



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 746 OF 2012

JUDGMENT

P J O

VERSUS

F A C L

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 746 OF 2012

P J O.....CLAIMANT

VERSUS

F A C LRESPONDENT

JUDGMENT

The Claimant was employed by the Respondent on 2nd July 1979 and worked in different capacities until 1st March 2011 when his employment was terminated by letter dated 22nd February 2011. The letter of termination stated that the Claimant would be paid pension, leave days, notice period and 12 months' salary or one year gratuity. The gratuity was in "recognition of the time you served with the company and the services you rendered...".

The Claimant was subsequently paid Kshs.2,689,929 on account of pension (employee's and employer's contributions) and Kshs.1,786,764 on account of terminal dues. The Claimant signed discharge vouchers in respect of both payments on 3rd March 2011.

On 12th August 2011 the claimant sent a demand letter to the Respondent through his Advocates alleging unfair termination and seeking payment of Kshs.14,000,000 being on account of earnings the Claimant would have received until retirement age.

Claimant's Case

By Memorandum of Claim dated 30th April 2012 and filed on 3rd May 2012 the Claimant instituted this suit against the Respondent claiming the following:

- a. ***A declaration that the Claimant's employment services with the Respondent were terminated wrongfully and unfairly.***
- b. ***Damages for wrongful termination.***
- c. ***Five (5) years' salary of Kenya Shillings Fourteen million (Kshs.14,000,000/=).***
- d. ***Severance pay at the rate of 15 days wages for each completed year – (15 x 5,217) x 30 years = Kshs.2,347,650/=.***
- e. ***Award of service pay for each completed year of service from the date of employment.***
- f. ***The Claimant be reinstated in his former employment without any loss of benefits and/or services.***
- g. ***The Claimant prays for costs of this claim.***
- h. ***Any other of further relief that, that the Honourable Court may deem fit and just to grant.***

The Claimant filed an Amended Memorandum of Claim on 5th February 2014 seeking the following:

- a. ***A declaration that the Claimant's employment services with the Respondent were terminated wrongfully and unfairly.***
- b. ***Damages for wrongful termination.***
- c. ***Five (5) years salary of Kenya Shillings Fourteen million (Kshs.14,000,000/=).***
- d. ***Severance pay at the rate of 15 days wages for each completed year – (15 x 5,217) x 30 years = Kshs.2,347,650/=.***
- e. ***Award of service pay for each completed year of service from the date of employment.***
- f. ***Without prejudice to the above prayers, the Claimant be reinstated in his former employment without any loss of benefits and/or services.***
- g. ***The Claimant prays for costs of this claim.***
- h. ***Any other of further relief that, that the Honourable Court may deem fit and just to grant.***
- i. ***Damages of twelve (12) months salary (12 x 156,000 x12) = Ksh.1,878,000/=***
- j. ***A declaration that the Respondent's action in terminating the Claimant's employment, discriminated on the Claimant on based on his health condition and such an act amount's to unfair, unjust and discriminating practices.***
- k. ***Damages for unfair termination based on discrimination of the Claimant on his HIV/Health Status.***
- ***A declaration that the rights of the Claimant not to be discriminated upon have been violated by the Respondent contrary to Article 27(5) of the Constitution.***
- m. ***Damages for violation of the Claimant's right not to be discriminated upon as enshrined under***

article 27(5) of the Constitution.

In his testimony the Claimant testified that he was employed as an *[particulars withheld]* and rose through the ranks to the post of *[particulars withheld]*, the position he held at the time of termination. His last salary was Kshs.156,500/=.

In March 2010 the Claimant was posted to the Respondent's newly opened office in *[particulars withheld]* but the Respondent did not obtain a work permit for him. He was also never given a letter of transfer to *[particulars withheld]*. He was relocated back to Kenya by letter dated 10th August 2010 which directed him to report back on 16th August 2010. He fell ill around October 2010 and was diagnosed HIV+ (positive). The diagnosis was devastating and he lost his mind. He went through counseling and all the medical expenses were paid by the Respondent. When he reported back to the office he found a new employee had been recruited to replace him and he had no office. He was thereafter served with the letter of termination. He signed the discharge vouchers because he needed the money.

Respondent's case

The Respondent filed a Memorandum of Defence on 2nd July 2012. The Respondent avers that the Claimant is estopped from making any claim against the Respondent as he was paid his terminal dues and signed a discharge voucher confirming the terminal dues were properly computed and he had no further claims against the Respondent. The Respondent avers that the claim is a non-starter and an abused of court process.

The Respondent denied that the termination of the Claimant's employment was unlawful, unfair or discriminatory. It also denied breach of any law and averred that it complied with all relevant provisions of the law and the Claimant's contract.

The Respondent further averred that due to internal re-organization and in line with the Respondent's Strategic Plan, the claimant together with other employees, were transferred to *[particulars withheld]*. Following the Claimant's transfer, the company recruited a replacement to fill the vacant post in the Reinsurance Department hence filling the Claimant's position. After a while the Claimant was found to be unsuitable for the position in *[particulars withheld]*.

The Respondent was unable to obtain a Work Permit for the Claimant in *[particulars withheld]* although it obtained such Permits for the other transferred employees. The Insurance Regulatory Authority also declared the Claimant unqualified for the position that he was holding. The Respondent averred that the Claimant was fully informed and advised of reasons for termination.

The Respondent denied that the Claimant was declared redundant. The Respondent also denied that it had refused to issue a certificate of service to the claimant. The Respondent denied that the Claimant is entitled to severance pay as he was a member of both NSSF and the Respondent's pension scheme.

At the hearing of the case the Respondent called its Managing Director Mr. Stephen Githaiga who reiterated the contents of the Respondent's Defence. Mr. Githaiga testified that after the Claimant was transferred to *[particulars withheld]* the Commissioner of Insurance of *[particulars withheld]* was unable to issue him a work permit because he did not have the requisite qualifications, that unfortunately the Claimant's job in Nairobi had been filled after he was posted to *[particulars withheld]*.

On the claim on discrimination, Mr. Githaiga testified that the Respondent was not aware about the Claimant's HIV status until they read about it in the Amended Memorandum of Claim.

Submissions

In the submissions filed for the Claimant it is averred that the Claimant was terminated on account of his HIV/AIDS condition contrary to Article 27(5) of the Constitution and Section 31 of the HIV/AIDS

Prevention and Control Act, that the termination was discriminatory and unjust. It is further submitted that the termination contravened Sections 43 and 45 of the Employment Act as the Claimant was not given any reason for the termination.

It was submitted that the claimant's record was exemplary and unblemished, that the termination was not on account of misconduct, that there is no evidence of unsuitability of the Claimant as alleged in the letter of termination nor proof that the letter from Insurance Regulatory Authority dated 10th December 2010 referred to the Claimant and that the termination amounted to redundancy.

For the Respondent it is submitted that by executing the discharge certificates the Claimant discharged the Respondent from liability relating to the termination of his employment and he is estopped from presenting any claim against the Respondent in respect of the termination of his employment as the discharge was voluntary and unambiguous, that the termination was effected lawfully and was therefore not unfair, discriminatory or in breach of any provisions of the law. It is submitted that the termination was a mutual arrangement following exhaustive, open and friendly discussions.

It is further submitted that following the claimant's relocation to Tanzania a replacement was recruited for his job in Kenya, that the Respondent was however not able to obtain a work permit for the Claimant due to lack of qualifications, that the Insurance Regulatory Authority of Kenya also declared the Claimant unqualified for the position of [particulars withheld] Manager which he was holding, that the Claimant was the author of his own misfortune as he had many times before failed or declined to take advantage of the Respondent's offer to sponsor him for studies to upgrade his academic qualifications.

It is submitted that the termination of the Claimant's employment was not a redundancy as it did not fall within the provisions of Section 40(1) of the Employment Act and consequently he is not entitled to severance pay.

Respondents further submits that there is no proof that the Claimant's employment contract was terminated due to his HIV/AIDS condition, that the late introduction of this allegation through an amendment of the Memorandum of Claim is proof that it is an afterthought in a bid to appeal for the court's sympathy, and is thus malicious and an abuse of court process. This allegation was never included in the demand letters.

It is submitted that the HIV and AIDS Tribunal established under Section 25 of the HIV and AIDS Prevention and Control Act is a Judicial Organ bestowed with jurisdiction to hear and determine complaints of discrimination on account of HIV/AIDS.

The Respondent urged the court to dismiss the Claimant's case with costs.

Issues and Determination

The issues arising for determination out of the facts of this case are the following:

1. ***Whether or not the Claimant was unfairly terminated.***
2. ***Whether the Claimant's termination was discriminatory.***
3. ***Whether the termination of the Claimant's employment amounted to a redundancy.***
4. ***What remedies the Claimant is entitled to.***

Section 41 of the Employment Act provides for the procedure for termination as follows:

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

Section 43 provides for proof of reason for termination by the employer as follows:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

The Respondent's evidence is that there was a discussion with the Claimant before he was terminated. The Respondent further stated that after the Commissioner of Insurance of [particulars withheld] declined to issue a work permit to the Claimant he was relocated back to Kenya but unfortunately his position in Nairobi had already been filled.

The Claimant's letter of termination however does not refer to lack of permit in [particulars withheld] or lack of qualifications for the position of [particulars withheld] Manager as alleged by the Respondent. The letter refers to the Claimant having found the posting to [particulars withheld] unsuitable, a fact that was denied by the Claimant in his letter dated 23rd February 2011 in response to the termination letter. Further, the letter recalling the Claimant from [particulars withheld] dated 10th August 2010 does not refer to a work permit or qualifications of the Claimant.

The Claimant's letter of termination refers to a discussion. The letter does not state what was discussed. The letter also refers to the filling of the Claimant's vacant post in Kenya which is also not a ground for termination of employment according to Section 41 which only recognizes misconduct, poor performance or physical incapacity as grounds for termination.

The Respondent did not indicate if the Claimant was informed of his right to be accompanied by either a union official or a colleague to the discussions on the termination of his employment, or that the Claimant was given an opportunity to respond to the grounds of termination.

For these reasons I find that the termination of the Claimant's employment was unlawful.

All the grounds cited by the Respondent, that is, recall from [particulars withheld] due to the Claimant not having been issued a work permit (for which no evidence was proffered by the Respondent), filling of Claimant's position in Kenya or lack of qualifications for the position of [particulars withheld] Manager are all grounds of redundancy which is defined by the Employment Act as:

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

The Respondent however failed to comply with Section 40 of the Employment Act both in the selection, the notification of the Claimant and the Labour Officer and the payment of severance pay. Section 40 provides for notification of both the Claimant and the Labour Officer at least one month before the redundancy. It also provides for selection of the employee to be declared redundant on the basis of seniority in time commonly referred to as “last-in-first-out”. This would have meant that the person recruited after the Claimant should have been the first to leave, unless there was proof that he was better than the Claimant in terms of skill, ability and reliability which the Respondent did not address at all in its

pleadings or evidence.

The result is that whether considered as normal termination or redundancy, the loss of employment by the Claimant would be unfair either way. I therefore declare that the Claimant was unfairly terminated by way of redundancy.

The Claimant also alleged that he was terminated due to his HIV/AIDS status. There is no evidence that the Respondent was aware of the Claimant's HIV/AIDS status. The Claimant did not raise the issue of discrimination in any of the correspondence before filing suit or in the Memorandum of Claim. This was introduced by the Amended Memorandum of Claim which is dated 29th August 2013 but was filed on 5th February 2014. I agree with the Respondent that this was an afterthought, perhaps intended to seek sympathy of the court. The same is therefore rejected as it has not been proved.

Remedies

The Claimant sought what I believe I can rightfully refer to as a litany of prayers numbering (a) to (m), that is 13 remedies in total. Some of them are repetitive. The prayers are listed elsewhere in this judgment.

I have already declared the termination to be an unfair termination by way of a redundancy. This having been a redundancy the Claimant is entitled to severance pay.

The Claimant prayed for severance pay at the rate of 15 days salary per year worked. At a salary of Kshs.156,500, his severance pay would be based on 31 years served from July 1979 to February 2011 – $156,500/30 \times 15 \times 31 = 2,425,750$. I award the Claimant severance pay in the sum of **Kshs.2,425.75**.

In addition I award the Claimant one month's salary in lieu of the notification of redundancy as provided in Section 40(1)(b) as he was only paid notice under Section 40(1) (f) at the rate of 2 months' salary in lieu of notice of termination. This is as provided for in his letter of 25th January 2008. The letter is attached to the Claimant's bundle of documents as No "D" at page 4 thereof.

The prayer for reinstatement is rejected as it is more than 3 years from the date of termination and the Claimant cannot avail himself of the same. Reinstatement is also available only in very exceptional circumstances which the Claimant has not proved.

The Claimant is not entitled to service pay as he does not qualify for the same, having been a member of both NSSF and the Respondent's retirement benefits scheme.

Having been terminated on 1st March 2011, the Claimant cannot claim payment up to retirement age as this is neither provided for by law nor conscionable as it would amount to unjust enrichment. All contracts of employment are subject to termination either as provided in the contract or by law and if there is breach, the Employment Act provides for compensation up to a maximum of 12 months' salary and no more. Holding otherwise would amount to reinstating the Claimant to work without requiring him to provide any service, and would be in contravention of Section 12 of the Industrial Court Act and Section 49(1) of the Employment Act. I therefore dismiss the prayer.

The Claimant prayed for compensation for unfair termination. Having found that the termination was unfair and taking into account the Claimant's length of service and all circumstances of his case, I award him 12 months' salary as compensation at **Kshs.1,878,000**.

The Respondent will pay Claimant's costs of this suit and the decretal sum shall be subject to interest at court rates from date of judgment.

Dated this day of 2015

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 29th day of October 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

.....for Claimant

..... for Respondent

The Respondent will pay Claimant's costs of this suit and the decretal sum shall be subject to interest at court rates from date of judgment.

Dated this day of 2015

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 29th day of October 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

.....for Claimant

..... for Respondent