



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 607 OF 2011

ESTHER CHEROTICH TUM.....CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND (NSSF).....RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 21st April 2011, the claimant seeks among others a declaration that the termination of her services on 6th October, 2009 was wrongful, malicious, discriminatory and in contravention of section 2 of the Employment Act. She further seeks a declaration that the termination of her services was unfair and in contravention of section 45 and 46 of the Employment Act. As a consequence thereof she seeks damages for wrongful dismissal and unfair termination of employment. The facts of the clam were that she was initially employed by the respondent as Chief Personnel Officer on 28th September, 1995. She rose through the ranks up to the through the ranks up to the position of Manager Human Resource and Administration, a post she held until her termination on or about 9th October, 2009 by way of retirement under the 50 year rule contained in the respondent's Human Resource Manual.

2. The claimant averred that the newly appointed Trustee who she claimed had a negative attitude toward her, sent her on compulsory leave during which she was never allowed access to her offices and her position advertised for filling by the respondent.

3. She complained that when her leave ended and was preparing to return to work, she was called by the respondent's General Manager Corporate Services to go and see him and was handed an early retirement letter dated 6th October, 2009. According to her, vide a letter dated 9th October, 2009. She made representations why she should not be retired under the 50 year rule, citing among others the Office of the President Circular AB 217A dated 20th March, 2009 which she contended superceded rule 5-8 of the respondent's Terms and Conditions of Service and the Employment Act. Despite the representations, the respondent terminated her services under the 50 year rule.

4. She averred that she appealed against the early retirement but was advised to appeal for enhanced retirement package instead of reinstatement. She complained that on 26th October, 2009 when was summoned to the General Manager's Offices and forced to withdraw her letter dated 26th October, 2009 and replace the same with another where she appealed to be paid enhanced package instead of

reinstatement.

5. The claimant further averred that despite the appeal for the enhanced package, she had by the time of commencing the proceedings never paid the enhanced package which according to her meant that the respondent had constructively terminated her services on 6th October, 2009 without due regard to fairness, justice and equity.

6. The claimant therefore sought an order of the Court directed to the respondent to pay the claimant salary and benefits until normal retirement including appropriate adjustments over the years totaling to Kshs.34,613,970/41.

7. The respondent in its memorandum of response averred that on 6th October, 2009 when the claimant attained 52 years, she was informed by the respondent in accordance with rule 5.8 of the National Social Security Fund Code of regulations of intention to retire her under the 50 year rule and was therefore requested to make representation of a personal nature against the intention to retire her. The respondent further averred that the claimant made representation to the Managing Trustee on 13th October, 2009 stating that she still had children in colleges, a single mother and she had taken a loan and mortgage from her cooperative Society and bank. According to the respondent the Board of Trustees after considering representations decided to retire the claimant and paid her entitlements. The claimant appealed accepting the decision to retire her but asked for a payment package which included 6 months pay in lieu of notice, commutation of leave days, access to her pension benefits and enhanced financial package of Kshs.10,266,136/=.

8. The respondent therefore contended that the claimant's services were not terminated on account of misconduct, poor performance or physical incapacity but that she was retired in accordance with the law and terms applicable to her employment. According to the respondent, the retirement of employees is not governed by the Employment Act but rules and regulations in public sector made pursuant to Pensions Act, RBA Act etc. The respondent further contended that the Office of the President's Circular which reviewed the retirement age from 55 to 60 years did not change the provisions in the Pensions Act and other policy guidelines governing public servants. The respondent therefore urged the Court to uphold its action and dismiss the suit.

9. During the trial only the claimant gave evidence. She stated in her evidence in Chief that she relied entirely on documents in support of her claim as her evidence. I have highlighted the salient points of the documents in support of her case hence there would be no need to summarize again her oral testimony which in essence repeated these facts. In cross-examination however she stated under clause 5.8 of the respondents' Code of regulations, an employee could elect to retire after attaining the age of fifty and further that the respondent could also retire an employee without assigning any reason and that she was aware of this clause. She further stated that after making her personal representations the respondent retired her and paid all her entitlements vide a letter dated 26th October, 2009.

10. The only issue the Court requires to determine in this suit is whether retirement under the 50 year rule under clause 5.8 of the respondent's code of regulations amounted to wrongful dismissal or unfair termination of employment to warrant an award of remedies provided for under the Employment Act.

11. Rule 5.8 of the respondent's code of regulations provide in the relevant part as follows:-

Retirement under the 50 Year Rule

(a) An Officer on attaining the age of 50 years may elect to retire any time thereafter or may be required to retire by the Fund at any time thereafter, without assigning any cause.

(b) An officer will normally be required to give six months' notice of his intention to retire under "50 year" rule and the Fund will normally give a similar period of notice to any officer to whom it is intended to apply this provision.

(c) If the Managing Trustee considers the officer should be called upon to retire or after reaching the age of 50, he should advise the officer that his compulsory retirement is under consideration asking him whether he wishes to retire voluntarily or whether he wishes to make any representations of a personal nature against his compulsory retirement.

(d) The Managing Trustee will forward such representations, if any, together with his own observations to the appropriate Management Committee for a decision.

12. The claimant in her evidence stated that she was informed of the intention to retire her and was consequently called upon to make representations of personal nature which she did but the respondent nonetheless proceeded to retire her and paid her entitlements. She further stated in her evidence that she appealed accepting the retirement but sought an enhanced retirement package which the respondent did not respond to.

13. In cross-examination the claimant conceded that the respondent had no obligation to assign any reason when a decision had been reached to retire an employee under the 50 year rule.

14. The Court has considered the pleadings, supporting documents submitted by parties in support of their respecting positions as well as submission by Counsel and is of the view that the claimants retirement under the 50 year rule was carried out in accordance with the respondent's code of regulations.

15. If the claimant felt her retirement was tainted with bad faith and what she claimed was negative attitude towards her by the incoming Managing Trustee she could have contested it the very moment the intention to retire her was communicated. Having received the letter of intention to retire her under the 50 year rule and made representations of personal nature as required by the code of regulations and accepted payment of her terminal dues on retirement she cannot turn around and question her retirement.

16. The Court therefore finds the claim as lacking in merit and dismisses the same with costs.

17. It is so ordered.

Dated at Nairobi this 19th day of February 2016

Abuodha J. N.

Judge

Delivered this 19th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge