



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT ELDORET
CAUSE NO. 53 OF 2017

(Formerly Nakuru Cause No. 648 of 2014)

(Originally Eldoret High Court Civil Case No. 140 of 2007)

STEPHEN KOECH.....CLAIMANT

v

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. Stephen Koech (Claimant) sued the Teachers Service Commission (Respondent) before the High Court on 9 August 2007 alleging breach of contract and seeking Kshs 4,155,213/- comprising of *pension, gratuities, refund of overpayments and salary increases*.
2. The Respondent did not file a Defence in time and on 18 September 2007, the Claimant applied for interlocutory judgment.
3. Judgment was entered on the same day and the Claimant issued a Notice of Entry of Judgment to the Respondent.
4. The service of the Notice of Entry of Judgment prompted the Respondent to move Court to set aside the judgment and on 27 May 2008 a consent order setting aside the *ex parte* judgment was entered, thus allowing the Respondent to file a Defence.
5. The parties thereafter filed documents/witness statements to be relied on in the course of time, and *Agreed Issues* on 22 June 2011.
6. On the same day, the Respondent applied for a Third Party Notice to be issued against the Director of Pensions and the same was allowed on 26 September 2012.
7. On 19 November 2014, the Attorney General entered a Memorandum of Appearance on behalf of the Third Party and on 15 December 2014, the Respondent filed an *Amended Statement of Defence and Counterclaim*.
8. The Claimant filed a *Reply to Amended Defence and Defence to Counterclaim* on 18 December 2014.
9. On 19 December 2014, the parties consented to the file being transferred to this Court sitting in Nakuru

from the High Court Eldoret.

10. Hearing thus commenced on 5 September 2016 when the Claimant testified. The Respondent's case was taken on 27 September 2017 when its Chief Human Resources Officer testified.

11. The Claimant filed his written submissions on 13 October 2017 while the Respondent filed its submissions on 30 October 2017.

12. Although the parties framed some 12 Questions as requiring the Court's determination, in the view of the Court the Questions can be condensed into 3 to wit, *Whether the Claimant was on temporary contract or permanent and pensionable terms, Whether the Claimant has proved breach of contract and appropriate remedies.*

13. Before examining the *Issues* arising for determination, some background would be in order as the facts are generally not in dispute.

Background

14. The Claimant was offered employment on *Temporary Appointment* by the Respondent through a letter dated 19 February 1977. The letter provided that there was no guarantee of permanent employment and that it was subject to the Teachers Service Commission Act and the Code of Regulations in place from time to time.

15. The letter was followed with an *Agreement* which the Claimant signed on 8 January 1979 and which provided that it was valid for a maximum of 5 years with no guarantee of permanent employment.

16. On 26 March 1982, the Claimant wrote to the Respondent asking to be confirmed on permanent and pensionable terms because he had served continuously for 6 years.

17. There is no indication whether the Respondent replied to the request.

18. On 16 June 1988, the Claimant applied to Kenyatta University for a 1 year Post graduate Diploma in Education (Claimant asserted that he cancelled the application upon the upgrading of his terms on the implementation of a new scheme of service).

19. Sometime in July 1998, the Respondent through a Pay Change Advice (PCA) upgraded the Claimant from Untrained Teacher to Graduate Teacher II Job Group K).

20. On 15 August 1988, the Respondent issued Circular TSC/Circular No. 9/88 on a *New Scheme of Service for Graduate and Approved Teachers*. Among the effects of the new service was upgrading of graduate/approved teachers and extension of salary scales. The Circular also provided for job appointment requirements and specifications.

21. Around January 1989, the Respondent issued PCA TSC/37/7/89/??? (copies of some documents not clear) adjusting the Claimant's salary and owner occupier house allowance.

22. Again around 19 June 2000, the Respondent issued PCA TSC/47/8/2000/?? adjusting the Claimant's salary, commensurate with upgrading from Graduate II to Graduate I (Job Group L) effective 1 July 1999.

23. The Pay Change Advice was followed up by a letter dated 27 November 2000 from the Respondent informing the Claimant that as part of the implementation of TSC Circular No. 5/97, he had been promoted to Graduate 1. The claimant's salary was adjusted accordingly.

24. Despite the Respondent's letter of 27 November 2000 on promotion, the Claimant wrote to the Respondent on 16 May 2001 requesting to be placed on permanent and pensionable terms of employment.

25. The Claimant wrote another letter requesting consideration to be converted into permanent and pensionable terms on 20 June 2001.

26. Instead of dealing with the Claimant's request, the Respondent wrote to him on 16 January 2002, advising him that the upgrading of his status to Graduate II in July 1988 vide PCA TSC/37/7/89/6 was being cancelled because he was *Untrained Teacher Graduate*.

27. The letter also cancelled the promotion to job Group L vide PCA TSC/47/1/2001/24.

28. The letter further indicated that the overpayments occasioned by the cancelled promotion(s) would be recovered in instalments.

29. Barely a month later, on 11 February 2002, the Respondent in reply to the Claimant's request to be considered for permanent and pensionable terms informed him that he did not qualify as being an *Untrained Teacher*, he did not qualify.

30. The Claimant continued to serve until the Respondent notified him through a letter dated 22 May 2003 that it had been decided to terminate his contract effective 31 December 2004 when he would attain the retirement age of 55 years. He was also advised to seek any benefits from the National Social Security Fund as he did not qualify for pension, having served on temporary terms.

31. The retirement must have prompted the Claimant to institute the present proceedings.

Temporary contract or permanent and pensionable terms

32. There is no dispute as to what terms and conditions of service the Claimant was initially employed under.

33. The contentions arise as to whether the contract transformed from the initial temporary terms into permanent and pensionable terms and what benefits accrued from the conversion.

34. The Claimant contended that although he was employed initially on temporary terms, the Respondent through the Pay Change Advices had upgraded and promoted him to serve on permanent and pensionable terms and/or misrepresented to him that his upgraded terms of service to Graduate II in June 1988 and Graduate Teacher I on 27 November 2000 meant he was serving on permanent and pensionable terms, which action made him rescind a decision to pursue a professional course at Kenyatta University. He further contended that the Respondent unlawfully revoked the promotion(s).

35. The Respondent on the other hand contended that Claimant's employment was subject to the Teachers Service Commission Act and the Codes of Conduct and Regulations (among others) and that because the Claimant did not obtain or secure professional qualifications, he could not be promoted and therefore the promotions were lawfully revoked. The promotions, were in error.

Evaluation

36. The common law and the general law of employment leaves it to the parties' autonomy to agree on the nature, scope and extent of a contract of employment.

37. The contract can be oral, written, of a fixed duration or even of an indefinite duration. That should have been the position even before the fundamental reforms brought through the Employment Act, 2007.

38. Where there are primary documents, the Court and the parties should look to the same to determine the nature of the contract.

39. The Claimant wants the Court to consider secondary documents/conduct (Pay Change Advices) of the Respondent to determine the nature and scope of his contract.

40. The Respondent however contends that the Court should look to the primary documents (formal contract, Teachers Service Commission Act, Code of Conduct and Regulations and other statutory documents) which governed its relationship with the Claimant.

41. In terms of the scheme of service for teachers, for one to be appointed or promoted to the Graduate/Approved Teacher Job Group 'J' or above, one needed a Bachelor of Education degree or post graduate diploma in education.

42. The Code of Regulations on the other hand provided that for appointment to permanent and pensionable terms, one needed to be a qualified teacher in terms of section 4 of Legal Notice No. 90 of 1967.

43. The Claimant did not possess either of the qualifications by the time he was informed of promotion to Graduate Teacher I Job Group L through the letter of 27 November 2000.

44. In my view therefore, his contract could not have been translated into permanent and pensionable terms by the mere action of the Respondent in upgrading him through Pay Change Advices.

45. The Claimant must have been aware of the qualifications and requirements for his contract to be converted, for a year after the purported conversion (on 16 May 2001 and 20 June 2001) he was still asking for consideration or translation into permanent and pensionable terms.

46. Further, in my view the purported promotion and salary adjustments could not amount to a representation or misrepresentation to warrant the Claimant genuinely cancelling his application to pursue a *professional qualification in education* at Kenyatta University.

Whether there was breach of contract

47. The Claimant also contended that the downgrading of his terms of service from permanent and pensionable back to temporary terms (Untrained Teacher) was in breach of contract.

48. The Respondent contended that there was a genuine mistake which it rectified after notifying the Claimant.

49. In light of the conclusions in respect to the first issue addressed hereinabove, it cannot be that in rectifying the mistake after notifying the Claimant, there was a breach of contract.

50. It cannot be said that the rectification of the mistake was unilateral as the Claimant was given notice and did not raise any specific complaints against the revocation until after his retirement.

Counterclaim

51. The Respondent counterclaimed against the Claimant for the balance of overpayments made as a consequence of the upgrading/promotion.

52. The counterclaim was introduced through an *Amended Statement of Defence* filed in Court in 2014.

53. In my view, the *Counterclaim* was not only an afterthought as it was being advanced some 9 years after the Respondent had noticed the mistake, but was also not presented *bona fides* because the Claimant had long retired in 2004.

54. The Counterclaim could as well be caught up by the law of limitations as the Respondent became aware of the mistake in 2002 and allowed the Claimant to retire without diligently following up on the balances not recovered by then.

55. In my view, it would be unconscionable to allow the Respondent to recover the balances when the

mistake that led to the payments can only be attributed to it and without any sufficient explanation.

Appropriate remedies/Orders

56. Considering the conclusion by the Court that the Claimant's contract was never converted from temporary terms to permanent and pensionable terms, the Court finds and holds that the heads of claims and hence reliefs for general damages for breach of contract, pension, gratuity, refund of overpayments and salary increases are not available to the Claimant.

57. Equally the Claimant not being a female employee was not entitled to marriage gratuity.

58. The Counterclaim is also found to be unmerited and is dismissed.

59. Each party to bear own costs.

Delivered, dated and signed in Eldoret on this 3rd day of November 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ayieko/Ms. Keser instructed by Onyinkwa & Co. Advocates

For Respondent Mr. Anyuor, Advocate, Teachers Service Commission

Court Assistants Nixon/Etyang