



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 562 OF 2014

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

V

RELI CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD.....RESPONDENT

JUDGMENT

1. Priscilla Kimani (Grievant) gave notice of early retirement to Reli Co-Operative Savings & Credit Society Ltd (Respondent) on 29 October 2013. The retirement was to be effective from 18 November 2013 and the reason given by the Grievant was that she intended to pursue further studies.
2. The Respondent in a reply dated 4 November 2013 informed the Grievant that her case ought to be one of resignation and not early retirement.
3. The Kenya Union of Commercial Food & Allied Workers (the Union), probably as a response, wrote to the Respondent on 19 November 2013 asserting that the early retirement of the Grievant was pursuant to clause 6B of the collective bargaining agreement between it and the Respondent.
4. On 4 January 2014, the Respondent wrote to the Grievant informing her that she had forfeited her appointment because she had failed to report back to work after her leave which ended on 15 November 2013. According to the Respondent, the Grievant had contravened clause C12 of the Staff Regulations.
5. The Respondent also fired a letter dated 19 February 2014 to the Union contending that the Grievant did not qualify for early retirement and that she had failed to resume duty on 18 November 2013 after her leave and therefore she was a deserter.
6. On 24 February 2014, the Respondent informed the Grievant that she owed it some Kshs 307,293/75 and that she should advise on repayment of the same. The Grievant responded to the letter on 4 March 2014 (letter is dated 4 February 2014 though). She also asserted that she had not been dismissed but had opted to retire early.
7. It appears there were disagreements on the mode of separation and the Union reported a trade dispute to the Cabinet Secretary, Labour on 25 February 2014.
8. The dispute was accepted by the Cabinet Secretary and he appointed a conciliator.
9. The Conciliator had submissions from the Union and the Respondent and he issued a report dated 23 June 2014. He found in favour of the Grievant and recommended that the Grievant be paid all terminal dues in accordance with the terms of the collective bargaining agreement.
10. The Respondent did not accept the findings and recommendations of the Conciliator and this prompted the present proceedings which were filed on 30 October 2014. A Reply to Claim and List of Documents were filed on 21 November 2014.
11. The Cause was heard on 22 July 2015 and both parties led witnesses.
12. The Union filed its submissions on 12 August 2015, while the Respondent's submissions were filed on 19 October 2015.
13. The Court has considered the pleadings, evidence and submissions and identified 2 main issues

for determination. These are *whether the Grievant's early retirement had contractual basis/was lawful and appropriate remedies/orders.*

Whether early retirement had contractual foundation/lawful

14. The Grievant's early retirement, it was contended had contractual foundation in clause 6B of the collective bargaining agreement between the Union and the Respondent.
15. Clause 6B of the agreement provides

SPECIAL EARLY RETIREMENT SCHEME (EMPLOYEES)

(1) This shall apply to staff who have worked for ten years or more and who have not attained the retirement age bracket subject to attaining 40 years.

However, should an employee opt to retire the following shall apply:-

- i. Notice period to be three months.
- ii. Will be paid benefits as per the prevailing pension terms.
- iii. Will be due all terminal benefits.
- iv. Will be paid severance pay equivalent to 60 days for every year worked.
- v. Will be put in pension payment for those who qualify.
- vi. Will be paid handshake of Kshs 100,000/-.
- vii. Will be paid transport of Kshs 10,000/-.

16. The Union asserted this was the relevant contractual provision while the Respondent would hear none of it.
17. It is not in dispute that the Grievant was employed by the Respondent in 2001 and that she had served for 12 years by the time of separation. The parties are also agreed on the papers that the Grievant was aged 44 years at the time of disengagement.
18. Considering the undisputed facts on period of service and age of the Grievant, it is my finding that the Grievant was entitled to early retirement on the giving of 3 months notice in terms of Clause 6B of the collective bargaining agreement.
19. The Grievant was therefore within the contractual agreement to opt for special early retirement and the purported action by the Respondent through the letter dated 4 January 2014 to the effect that she had forfeited the appointment was of no legal consequence as the relationship had ended the previous year (even the contention before the Conciliator that the Grievant had deserted work is not valid).
20. But she did not give the requisite 3 months notice. She gave about 2 weeks' notice and this was in breach of contract on her part.
21. Just because the Grievant did not give the expected notice or tender pay in lieu thereof should not invalidate her notice to retire early. The Respondent's option was and is to demand pay in lieu of notice or sue for breach of contract. But the Respondent did not claim breach of contract on account of inadequate notice.
22. Of course the Court is alive to the scenarios where employees have successfully challenged early retirement by employers on account of inadequacy of notice as being unfair. But whether an employer can also challenge an employee's action to retire without giving the requisite notice as being unfair in terms of statute is at large.
23. For now I can only observe that the statute of general application (the Employment Act, 2007) has not established a statutory cause of action where there is inadequate notice.
24. The Court would therefore agree with the findings and recommendations of the Conciliator and find in favour of the Grievant.

Appropriate remedies/orders

Notice pay

25.It is the Grievant who was in breach of contract by failing to give the 3 months notice of retirement. She can therefore not sustain a head of claim for pay in lieu of notice.

26.The Respondent would be in order to recover such amount equivalent to the notice period. However, there was no counterclaim.

Severance pay

27.The Union sought Kshs 1,145,492/- under this head of claim.

28.Severance pay is a term of art under our statutory framework and it is only applicable in cases of redundancy, where an employee loses employment through no fault on his/her part.

29.The contract applicable in place does not define severance pay and it is unclear whether it was used in the agreement as a general term or term of art. But what is clear is that clause 6B(iv) of the collective bargaining agreement provided for severance pay in cases of special early retirement and clause 6B(v) provided additionally for pension.

30.However, the Respondent filed a schedule of final dues owing to the Grievant and the documents show that the Grievant was entitled to Kshs 939,240/- on account of severance pay and the Court would award severance pay as calculated by the Respondent.

Handshake

31.The Grievant is entitled to this relief as it is part of what the parties mutually agreed to in the sum of Kshs 100,000/-.

Transport

32.Again, the Kshs 10,000/- was mutually agreed to and the Grievant is entitled to the same.

Conclusion and Orders

33.The Court finds and holds that the Grievant validly and pursuant to a contractual provision retired early and that she is entitled to and is awarded the following entitlements

a. Severance pay	Kshs 939,240/-
b. Handshake	Kshs 100,000/-
c. Transport	Kshs 10,000/-

TOTAL **Kshs 1,049,240/-**

34.In the view of the Court, it would be inequitable to allow the Grievant to get away with liabilities owed to the Respondent merely because there was no counterclaim. The Respondent should therefore recover the liabilities indicated in the final dues schedule (adjusted accordingly for pay in lieu of notice) but also pay the undisputed dues in the said schedule.

35.The present legal action would have been unnecessary had the Respondent accepted the findings and recommendations of the conciliator.

36.The Court therefore awards the Union costs of Kshs 25,000/-.

Delivered, dated and signed in Nakuru on this 22nd day of January 2016.

Radido Stephen

Judge

Appearances

For Union Mr. Owiyo, Industrial Relations Officer, Kenya Union of Commercial Food &

Allied Workers

For Respondent Mr. Muriithi A.N. instructed Muriithi Kireria & Associates

Court Assistant Nixon