



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 167 [N] OF 2009

BETWEEN

1. GEOFFREY KINYANJUI
2. KIPKOSKEI S.A. BUIGUTT
3. ANASTACIA N. KITHUKU
4. ANNE KIMANI

5. JOYCE ONYANGO
 CLAIMANTS

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY [NEMA]
 RESPONDENT

Rika J (Part-hearing and writing of the Award)

Court Assistant: Ms. Leah Muthaka

Court Members: Mr. Lokwee & Mr. Siele

Abuodha J (Part-hearing and delivery)

Court Assistant: Edward Kidemi

Rachier & Amollo Advocates for the Claimants

Mr. Erastus Gitonga Advocate for the Respondent

ISSUE IN DISPUTE: WRONGFUL, UNLAWFUL AND UNFAIR TERMINATION, AND
 DISCRIMINATION AGAINST:

1. GEOFFREY KINYANJUI
2. KIPKOSKEI S.A. BUIGUTT

3. ANASTACIA N. KITHUKA
4. ANNE KIMANI
5. JOYCE ONYANGO

AWARD

[Rule 27 [1] [a] of the Industrial [Procedure] Rules 2010]

1. This is an old Claim, filed on 16th April 2009. The Respondent filed its Memorandum of Reply on 21st May 2009. Claimants Number 1 to 4 gave evidence on the 22nd October 2010. Claimant Number 5 testified on 25th May 2011, when the Claimants' case wound up. Thereafter, the first Advocates for the Respondent sought to cease acting for the Respondent, an application which together with the changes in the Industrial Court, seems to have the overall effect of slowing down the finalization of the Claim.

2. It was not until 11th March 2015, that the sole Witness for the Respondent, Human Resource Officer Mr. Cyrus Mbuvi, testified for the Respondent bringing the hearing to a close. The Claimants filed their Closing Submissions on the 2nd April 2015, while the Respondent filed its Submissions on the 21st April 2015. The file was then forwarded by Hon. Judge Abuodha to the undersigned Judge, who had heard a large portion of the Claim, for the preparation of the decision.

The Claim

3. The Claimants state the Respondent is an Authority, established under Section 7 of the Environment Management and Coordination Act No. 8 of 1999. It exercises general supervision and coordination over all matters relating to the environment. It implements all policies of the Government relating to the environment. It is a Body Corporate. The Authority was created from existing public environmental institutions namely the National Environment Secretariat [NES], Permanent Presidential Commission on Soil Conservation and Afforestation [PPCSA], and Department of Resource Surveys and Remote Sensing [DRSRS].

4. The **1st Claimant Geoffrey Kinyanjui** was employed by the Respondent as the Assistant Provincial Director of Environment in the salary Scale Job Grade E8, on the 14th November 2003. The **2nd Claimant Kipkoskei S.A. Buigut** was employed by the Respondent on the same date, as Senior Information Management Officer Salary Scale Job Grade E6. **3rd Claimant Anastacia N. Kithuku** was employed as a Copy Typist 1, Salary Scale Job Grade E12, on 14th November 2003. The **4th Claimant Anne Kimani** states she was employed as a Shorthand Typist/Audio Typist 1 & 2 in Job Grade E11. She was employed effective 1st December 2003 to 20th December 2005. The **5th Claimant Joyce Onyango** was employed as the Principal Planning Officer in Job Grade E5, effective 1st December 2003. 1st and 2nd Claimants state their contracts were unfairly and unlawfully terminated on 30th November 2006. The 3rd Claimant states her contract was similarly terminated in December 2006, while the 4th Claimant's was terminated on 20th December 2005. The 5th Claimant was not clear on the date of termination, but states it was in the year 2005.

5. The 5 Claimants state prior to their being employed by the Respondent, they were Employees of the various departments that preceded the Respondent, under the Ministry of Environment. The **1st Claimant** was in Job Group M at the National Environment Secretariat; the **2nd Claimant** was in Job Group M at the Department of Resources Surveys and Remote Sensing; the **3rd Claimant** was in Job Group G at the National Secretariat; the **4th Claimant** in Job Group H at the Permanent Presidential Commission on Soil Conservation and Afforestation; and the **5th Claimant** in Group M at the National Environment Secretariat.

6. The Claimants explain that the Job Grades under the Respondent were the equivalent of the following Groups in the Civil Service:

E2 equivalent to Group Q/ R in the Civil Service

E3 “ “ “ “Group P

E4 “ “ “ “Group N

E5 “ “ “ “Group M

E6 “ “ “ “Group L

E7 “ “ “ “ Group K

E8 “ “ “ “ Group J

E9 “ “ “ “ Group H

E10 “ “ “ “ Group G

E11 “ “ “ “ Group F

E12 “ “ “ “ Group E

E13 “ “ “ “ Group D/C

E14 “ “ “ “ Group A/B

7. The Government had determined that Employees recruited to the Respondent from the defunct Ministry Departments, be employed by the Respondent in the same Job Group they were already serving, at the time of their exit from the Ministry. They were to continue serving under the terms and conditions of service applicable in the Civil Service. They would work until mandatory retirement age of 55 years.

8. The Respondent placed the **1st Claimant** in Job Group E8 instead of E5; **2nd Claimant** in Group E8 instead of E5; **3rd Claimant** in Group E12 instead of E10; **4th Claimant** in E12 instead of E9; and **5th Claimant** in Job Group E6 instead of E5. The Claimants state their misplacement was discriminatory and without justifiable cause. It was found to amount to a gross irregularity in the ‘Report on Investigation into Alleged Corruption at the National Environment Management Authority’ prepared by the Efficiency Monitoring Unit. The Claimants allege as a result of being downgraded, they suffered loss of earnings for the period they worked for the Respondent.

9. The **1st Claimant** seeks a sum of Kshs. 1,818,490, being the salary arrears arising from the difference between what was payable in his rightful Job Group, and what was paid in the Grade assigned to him. This sum also includes the amount the **1st Claimant** would have earned before he attained the age of 55 years. Adopting the same method, the **2nd Claimant** prays for the sum of Kshs. 2,204,635; the **3rd Claimant** Kshs. 612,215; the **4th Claimant** Kshs. 906,951; and the **5th Claimant** Kshs. 184,940. The Claimants also pray for 12 months’ salary in compensation for unfair termination in the following sums respectively: Kshs. 575,436; Kshs. 656,856; Kshs. 299,016; and Kshs. 224,976. The **5th Claimant** does not seek compensation for unfair termination. They claim general damages for breach of contract, costs, interest at commercial rate and any other suitable reliefs.

10. **1ST Claimant, Kinyanjui**, testified an Inter- ministerial Task Force recommended that Employees over 50 years old, could not transit into the new Authority from the respective defunct departments on permanent terms. They were required to enter into fixed term contracts with the Respondent. This was contained in clause 2.6.2 of the NEMA Terms and Conditions of Service [Page 58 of the Memorandum of Claim]. The Employees were to be placed on renewable 3 year contracts, on mutually agreed terms. Mr.

Kinyanjui stated he stopped working on 30th November 2006. He was already 55 years on the date of retirement.

11. He testified he was wrongly graded. The Respondent failed to consider the recommendations of the Inter-Ministerial Committee. He was placed in Grade E8, instead of E5. He had lodged a complaint with his Employer many times on misplacement, to no avail. It was not his choice to be on contract. It was the mandatory directive of the Government. Renewal of the contracts would be automatic. Cross-examined, Mr. Kinyanjui testified his letter of employment is dated 14th November 2003. It did not say when the contract would end. He served probation of 6 months. The Inter-Ministerial Committee recommended the Employees be absorbed in the Respondent. The 3 year contract clause applied to the 1st Claimant. Renewal was automatic. The contract was terminated without notice on the 30th November 2006. The contract expired. He was aware the contract was ending. He applied for renewal. The Report by Efficiency Monitoring Unit had a lot to do with the Employees. Corruption was what led to their wrong grading. He was supposed to work until he was 55 years. He was paid all terminal dues. Mr. Kinyanjui emphasized in answering questions from Members Mr. Lokwee and Mr. Silele that he was the Provincial Director of Environment while at NES. The contract issued by the Respondent was automatically renewable.

12. **Kipkoskei Buigutt, Claimant Number 2**, told the Court he was teaching at the Moi University, as at the time of giving evidence. He was in the Department of Survey and Remote Sensing. He was employed by the Respondent between 2003 and 2006. He transitioned into the office of Senior Information Management Officer Grade E6. In the Ministry, he was in Group M. His contract expired in November 2006. He expected it would be renewed. Clause 2.6.2 made him think renewal would be automatic. In 2006, he was 53 years old. He had not attained the mandatory retirement age. The Report by EMU confirmed recruitment in NEMA was messy with staff having high qualifications taken to lower grades. He later went back to the Ministry, and worked until he was 55 years. This was on 21st July 2007 when he returned to the Ministry in the position of Principal Publication Officer.

13. He testified on cross-examination he applied for the position of Principal Publication Officer with NEMA. He was interviewed for the position but appointed Senior Information Manager, a position he did not apply for. He accepted this position because he was aware there was a grievance procedure which he could utilize. The contract expired. It was not terminated. He served the full term, and was paid his full terminal dues. The document on remittance of pension stated falsely that the Claimant was Grade E3. He did not ask for the information to be corrected. He agreed he went back to the Ministry.

14. **Anastacia Kithuku, 3rd Claimant**, served under the National Environment Secretariat before joining NEMA. She was a Copy Typist 1 in job group G. She joined the Respondent in the same position, and was placed in Group E12. She had served the Government for 29 years. She was placed on a 3 year contract in NEMA. She was 54 years on 30th November 2006. She had been asked by the Respondent if she wished to have renewal and answered in the affirmative. She was however asked to go on terminal leave in 2006. She went on leave and received a letter in January 2007, informing her, the contract would not be renewed. She was not correctly graded by the Respondent.

15. Questioned, Anastacia stated she was given a job by NEMA which she accepted. It was based on 3 years, which she served and was paid all her dues. It was not renewed. She agreed she had no business being in the office upon the expiry of her contract. All Employees under NES were absorbed in NEMA. It was those who were 50 years and above who were placed on contract. She had 7 months to the age of 55 years, when her contract expired. She kept asking to be placed in the right grade. She accepted the contract under NEMA voluntarily. She should have been a Senior Copy Typist.

16. **The 4th Claimant, Anne Njeri Kimani**, started working with NEMA in 2003. She was on a 3 year contract, to expire in December 2006. She however was retired in December 2005. She worked as a Shorthand Typist 1. She was Job Group H in the Ministry. She was assigned Grade E11 in the Authority, instead of the rightful E8. She was not given a notice of termination. She was 52 years when placed on 3 year contract. The Ministry had advised the Employees could apply for early retirement, under the 50

year rule, which the Claimant did on 30th September 2004. She testified on cross-examination that she had attained the age of retirement, at the time her contract expired. Her salary was Kshs. 18,000. She never earned Kshs. 24,000 per month. She accepted the contract for lack of knowledge.

17. **The 5th Claimant Joyce Onyango** stated she worked in the NES in the Ministry, before joining NEMA. She was a Senior Environment Officer, in Group M. She joined the Respondent in 2003 as the Senior Planning Officer, in Grade E 6. Her salary was indicated as Kshs. 40,393. She protested because this was not commensurate with her education and training. She acted as the Director of Environmental Research Co-ordination until termination in 2005. She was graded E5. She should have been E4 like other Principal Officers. All terms applicable in the Civil Service applied to the Employees taken to NEMA. She was placed on 3 year contract. She should have been on higher Job Group. There was a difference between what the Claimant was paid, and what she ought to have earned in the higher Grade.

18. She testified on cross-examination that the Inter- Ministerial Committee recommended which Job Groups the transitioning Employees should be located in. She had applied for the position of Principal Planning Officer. She did not interview for Chief Officer. She accepted the position of Principal Officer. She accepted the terms under the Respondent. The salary was Kshs. 47,953 per term. The Grade was E5. The contract was for 3 years. She accepted the terms. She needed a job and had no choice. Her complaint is that she should have been E4, earning Kshs. 56,663 per month. She was paid for her acting position by the time she left. She ought to have been paid more by the time she left employment. She earned Kshs. 56,663 by the time she left. She explained on redirection that she earned a higher figure because she was acting as Director. She did not cause her being in the wrong Job Group.

The Response

19. The Respondent states the **1st Claimant** requested in writing on 28th July 2004 to be placed on 3 year contract, under Clause 2.6.2 of the Respondent's Terms and Conditions of Service. The Respondent agreed, and placed the Claimant on 3 year contract, effective 1st December 2003. This expired on 31st January 2007. The Respondent advised the Claimant it would not renew the contract. He was neither dismissed; nor have his contract terminated; and nor was he treated discriminatively. His contract expired. The **2nd Claimant's** contract was for 3 years. It expired around November 2006. He returned to the Ministry and continued to serve. The **3rd Claimant's** expired in November 2006. She was advised there would be no renewal in a letter dated 31st January 2007. **The 4th Claimant** was placed on 3 year contract beginning 1st December 2003. She applied to go on early retirement under the 50 year rule, on 30th September 2004. The application was accepted. She was therefore retired on 20th December 2005. She had already attained the mandatory retirement age on this date. **The 5th Claimant** appealed for higher Grade and Salary. The Respondent raised her salary to Kshs. 43,883 per month but retained her in the same Grade. She was promoted to the position of Principal Planning Officer on 16th April 2004. She applied on 21st March 2005 to retire under the 50 year rule. She was retired on 20th December 2005. She was already 55 years on retirement.

20. On grading, the Respondent explains that the Inter-Ministerial Task Force Report of April 2003 recommended grading and structure for staff. The Respondent was not to adopt the existing structures and grading in the Civil Service. Employees of the defunct Departments were not to be recruited to the same Job Groups and terms in the Ministry. Employees of the defunct Departments were to be deployed to NEMA on temporary basis, effective from 1st July 2002 when the Authority came into being. These were the Employees to remain on Civil Service terms and conditions during the transition. The Respondent started recruitment from 1st December 2003, giving the Ministry Employees priority in the exercise. Those successful were not to be employed on same Grade and Terms prevailing under the Ministry. They joined NEMA on fresh terms, governed by fresh individual contracts and the Terms and Conditions of NEMA Staff. They were issued letters of employment showing Grade, Salary and Terms and Conditions of Service. Those who did not wish to join NEMA were to return to the Ministry. Those on deployment, who had attained the age of 50 years and above, were to be appointed on 3 year contract. The Job Grades under NEMA were not therefore based the Job Groups in the Ministry.

21. The **Respondent's Sole Witness Cyrus Mbuvi** reaffirmed the above position in his evidence before the Court. Cross-examined, he stated he was not in employment at the time the bundles of documents on record were generated. He was aware the Claimants were employed by the Ministry of Environment. He was not sure the circumstances preceding their exit from the Ministry. They were offered employment initially on permanent and pensionable terms, later converted into contractual terms. Their contracts with the Respondent were independent of the Ministry. The 1st Claimant worked for 2 months after his contract had expired on 30th November 2006. Communication on non-renewal was on 31st January 2007. The Witness did not know if the 1st Claimant asked for renewal. The 2nd Claimant's contract expired. He must have been above 50 years. The 4th and 5th Claimants applied for early retirement. Their letters on application were addressed to the Permanent Secretary in the Ministry. The Witness explained this was to facilitate preparation for the release of their pension. Redirected, the Witness testified the Claimants' ages were shown in their pay slips. They were not on deployment; they could not have been offered letters of employment and placed on probation, if they were on such deployment. They were placed on fixed term contracts because of their ages. The Permanent Secretary in the Ministry sits in the Respondent's Board. The Ministry supervises the Respondent.

Issues

22. The Court understands the issues in dispute to be: *whether the Claimants were improperly graded and therefore deprived of their rightful benefits by the Respondent; whether their contracts were unfairly and unlawfully terminated; and whether they are entitled to arrears of salary, damages and compensation.*

The Court Finds:-

23. **GRADING:** The grading system was shown by the Claimants to have been flawed and discriminatory. This was brought out in the comprehensive Report of the Efficiency Monitoring Unit. The Report was not contradicted or otherwise faulted by the Respondent. The significant section is under clause 4.3 of the Report, which states:

‘‘ An examination of documents available to the team which were used to absorb staff taken over from the Departments that formed NEMA revealed that the Board of Management failed to consider qualifications, experience and the expertise of the serving Officers. It was particularly noted that Senior Officers who had served their Departments for many years were graded at lower levels than those who were Junior Officers.it is clear that Junior Officers superseded their Seniors without any apparent reason. Officers in Job Group N were absorbed in Grades E6, E7 and E8 while others in Job Group M, were absorbed in Grades E3, E4, E5 and E6. Officers in Job Group L were absorbed in Grades E6 and E7 while Officers in Job Group K, were absorbed in Grades E6, E7, and E8, thus superseding those who were in Job Groups N, M and L.’’

24. The Report concluded grading was haphazard. The Board of Management unfairly and deliberately graded Staff without due regard to their knowledge, experience and competence, with Senior Officers given junior positions. Officers were absorbed without regard to seniority and experience. Samples of specific Officers affected by this official corruption were listed in the Report. There was no reason for NEMA to do this. The Inter-Ministerial Task Force on institutionalization of NEMA had given clear guidelines that staff recruitment was to follow the procedure used by the Public Service Commission. The Respondent cannot be heard to say that it was exercising its role as an autonomous entity, and therefore free to misplace those coming in from the Civil Service.

25. The irregularity was not cured or otherwise mitigated, by the Claimants' acceptance of the terms and conditions of service. The process of recruitment was to faithfully follow the standards of fairness and equality of treatment, existing in the Public Service Commission of Kenya. This was set out in Report of the Inter-Ministerial Taskforce of April 2003. A letter of appointment which placed an Employee in a Grade lower than that served under the Ministry, was in violation of the standards of fairness and equality of treatment in the public service, and could never be endorsed by any judicial tribunal exercising its mind fairly, reasonably and impartially. The letters of appointment were shown in the EMU Report to have been issued against a background of official corruption. There is no doubt the Claimants were

among the Officers affected by this irregular grading. The **1st Claimant** worked at Job Group M while at the Ministry. He was moved into Group E8 instead of Group E5. **2nd Claimant** was in Group M. He was moved Group E8 rather than his rightful Group E5. The **3rd Claimant** was in Group G at the Ministry, and moved to Group E12 instead of E10. The **4th Claimant** worked in Group H and was moved into Group E12, instead of E9. The **5th Claimant** worked under Group M. She was moved to E6 instead of E5. There is therefore no doubt the Claimants were among the Staff who were shabbily treated by NEMA, as concluded by the EMU in its Report, on the subject of staff grading. The result of the action by NEMA was that the Employees, who were unfairly treated, suffered low morale and discontent. They were economically injured.

26. The Claimants have established that as a result of the Respondent's irregular grading, they suffered economic injury. They ought to have been earning superior terms, if they were properly placed. They were shown to have complained to the Respondent about the misplacement. The Respondent re-graded some of the Claimants, but still placed them in the wrong grades. It is instructive that a Colleague of the Claimants initiated claim against the Respondent in the Lower Court, based on the same facts, and the Court found in his favour, a decision which from the record does not seem to have been challenged on appeal and overturned. The Court has emphasized the need to correct pay disparity, particularly once it is shown such disparity existed through forms of discrimination and wrong grading. This was the holding by the Court in *Industrial Court at Nairobi Cause Number 1029 of 2011 between Zaccheus Mumali v. Nzoia Sugar Company* and *Cause Number 1813 of 2011 between David Wanjau Muhoro v. Ol- Pajeta Ranching Limited*.

27. The Claimants however have not shown the Court how the respective amounts of Kshs. 1.8, 2.2, 0.6, 0.9 million for Claimant 1 to 4, were arrived at. A more persuasive and realistic compensation for the economic injury is contained in Schedule 1 attached to the Statement of Claim titled 'LOSSES BY WRONG GRADING BACK-DATED TO DECEMBER 2003.' The computation was as follows:-

1st Claimant- Kshs. 919,110

2nd Claimant- Kshs. 255,765

3rd Claimant- Kshs. 261,720

4th Claimant -Kshs. 344,535

5th Claimant- Kshs. 184, 940

Total: Kshs. 1,966,070

28. The other figures floated by the Claimants are without foundation and were not justified in their Evidence, Pleadings or Submissions. The Court grants the Claimants the amounts above as compensation for their improper grading.

29. **UNFAIR AND UNLAWFUL TERMINATION.** Clause 2.6.2 of the Respondent's Terms and Conditions of Service stipulated Staff of 50 years and above, would be placed on 3 year contracts. Mr. Kinyanjui was in this category and served on a 3 year contract which lapsed on 30th November 2006. This was the same for the Mr. Buigutt and Ms. Kithuku. Clause 2.6.2 of the Terms and Conditions of service provided the initial contracts were *subject to renewal for another 3 years on mutually agreed terms*.

30. The Court understands this to comprise an expectation for renewal, the only thing to be discussed, being the terms of agreement. The 3 Claimants went on working, even after the expiry of their contracts in November 2006. They had applied for renewal. There was nothing in Clause 2.6.2, stating that an Officer serving under that Clause, even on attaining the age of 55, could not have their contracts renewed

for another 3 years. The 3 Claimants applied as early as August 2006 for renewal. They went on working after November 2006 expiry date. They were only told there would be no renewals, on 31st January 2007.

31. The Permanent Secretary in the parent Ministry expressed his disconcert with this state of affairs, in a letter to the CEO NEMA, dated 30th May 2007. He stated unequivocally that the Respondent should have deliberated on the applications for renewal early, and informed the Officers of its decision, to enable the Officers take the necessary actions. *“The reasons provided for non-renewal should have been communicated to the Ministry as well as the Officers at an appropriate time,”* writes PS Prof Ole Kiyiapi. He recommended the Respondent ensured the Officers were paid the salary for the 2 months worked in excess of their contracts. This letter again supports the finding that there was an expectation of renewal, and notice and reasons for non-renewal were supposed to be availed to the Claimants.

32. The 2nd Claimant however returned to the Ministry and the Court shall accept the submission by the Respondent, that he suffered no economic injury as a result of non-renewal.

33. The 1st and 3rd Claimants were clearly disadvantaged. Their expectation to go on working and earning an income was shattered. They were given no time to arrange for their hereafter. They were given no reason for non-renewal, while there was ground to legitimately expect another 3 years of service. They are entitled to compensation which the Court grants as follows:-

1st Claimant- 12 months’ salary at Kshs. 575,436

3rd Claimant – 12 months’ salary at Kshs. 299,016

34. The 4th and 5th Claimants expressed their desire to go on early retirement, under the 50 year rule. This desire was made known while their contracts subsisted. It amounted to their voluntary variation of the terms and conditions of service contained in the letters of employment and the Terms and Conditions of Service. The 4th Claimant cannot therefore turn around to say her contract was unfairly terminated. Like the 5th Claimant, she should have confined her grievance to the grading. Her prayer for compensation for unfair termination is rejected.

35. On costs the Court is persuaded the Respondent should have settled this Claim earlier, rather than wait for a Court-imposed dispute resolution. The Respondent had the advantage of the decision made by the Lower Court on the subject matter, a decision the Claimants submit, has been satisfied in full by the Respondent. As the Respondent failed to resolve the dispute when it should have, it is only fair and just, that the Respondent meets the costs of this prolonged litigation. **IN SUM, IT IS ORDERED:-**

[a] The Claimants were placed in the wrong Job Grades by the Respondent.

[b] They shall within 30 days of the delivery of this decision be paid a total of 1,966,070 in compensation for the wrong grading as particularized in paragraph 27 above.

[c] The 1st and 3rd Claimants’ contracts of employment were unfair terminated.

[d] The Respondent shall within 30 days of the delivery of this decision pay the 1st Claimant Kshs. 575,436 and pay the 3rd Claimant Kshs. 299,016 in compensation for unfair termination.

[e] Costs to the Claimants.

[f] The principal sum to attract interest at the rate of 14% p.a. upon the lapse of the 30 day period indicated in [b] and [d] above.

Dated and signed at Mombasa this 28th day of July, 2015

James Rika

Judge

Dated, signed and delivered at Nairobi this 2nd day of October, 2015

Jorum Nelson Abuodha

Judge