employment Act, 2007.

7. The Claimant in opposing the preliminary objection asserts that because the Respondents have not determined the appeal or communicated otherwise, there is a *continuing injury* and therefore time does not run.

8. The Claimant in this respect drew the attention of the Court to the Response where the Respondents pleaded

17. Accordingly, the Respondent reiterates that the present suit is premature and ought to be dismissed as the Claimant has not exhausted all the dispute resolution mechanisms available to him specifically under section 46 of the TSC Act.

Evaluation

9. It is not disputed that the Claimant instituted action outside the 3 year allowed under section 90 of the Employment, 2007.

10. What is in dispute is whether a cause of action for unfair termination of employment/wrongful dismissal is a *continuing injury* in a situation where the employer has not made a final determination preferred by the employee pursuant to an internal appeal process.

11. I discussed the question of *continuing injury* in *Stephen Kamau Karanja v Family Bank Ltd* (2014) eKLR thus

22. *Two, the two decisions have not attempted to define or put contours to what a continuing injury or damage is. The Employment Act, 2007 has not defined what a continuing injury or damage is.*

23. *It would be appropriate for me therefore to make reference to other reputable sources. Black's Law Dictionary, ninth edition defines continuing injury as*

An injury that is still in the process of being committed - An example is the constant smoke or noise of a factory.

24. *To the examples given, I would add payment of wages below the prescribed minimum rates would be a continuing injury.*

25. In my view, once the services of an employee have been wrongfully, unprocedurally or unfairly terminated or he has been dismissed, he suffers a violation of the rights above mentioned, and the injury becomes a *fait accompli*.

12. In my view, an employee suffers a legal injury or legal wrong at the point of termination. Any appeal, whether successful or not would not affect the accrual of the cause of action which accrues at the point of termination or dismissal.

13. The limitation period prescribed under section 90 of the Employment Act, 2007 therefore begun to run on 26 April 2012 when the right to sue first accrued.

14. The internal appeal and the failure by the Respondent employer to determine the appeal, in my view did not create a successive violation of the right not to be unfairly dismissed or give rise to a fresh cause of action on a decision being made on the appeal, or to sustain such cause of action because of action beyond the limitation proviso.

15. Such cause of action may be sustained beyond the limitation period where there is statutory or contractual *estoppel* or where *estoppel* can be implied by conduct of the employer.

16. No such *estoppel* was suggested in the case under consideration.

17. Parties and litigants, in my view should know that there is a general principle of law that law is made to protect only diligent and vigilant people.

18. Equity aids the vigilant and not the indolent. Law will not protect people who are careless about their rights, (*vigilantibus non dormientibus jura subveniunt*).

19. A litigant in a situation similar to the present Claimant should move Court within the prescribed time to preserve the status quo during the pendency of an appeal.

20. On the converse, this country has not developed the law of *condonation of delay* which is meant to keep the principle of natural justice alive in cases such as presented herein.

21. Therefore this Court is unable to go as far as concluding that the actions of the Respondents in not concluding the appeal expeditiously should affect the question of limitation.

22. The legislature may consider amending the law of limitation to expressly provide for *condonation of delay* in cases such presented here wherein an employer's internal disciplinary mechanisms had not been finalised because of the fault of the employer in view of the principle of fairness as contemplated by Article 41 of the Constitution.

Conclusion

23. The Court in effect upholds the preliminary objection and strikes out the Memorandum of Claim herein with no order as to costs.

Delivered, dated and signed in Eldoret on this 29th day of September 2017.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Kirima instructed by Ombima & Co. Advocates

For Respondents

Ms. Ngere instructed by Sylvia Ngere, Advocate

Court Assistants

Nixon/Etyang